

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: 124 of 2009.

BETWEEN: **MAFOA KOSOSAYA & KELERA KOSOSAYA** of Naiyala Subdivision,
Wainibokasi, Nausori, retired Pastor and Secretary respectively.

PLAINTIFF

AND: **DIRECTOR OF LANDS.**

1ST DEFENDANT

AND: **PERMANENT SECRETARY FOR EDUCATION.**

2ND DEFENDANT

AND: **ATTORNEY GENERAL OF FIJI.**

3RD DEFENDANT

BEFORE : Justice Deepti Amaratunga

COUNSEL : Mrs. Raikaci N. for the Plaintiff
 Mr. Lajendra L for Intended party

Date of Hearing : 15th March, 2013

Date of Decision : 17th April, 2013

DECISION

A. INTRODUCTION

1. The Plaintiffs instituted action by way of writ of summons seeking damages for the loss of their house due to a fire. The said house was under a mortgage at the time of the fire. After the fire the house got completely destroyed and insurance claim was settled for the full value of the house and the outstanding sum of the mortgage of the said property which got destroyed was settled. The Plaintiffs obtained a second loan in order to reconstruct the house that got destroyed and the Plaintiffs defaulted the second loan, and the 1st Plaintiff is

seeking to join the Fiji Development Bank who granted the second loan to this action for damages for negligence that resulted the fire and destruction of the previous house. The cause of action in this action is not related to mortgage of the property in issue even the subject matter is not the same since the loan that was defaulted was not relating the house that got destroyed, which is the subject matter for alleged negligence of this action. The application for joinder of the financial institute which granted a loan to reconstruct the house is made in pursuant to Order 29 rule 1(1) and (2) and Order 15 rule 6(2)(b)(i) and also Order 20 rule 5.

B. ANALYSIS

2. The Ex- parte motion dated 13th December, 2012 seeks following orders
 - a. Leave to join the Fiji Development Bank as a party to this action
 - b. If leave is granted, to amend the writ and the statement of claim
 - c. Restraining order against the intended party, Fiji Development Bank from proceeding with mortgagee sale.
 - d. Cost.
3. The main relief sought is the restrain of the intending party from exercising its power under the mortgage, but this is contingent on the order for joinder as refusal to join the intending party, namely Fiji Development Bank would invariably leave the said party out from this action, hence no order for restraining against the said party can be made in this action. In the circumstances the orders (b) and (c) of the summons filed on 13th December, 2012 are contingent on the application for joinder.
4. Order 15 Rule 6 deals with 'Misjoinder and non joinder of parties'. The said provision states as follows:-

“2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such

terms as it thinks just and either of its own motion or on application-

- (a)
- (b) Order any of the following persons to be added as a party, namely-

- (i) ***Any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or***

- (ii) *Any person between whom any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*

5. If the claim contained in the statement of claim is already statute barred in terms of the Limitation Act, the provisions contained in the Order 15 rule 6(5) and 6(6) applies and discretion granted in the Order 15 rule 6(2) is curtailed. The provision that has to be fulfilled in those circumstances are different from a person who intends to be added when the application is made with in the limitation period.

6. The above distinction for applications made before and after the limitation period, is done with a sound reasoning, as a person who is to intervene in an action before the expiry of limitation can always file a separate action as oppose to a person who makes an application to intervene after the expiration of the limitation period. So a less stringent attitude is observed for the parties who is to be joined before the expiry of the limitation period as oppose to the more restrictive attitude against the person who seeks addition or substitution after the expiry of the limitation period. This also indicate one important aspect of joinder and that is the relationship between the cause of action contained in the

statement of claim and the intended party's relationship to the said cause of action. If there is no relationship with the cause of action, no joinder can be allowed.

7. At the oral hearing of this summons the counsel for the 2nd Plaintiff admitted that the cause of action contained in the statement of claim is statute barred under the Limitation Act when this summons seeking joinder was filed.
8. It is also to be noted by joinder of a party after the expiry of limitation period, will effectively deprive the other party's right to plead the limitation against the said added or substituted party and the plea of limitation is generally available to all the parties who come before it except in the special circumstance that are laid in the Limitation Act itself. So, allowing a joinder of a party after the expiration of the limitation period effectively deprives the other party's plea of limitation and High Court Rules of 1988 specifically indicates the instances where such an addition or substitution after the expiry of the limitation period is allowed. The general rule is that such additions or substitutions should not be allowed after the expiration of the limitation period, but the exceptions are specified very restrictively in Order 15 rule 6(5) and 6(6). If the joinder is to be allowed there should be an additional fulfillment of the requirements contained in the said provisions.
9. Order 15 rule 6 (5) states as follows:

No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either –

- a. The relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or
- b. The relevant period arises under the provisions of sub paragraph (i) of the proviso to paragraph 4(1)(d) of the Limitation Act and the Court directs that those provisions

should not apply to the action by or against the new party.
(emphasis is added)

10. It is clear that the Court no longer exercises the discretion granted in the Order 15 rule 6 (2) when the party who intends to substitute makes the application after the expiry of the limitation period and the party who is making the application has to satisfy the court that it is necessary for the determination of the action that the new party should be added, or substituted. This is a qualification that has to be fulfilled before it is substituted as in this case.
11. The word '*necessary party*' is interpreted in an exclusive and restrictive manner in the Order 15 rule 6 (6) and it states as follows:

“(6) The addition or substitution of a new party shall be treated as necessary for the purposes of paragraph (5) (a) **if, and only if, the Court is satisfied** that-

- a. The new party is a necessary party to the action in that property is vested in him at law or in equity **and** the plaintiff's claim in respect of **an equitable interest** in that property **is liable to be defeated unless the new party is joined;** or
- b. The relevant cause of action is **vested in the new party and the plaintiff jointly but not severally;** or
- c. The new party is the Attorney-General and the proceedings should have been brought by realtor proceedings in his name; or
- d. The new party is a company in which the plaintiff is a shareholder and on whose behalf the plaintiff is suing to enforce a right vested in the company; or
- e. The new party is sued jointly with the defendant and is not also liable severally with him and failure to join the new

party might render the claim unenforceable.” (emphasis is mine)

12. In the affidavit in support of this summon, there is no clear indication as to which category described in the Order 15 rule 6(6) (a) to (e) the intended party can be included. The oral submissions made by both parties did not address this point and when the court inquired both counsel were unable to make any submissions on this point. I could not find any category stated in Order 15 rule 6(6)(a) to (e) that satisfy the intended party. The list contained in (a) to (e) in Rule 6(6) of Order 15 is exhaustive, the application for the joinder of Fiji Development Bank should be struck off *in limine*, on that ground alone.
13. The scenario described in Rule 6 (6)(c) is clearly not applicable as the new party is not AG. The scenario in (d), does not apply as the Fiji Development Bank is not shareholder. The situation contained in (e) applies when the intended party is sued jointly with the existing Defendant, which again not applicable to this case before me since there cannot be any joint claim for the negligence due to fire that can be attributed to the Fiji Development Bank. The situation described in (b) above does not arise as it refers to vesting of property jointly, but not severally. The scenario described in (a) is also not applicable as there are two requirements to fulfill and they are, that the property should be vested in law or equity and also the plaintiff's claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined, there is no such situation in this case.
14. The Order 15 rule 6 prevents an action being defeated by the Misjoinder or non joinder. It cannot be used to a subsequent event which is not related for determination of the alleged cause of action contained in the statement of claim.

C. CONCLUSION

15. The action against the Defendants is for fire due to negligence that cause the destruction of the initial house that got destroyed. The intended party Fiji

Development Bank cannot be a party to the said action, since no allegation of negligence on their part to the said fire and destruction of the property. The word ‘necessary’ contained in the Order 15 rule 6 (2)(b) is interpreted in a very restrictive manner in Order 15 rule 6(6). Fiji Development Bank cannot be considered a necessary party, under the said restrictive interpretation and also it cannot relate to the said cause of action based on negligence. In any event Fiji Development Bank cannot be joined in an action seeking damages for negligence for fire since the Fiji Development Bank paid no part in the alleged negligence and the cause of the fire, as they were only a financial institution. This application to join the Fiji Development Bank cannot be allowed and if allowed it would be a miscarriage of justice, since they had no part in the alleged fire other than financing. The present summons seeking addition is prompted due to default of the loan which was utilized to reconstruct the house on the same land, but this cannot be a reason to add the financier, to this action based on the alleged negligence that resulted the fire. The application for joinder is refused for the grounds stated above and as I have stated earlier in this decision the refusal of order (a) in the summons would invariably result the refusal of orders (b) and (c) since they are contingent to the order (a). The summons dated 13th December, 2012 is struck off. The cost of this application is assessed summarily at \$500 to be paid by the party who made this application to the Fiji Development Bank, (the intended party).

D. FINAL ORDERS

- a. The summons dated 13th December, 2012 is struck off.
- b. The Fiji Development Bank, is granted a cost of \$500 assessed summarily.

Dated at **Suva** this **17th day of April, 2013.**

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Justice Deepthi Amaratunga
High Court, Suva