

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. 659 of 1998**

**BETWEEN:**                    **MOHAMMED SAHIK KHAN** of Nadi, Businessman

**1<sup>st</sup> PLAINTIFF**

**SHEIKS RENT A CAR LIMITED** a limited liability company  
having its registered office at Raggs Street, Martintar, Nadi

**2<sup>ND</sup> PLAINTIFF**

**AND:**                        **HABIB BANK LIMITED** of Suva

**1<sup>ST</sup> DEFENDANT**

**MOHAMMED AFZAL KHAN** of Suva, Solicitor

**2<sup>ND</sup> DEFENDANT**

**Before:**                    **Hon. Justice Kamal Kumar**

**Counsel:**                **Mr R. Singh for the Plaintiffs/Applicants**  
**Ms B. Narayan for the First Defendant/Respondent**  
**No Appearance for Second Defendant**

**Date of Judgment:**    **28 September 2018**

**JUDGMENT**

## **Introduction**

1. Pursuant to Leave granted to the Appellant to file Appeal Out of Time, Appellant on 2 December 2015, filed Notice of Appeal and Grounds to Appeal against the decision of Master Amaratunga (as he then was) stating the grounds of appeal as follows:-
  - a. *That the Learned Master of the High Court erred in law and in fact striking out the Plaintiffs claim for Want of Prosecution;*
  - b. *That the Learned Master of the High Court erred in law in failing to consider that after the decision of Honourable Court on 29<sup>th</sup> April 2005 the Plaintiff filed an application for Pre Trial Conference be dispensed with the intention of carrying the trial forward.*
  - c. *That the Learned Master erred in law in holding that the actions of the Plaintiff amounted to an abuse of process of the Honourable Court.*
  - d. *That the Learned Master erred in law and in fact holding that there has been a delay of 18 years in the proceedings and those 18 years delay is by the actions of the Plaintiff alone.*
  - e. *That the Learned Master erred in law and in fact in holding that the Plaintiff's claim and proof thereof is mainly from oral evidence when Plaintiff claim requires mainly proof of documentary evidence.*
  - f. *That the Learned Master erred in law and in fact in finding that a fair trial is not possible when the Plaintiff's claim is based on documentary evidence."*
2. On 20 November 2015, when Ruling in respect to Application to Appeal Out of Time was granted, parties were directed to file Submissions by 2 February 2016, and the Appeal was adjourned to 5 February 2016, for mention.
3. On 19 January 2016, Appellant filed Submissions and List of Authorities.
4. On 5 February 2016, Respondent (1<sup>st</sup> Defendant) was directed to file Submissions by 18 February 2016 with Appellant to file Reply to Respondent's Submission by

26 February 2016, and the Appeal was adjourned to 5 May 2016, at 2.30pm for hearing.

5. On 15 February 2016, Respondent filed Submissions with Appellant filing Reply to Submissions on 2 May 2016.
6. Appeal was heard on 5 May 2016, when parties made Oral Submissions mostly relying on Submissions filed in Court and the Appeal was adjourned for judgment on notice.

### **Appeal**

7. It is not disputed that the Learned Master (as he then was) struck out Plaintiff's claim for it being an abuse of process and for want prosecution after Respondent (1<sup>st</sup> Defendant) filed Application to Strike Out.
8. It is well settled that Striking Out Application is Interlocutory. **Gounder v. Minister for Health** [2008] FJCA 40; ABU0075.2006S (9 July 2008).
9. The principle in dealing with Appeals against interlocutory orders has been stated in **Gosai v. Nadi Town Council** [2008] FJCA 1.ABU116.2005 (22 February 2008) as follows:-

“28. *APPEAL ON INTERLOCUTORY DECISION*

*In coming to the decision that the appeal should be refused, the Court has also had reference to the High Court's decision in **Heffernan v. Byrne and Ors** HCF Civil Action No. HBM 105 of 2007 (19 February 2008). There, in refusing leave to appeal against an interlocutory decision, His Lordship set out a comprehensive collocation of the authorities, referring to **Kelton Investments Limited an Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited** [1995] FJCA 15, ABU 0034d.95s; **Edmund March & Ors v. Puran Sundarjee & Ors** Civil Appeal ABU 0025 of 2000; and **KR Latchan Brothers Limited v. Transport Control Board and Tui Davuilevu Buses Limited** Civil Appeal No. 12 of 1994 (Full Court).*

29. As His Lordship observed, in *Edmund March & Ors* this Court said:-

*As stated by Sir Moti Tikaram, President Fiji Court of Appeal in **Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers** (Civ. App. No. 33 of 1996 p. 15):*

*It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.*

30. Further, as His Lordship also noted, in **KR Latchan Brothers Limited** a Full Court of Appeal (Tikaram, Quillam and Savage JJ) said:

*... The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in **Ashmore v. Corp. of Lloyd's** [1992] 2 All ER 486-*

*Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings.”*

10. Appellant will need to establish that the Learned Master (as he then was) exercised his discretion in striking out Appellant’s case was plainly wrong and there are exceptional circumstances.

11. All the grounds of appeal will be considered in determining the issue in paragraph 10 of this Judgment.

12. Appellant submits that the Learned Master exercised his discretion wrongly by stating that once the Court finds that there was an abuse of process, there was no need to consider factors such as “prejudice to Respondent and failure to consider the principle laid down in **Berket v. James** [1977] 2 AU...R 801
13. At paragraph 3, 4 and 5 of his Ruling delivered on 6 February 2013, the Learned Master stated as follows:-

“3. *Applicable law in striking out application adopts approach of English House of Lords in **Birkett and James** [1977] 2 All ER 801, 805; [1978] A.C. 297, 318, per Lord Diplock:*

*“The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg. 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.”*

4. ***Birkett and James*** [1977] 2 All ER 801, 805; [1978] A.C. 297, very clearly stated that in an application for strike out in terms of Order 25 rule 9 for want of prosecution can be granted, if the conduct of the Plaintiff is such that it had amounted to an abuse of process. This ground of strike off is mutually exclusive ground which does not depend on any other ground or grounds laid down in the said decision. So, the applicant does not need to satisfy the court any prejudice due to delay if the ground for abuse of process is established. It is pertinent to note that abuse of process can be established due to the totality of the conduct of the Plaintiff in the action and delay is also a factor in such circumstances among other

things and this is the ratio in the decision of the House of Lords 20 years after **Birkett** (supra) was decided, in **Grovit and Others v. Doctor and Others** [1997] 2 All ER 419.

5. In **Grovit and Others v. Doctor and Others** [1997] 2 All ER 419, the House of Lords considered the **Birkett and James** [1977] 2 All ER 801, 805; [1978] A.C. 297, 318 and thought, that although there were criticisms over said judgment **Birkett** (supra), that it was not appropriate time to overrule it, but used the ratio of **Birkett** (supra) judgment to strike off a matter which was inactive for two years.”

14. There is no doubt that this Court has inherent jurisdiction to strike out any pleading on ground of abuse of process, in addition to Order 18 Rule 18(1)(d).
15. At paragraphs 18/19/17 and 18/19/18 of the Supreme Court Practice 1993 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).”

16. This Court is of the view that abuse of process is separate ground for striking out pleadings.

17. This Court therefore accepts the Learned Master's view that if Court holds that there is an abuse of Court process that required the pleadings or action to be dismissed or struck out then there is no need for Court to consider any other factor such as prejudice to the Respondent or the Appellant.
18. Appellant further submitted that that Learned Master failed to assess the evidence to establish there was an abuse of process by the Appellant.
19. This Court does accept Appellants' Submission that there is a need to explain why the pleadings or action is to be dismissed or struck out.
20. At paragraphs 9 and 10 of his Ruling the Learned Master stated as follows:-
  - “9. *Conduct of the Plaintiff is an epitome of abuse of process. Even after such adverse comments being made by a Judge in the said decision Plaintiff did not take any action for more than 5 years and conduct of the Plaintiff is an abuse of court process. The action for Plaintiff should be struck off for abuse of process.*
  10. *Plaintiff states that he could not find a lawyer after the death of his previous solicitor. Then how could he promptly file affidavits in opposition when application was made to Strike off. I do not accept this lame excuse for delay of more than 5 years till this strike out summons was served to the Plaintiff. If not for this summons the Plaintiff could have even waited longer, making the death of solicitor as an excuse!*”
21. It is clear from the above paragraph that the Learned Master did consider the evidence that led him to hold that Appellants' conduct which is delay in prosecuting this action was an abuse of court process.
22. This Court takes note of the following:-
  - (i) On 7 June 2006, his Lordship Justice Jitoko (as he then was) gave following directions:-
    - (a) Plaintiff (Applicant) to file and serve Notice of Change of Solicitors;

- (b) Matter to take its normal course until Plaintiff intend to pursue with Summons to dispose with Pre-Trial Conference;
  - (c) Leave to Defendant to amend Statement to reflect the sale of property (Mortgagee Sale).
- (ii) On 17 June 2011 (lapse of more than 5 years) Respondent (1<sup>st</sup> Defendant) filed Application by Summons to dismiss action for want of prosecution and/or abuse of Court process;
  - (iii) On 28 July 2011 (after a lapse of more than 5 years), Appellant (Plaintiffs) filed Notice of Change of Solicitors.
23. Appellants submit that Learned Master wrongly relied on the following statement of His Lordship Justice Jitoko (as he then was) in Ruling delivered by Justice Jitoko on 29 April 2005:-
- “There is certainly some credence in believing that the application is deliberately made with the view of delaying further the case and at the same time thwarting the 1<sup>st</sup> Defendant’s exercise of its rights to mortgagee sale.”*
24. It is clear from what has been said at paragraph 9 of Learned Master’s Ruling quoted at paragraph 19 of this Judgment that the contents of his Lordship Jitoko’s (as he then was) statement was only supplementary and not determinative factor.
25. Appellants further submit that the Learned Master failed to consider fact that:-
- “A. Respondent (1<sup>st</sup> Defendant) failed to file Amended Statement of Defence for which Leave was granted on 7 June 2006 and delayed in filing of PTC Minutes.”*
26. Before dealing with this Submission this Court takes note of the fact that Respondent (1<sup>st</sup> Defendant) signed PTC Minutes as appears in Affidavit of Mohammed Sahik Khan sworn on 5 August 2002 and filed on 13 August 2002.

27. This Court accepts Respondent's Submission that Order 20 Rule 8 of the High Court Rules provides that the Order for Respondent (1<sup>st</sup> Defendant) to amend Statement of Defence ceased to take effect on 21 June 2006 (i.e. fourteen days from 7 June 2006).
28. Also it must be stated in no uncertain terms that if the action is filed by the Plaintiff, then it is Plaintiff's obligation to see that the action is prosecuted diligently and mere fact that the Defendant has not complied with the Rules or Court directions does not give Plaintiff a licence to sit and relax with his/her case being parked in Court.
29. The fact that Learned Master did not take this factor into consideration is because it was not relevant to determine Respondent's Application for reasons stated at paragraphs 27 and 28 of this Judgment.
30. This Court also takes note that even though the Learned Master stated that the action needs to be dismissed on the ground of abuse of process he did consider the factors such as delay, reason for delay and prejudice to Respondent at paragraphs 10, 11 and 13 of his Ruling which are very neatly summarized at paragraph 14 of the Ruling in following terms:-

*"14. The conduct of the Plaintiff is an abuse of process in this case and the excuse of death of solicitor cannot be accepted for such a long delay of over 5 years inaction in this case. This long dormancy was after the failure to obtain injunctive relief. The 1<sup>st</sup> Defendant had also indicated prejudice due to the delay of over 18 years from the date of alleged incident. Since the allegation is misrepresentation which mainly evidence from oral evidence, the delay and invariable loss of evidence as well as the fading of memory of a routine act as opposed to a special event (e.g. accident) is another factor that makes fair trial impossible which would be an additional ground for strike out. The statement of claim of the Plaintiff is struck off. The cost of this application is assessed summarily at \$1,000.00 for the 1<sup>st</sup> Defendant."*

### **Conclusion**

31. After careful analysis of the Submissions filed/orally made this Court is of the view that the Learned Master exercised his discretion, judicially was not plainly wrong and no exceptional circumstances has been established to allow the Appeal.

### **Costs**

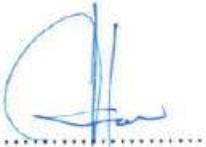
32. This Court takes into consideration that both parties filed Submissions and made Oral Submissions.

### **Order**

33. This Court makes following Orders:-

- (i) Appeal against Master's decision delivered on 6 February 2013, is dismissed and struck out;
- (ii) Appellant do pay Respondent's (1<sup>st</sup> Defendant) costs assessed in the sum of \$2,000.00 (two thousand dollars) within twenty-one (21) days from date of this Judgment.



  
K. Kumar  
**JUDGE**

**At Suva**

**28 September 2018**

**PATEL & SHARMA for the Plaintiffs/Appellants**

**LATEEF & LATEEF for the First Defendant/Respondent**