In the High Court of Fiji at Labasa

Civil Jurisdiction

Civil Action No.HPP 7 of 2013

Between: Ernie Steiner

Plaintiff

And: Jacob John Steiner Jnr

Defendant

Appearances : Mr M. Sadiq for the plaintiff

Ms P.Salele for the defendant

Date of hearing: 11th November,2014

JUDGMENT

1. The plaintiff, in his statement of claim filed on 12th February,2013,seeks to renounce the validity of a Will of 26th December,1969, of his father, Jacob J Steiner Snr and revoke the probate granted to Philip Steiner on 11thAugust,1970.The plaintiff alleges that the Will was forged and executed after the death of the Jacob J Steiner Snr by an Indian man. Jacob J Steiner Snr owned a property known as "*Nukubati Island*". After Philip Steiner's death, the defendant obtained probate of Philip Steiner's estate and transferred the property to himself.The plaintiff seeks to cancel the transfer. The defendant, in his statement of defence denies the allegations and states that the claim is time barred. The plaintiff is guilty of laches and acquiescence.

2. By summons dated 30th June,2014,the defendant moves to strike out the plaintiff's statement of claim on the ground that the claim is time barred under section 10 of the Limitation Act and the action would prejudice the defendant.

3. In his affidavit in support, the defendant states that :
    - The allegations made by the plaintiff are time-barred.
    - The plaintiff failed to institute proceedings or report the forgery for the last 43 years.

- He would have to look for witnesses that "*knew of what transpired on that particular day 45 years ago..since the person referred to in the Plaintiff's claim as having forged the Will has died*".

4. The plaintiff, in his affidavit in support,states that the claim is not time-barred, as he came to know of the "*forged Will*" when he came to Fiji in "*December,2012*". The court has to determine whether this case falls within section 15 of the Limitation Act, which provides exceptions as to when the time bar applies. It is further alleged that the defendant knew the Will was forged and made after the death of Jacob J Steiner Snr.

5. ***The hearing***

At the commencement of the hearing, Mr Sadiq,counsel for the plaintiff stated that his client objected to my hearing this summons, since I had commented that his claim "*is unlikely to succeed*" in my Judgment declining the plaintiff's application for an interim injunction in this case.

Ms Salele, counsel for the defendant, stated that she was not made aware of this objection hitherto. She opposed the application.

I overruled the objection and proceeded to hear the summons, for the reason that the matter before me was a striking out application, not the substantive case. It is settled law, as both parties have submitted in their written submissions citing ***Nagle v Fieldon,***(1966) 1 All ER 689 that a Court will have recourse to this summary remedy only in plain and obvious cases, as I will elaborate further in this judgment.

6. ***The determination***

6.1 In support of the defendant's summons for striking out,Ms Salele contended that the plaintiff's case does not present a reasonable cause of action within the meaning of Or 18,r 18(1)(a). The plaintiff has failed to provide sufficient evidence to establish that there is an issue to be tried.The claim does not provide information to support the reliance on section 15 of the Limitation Act. There is no Power of Attorney attached to the plaintiff's affidavit in reply.Finally,Ms Salele submitted that the plaintiff is guilty of laches, since there has been an unreasonable lapse of time of more than 40 years since the alleged forgery

6.2 Mr Sadiq, in reply contended that by virtue of section 15 of the Limitation Act,the period of limitation runs from the time the plaintiff discovered the fraud. He rests his case on the doctrine of concealed fraud and refers to authorities on that point. Next, he states that a striking out of an action is the last resort. Finally, Mr Sadiq submits that he plaintiff is required to plead facts, not evidence.

6.3 I note that the plaintiff, in his reply to the amended statement of defence, avers that the "*fraud*" was discovered by the plaintiff "*in 2010*" when he returned to Fiji "*after being away for many years*". The plaintiff pleads section 15 of the Limitation Act. It is also averred that the defendant is one of the witnesses to the alleged forged Will.

6.4 On the test to be applied in a striking out application,I would refer to the following authorities.

6.5 In ***Attorney-General v Shiu Prasad Halka***,(1972) 18 FLR 210 Marsack JA at page 215 noted:

> *it is definitely established that the jurisdiction to strike out proceedings under Order 18 `Rule (18) should be very sparingly exercised and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised.*

The Court of Appeal in ***National MBF Finance (Fiji) Limited v Nemani Buli*** (unreported Civil Appeal No. 57 of 1998) stated:

> ***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 pleading as they appear before the court.*** (emphasis added)

6.6 I would also refer to the passages reproduced by the FCA in ***Pratap v Christian Mission Fellowship,*** (2006) FJCA 41 .

> *In Dey v. Victorian Railways Commissioner[(1949) 78 CLR 62, 91 Dixon J said:*
>
> > *A case must be very clear indeed to justify the summary intervention of the court .. once it appears that there is a*

> *real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.*

More recently, in Agar v. Hyde (2000) 201 CLR 552 at 575 the High Court of Australia observed that:

> *It is of course well accepted that* ***a court ... should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes"*** (emphasis added)

6.7 The defendant's concern is that he would have to look for witnesses to testify on what happened 45 years ago. I need hardly state that it is for the plaintiff to establish his case of forgery.

6.8 In my judgment, the plaintiff has placed before Court issues of fact which have to be determined at the trial. The issues cannot be decided in a "*summary way*" in the words of the High Court of Australia in the passage I have quoted.

7. ***Orders***

(a) The defendant's summons to strike out this matter, is declined.

(b) The defendant shall pay the plaintiff costs summarily assessed in a sum of $ 1000 within 21 days of this judgment.

14th November, 2014

A.L.B.Brito-Mutunayagam

Judge