IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 89 of 1989

BETWEEN : **LATCHMAMMAL NAIDU** a.k.a **LATCHAMMA NAIDU** formerly of Nakavu, Nadi, but now of Raiwasa, Samabula, Suva, Widow.

Plaintiff

AND : **SAUNAKA LAND PURCHASE CORPORATIVE SOCIETY LIMITED** a body corporate under the provisions of the Corporative Societies Act having its registered Office at Saunaka, P.O. Box 212, Nadi.

1st Defendant

AND : **THE ATTORNEY-GENERAL OF FIJI**

2nd Defendant

AND : **SITAMMA** of Nadi Airport, Nadi, Domestic Duties as Administratrix of the estate of **THEG RAJAN**, a.k.a. **DEO RAJAN NAIDU** Deceased.

3rd Defendant

Counsel : N/A for the Plaintiffs
M/S Mishra Prakash & Associates for the 3rd Defendant

RULING

INTRODUCTION

1. I have to consider whether or not to strike out the claim. The Registry Clerks have sent out several Notices of Adjourned Hearing to the plaintiff's solicitors. However, neither the plaintiff nor her solicitors have responded to these Notices.

2. When Mr. Justice Sosefo Inoke delivered an interlocutory ruling in this case on 28 March 2012, he observed *inter alia* that this was, then, the second oldest case in the jurisdiction that then remained unresolved. Inoke J was dealing with an application to strike out the claim filed by a much frustrated 3rd defendant.

3. The third defendant's application was made on the allegation that the claim was scandalous, frivolous and/or vexatious and may prejudice, embarrass or delay the fair trial of the action.

4. The third defendant also highlighted in her application that the plaintiff had, up to that stage, not completed the pretrial conference.

5. Mr. Mishra had also argued that the claim contained no reasonable cause of action and that the plaintiff had no *locus standii* to bring the proceeding in that the plaintiff had failed to apply to the Registrar of Cooperatives as required under the relevant legislation existing at the time when she instituted the action.

6. Inoke J dealt with the application as if it was one to strike out the claim for want of prosecution. After reviewing the law applicable in Fiji in **Pratap v Christian Mission Fellowship** [2006] FJCA 41; ABU0093J.2005 (14 July 2006), he would go on to dismiss the application with costs in the cause.

7. At paragraph 9 of his ruling, Inoke J made the following comment which perhaps captures the gist of his reasoning:

> [9] It is now clear that delay alone is not sufficient and case management considerations should not be given prominence in the decision process.
> [10]..... But both parties and their previous solicitors are equally to be blamed for not having the action ready for trial at the earliest, for what appears to be a relatively simple case. The delays in this action cannot be placed solely at the feet of the plaintiff or her solicitors. I am not convinced that the delay is intentional or contumelious and inexcusable.
> [11] That therefore leads me to decide whether justice can still be done. The plaintiff's evidence has been taken and recorded. The son is now deceased. Will his widow be prejudiced in defending the claim? I do not think so. She is not in a worse position now than when this action was filed in 1989 because her husband had already died by then. The fact that she now lives in Canada is not material.

HISTORY OF COURT PROCEEDINGS

8. The history of the proceedings in this case is set out in Inoke J's ruling in paragraph [3] which I reproduce in full below:

> **THE BACKGROUND**
>
> [3] This is the second oldest case in this jurisdiction that remains unresolved. It is not quite ready for hearing as certain preliminary steps remain to be completed. The writ of summons was first filed in the Suva registry on 3 April 1986 as Civil Action HBC 292 of 1986. An amended Statement of Claim was later filed on 18 March 1987. After the pleadings closed, the elderly plaintiff obtained an order on 4 December 1987 that her evidence be taken before the trial. That evidence was taken on 22 September 1988 at her

residence in Nadi, the plaintiff having moved from Suva to Nadi. On 25 November 1988, the Court by consent ordered that this matter be tried in this Court. A further amended Statement of Claim was filed in this Court on 12 May 1993. **Since then, there have been numerous attempts to have the pretrial conference and other matters completed without much success.** The parties have also changed solicitors and the matter had been called on many occasions before several Deputy Registrars and Judges of this Court. In fact the matter had been set down for hearing in January 1999 but the hearing obviously did not take place. It appears from the file notes that the allocated Judge was not able to hear it for ethical reasons. It is not clear from the Court file what transpired between the end of 1999 and October 2009 when the plaintiff's new solicitors filed a Notice of Intention to proceed. Since then the plaintiff again changed solicitors and the matter called on 8 more occasions until the Master took it off the list on 16 August 2010 as no progress had been made in finalising the matter for trial. On 23 September 2010, the plaintiff's solicitors filed an application to have the matter restored to the list. The Master restored the matter on 9 November 2010. On 21 December 2010, the third defendant's solicitors applied to withdraw but did not proceed with the application. The application was later withdrawn on 15 February 2011. The matter was then called on four more occasions before the Master until the third defendant's solicitors filed this application on 3 November 2011 made returnable on 23 January 2012. It came before me on that date and I gave directions for the filing of affidavits and set the application down for hearing on 13 March 2012.

OBSERVATIONS

9. I observe when I went through the case file yesterday and last night that some records are not arranged in chronological order as is normally the case. The impression one gets is that the court records and documents had been taken apart at some stage, perhaps, to photocopy a particular document or documents for a searching party. Clearly, whoever is responsible had overlooked to arrange the documents in the order of their chronology when re-placing the documents in the court file.

10. I also observe, as Inoke J had noted above, that there had been an Order made on 04 December 1987 by Mr. Justice Pathik that the plaintiff be examined and that her evidence on oath be taken before the trial, in light of her age and ailing condition.

11. The plaintiff's evidence was recorded by the Deputy Registrar on 22 September 1988 at the plaintiff's residence. However, both the manuscript and the typed copy have turned yellow and have rotted and worn out considerably around the edges. This *wear-and-tear* process has affected much of the manuscript and the typed copy, so much so, that quite a significant part of the evidence recorded has either been obliterated completely or is beyond legibility.

12. For the record, I have highlighted this to the Deputy Registrar yesterday morning.

13. The question I have to decide now is what to do given that neither the plaintiff nor her counsel has answered the Notice of Adjourned Hearing sent out by the court clerks to attend Court.

14. I have to say that since the Ruling of Inoke J, nothing further has happened. There are still no pre-trial conference minutes and neither the personal representative of the plaintiff's estate nor the plaintiff's (latest) solicitor on record, Ms Draunidalo, has not turned up in court. On this note, let me just say here that Ms Draunidalo had filed a Notice to Withdraw as Counsel in 2014 but there is no indication that leave was ever granted to her. I observe also that the plaintiff has changed counsel many times throughout this case.

DISCUSSION

15. The background to the substantive issues in this case is succinctly summarised by Inoke J as follows:

> [4] The plaintiff, now deceased, was the mother of the third defendant, Theg Rajan, also deceased. The third defendant Sitamma is Theg Rajan's widow and administratrix of her husband's estate.
> [5] The plaintiff was one of the founders and initial members of the Saunaka Land Purchase Cooperative Society Limited, the first defendant. The Cooperative was the registered proprietor of 56 acres of freehold land in Nadi which was purchased, divided up and occupied by its members. On the plaintiff's 1 acre block was a house built by one of her other sons in 1960. The plaintiff's case is that she was deceived by her son (Theg Rajan) into signing what she thought was an authority for him to act on her behalf but was in fact a transfer of her share in the Cooperative and the land to her son. Her claim is based on the doctrine of *non est factum*. The alleged fraud did not become known until after her son died in 1983. The plaintiff has since died and the son's widow has migrated to Canada. The third defendant widow is now the beneficial owner of the land under dispute.

16. I am mindful that this case has been long pending for some thirty two years or so. I am mindful also of the observations of Inoke J. Both parties are prejudiced by the long delay. In the circumstances, I am cautious that another adjournment will benefit the dilatory plaintiff to the prejudice of the defendant.

17. The dispute is essentially between a mother and a son as Inoke J had noted above. The son predeceased the mother, who has also since died. The son is now substituted by his surviving widow who is also the personal representative of his estate. It is not clear to me at this time who the personal representative of the mother's estate is. The late mother's cause of action is based entirely on an allegation that the son had brought to her a document to sign which she did not knowing that she was in fact signing away to the benefit of her son her shares in the Saunaka Land Purchase Cooperative Society. She alleges fraud and non-est factum.

18. In **Fiji Development Bank v Raqona** [1984] FJLawRp 3; [1984] 29 FLR 113 (1 May 1984), the Fiji Supreme Court (As the High Court was then known), said as follows:

> In the House of Lords case ***Saunders v. Anglia Building Society*** (1971) AC l004 it was stressed that the defence of non est factum was not lightly to be allowed where a person of full age and capacity had signed a written document embodying contractual terms.
>
> The general rule is that a party of full age and understanding is normally bound by his signature to a document whether he reads or understands it or not.

19. In Australia, as is usually the case throughout the common law world, non est factum is raised as a defence by a person who alleges that he or she had been misled into signing a document which was different fundamentally from what he or she intended to sign. If the defence is successful, the signing party may be able to escape the effect of the signature (see **Petelin v Cullen** (1975) 132 CLR 355; **PT Ltd v Maradona Pty Ltd** (1991) 25 NSWLR 643).

20. Generally, the person relying on the defence must establish that he was unable to understand the purport of the particular document in question due to some disability such as blindness or in some cases, illiteracy.

21. In this case, the two persons at the centre of the transaction in question are now both deceased. The mother had alleged fraud against the son. That allegation was made after he died. She has also since died.

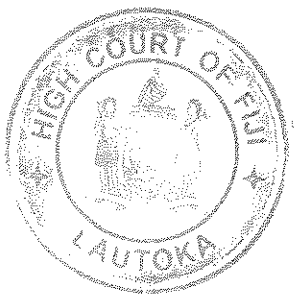
22. In evidentiary terms, the mother would bear the burden of persuading the court on the balance of probabilities of the alleged fraud.

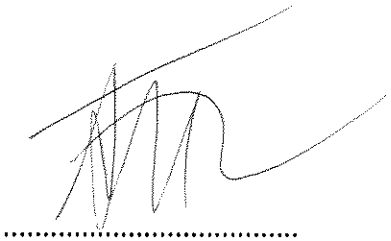
23. The Order for her evidence to be recorded in light of her ailment was made exactly twenty one years ago on 04 December 1987. Her evidence was taken sometime in mid-1988. Even with this, there is the lingering question as to how reliable her evidence would be and how much weight should be given to it considering that the son against whom the alleged fraud is made had predeceased her and considering what her state of mind at that time of the recording would be. Then, of course, there is the added issue concerning the wear and tear of the manuscript and the typed copy.

24. In such a situation, a Court would be well advised to look for corroboration of the allegations (see **Weeks v Hrubala** [2008] NSWSC 162, at [20], the court generally looks for corroboration of those claims (see also **Re Hodgson** (1886) 31 Ch D 177; **Vukic v Luca Grbin and Ors**; **Estate of Zvonko Grbin** [2006] NSWSC 41), **Plunkett v Bull** [1915] HCA 14; (1915) 19 CLR 544; **Clune v Collins Angus & Robertson Publishers Pty Limited** [1992] FCA 503; (1992) 25 IPR 246, at 253).

CONCLUSION

25. I have considered all and, having reviewed this case, and the fact that the plaintiff has persisted in being dilatory even after Inoke J's Ruling, that the interest of justice has tipped in favour of striking out this claim in light of the prejudice to both parties. In my view, a fair trial of this matter is no longer possible. Claim dismissed. No Order as to costs.





.....

Anare Tuilevuka

JUDGE

05 December 2018