IN THE HIGH COURT OF FIJI
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 75 OF 2013

BETWEEN : SHIU KUMAR SINGH of Martintar, Nadi, Farmer

Plaintiff

AND : SESH PAL SINGH of Martintar, Nadi.

Defendant

AND : THE CIVIL AVIATION AUTHORITY OF FIJI

Nominal Defendant

Mr. P. Naidu for the Plaintiff.
Mr. E. Maopa for the Defendant.
Mr. R. Singh for the Nominal Defendant

Date of Hearing - 20th January 2015
Date of Ruling - 20th February 2015

EXTEMPORE RULING

(A) INTRODUCTION

1. This matter comes before the Court by way of an Interlocutory Summons filed on behalf of the "Nominal Defendant" dated 30th September 2014, Under Order 18, Rule 18 of the High Court Rules seeking the following orders:

   a) *That the action against the Second (Nominal) Defendant be dismissed, as it discloses no reasonable cause of action against the Second (Nominal) Defendant, is vexatious and frivolous and the action against the Second*

(Nominal) Defendant is otherwise an abuse of the process of this Honourable Court.

b) Costs on a solicitor indemnity basis.

c) Any further or other order or relief as this Honourable Court may deem fit in the circumstances.

2. The application is opposed by the Plaintiff.

3. The Plaintiff and the "Nominal Defendant" filed written Submissions and addressed the Court in respect of those written submissions. The Defendant made oral submissions to Court.

(B) FACTUAL BACKGROUND

(1) By Writ of Summons dated 3rd May, 2013, the Plaintiff claims vacant possession of the land occupied by the Defendant, damages and costs.

(2) The Plaintiff in his Statement of Claim pleads inter alia;

(a) THAT the Plaintiff is a tenant of the Nominal Defendant since the 22nd day of June 1984 over land known as Lot 26 on Deposited Plan 2157 part of Certificate of Title No. 11668 situated at Nadi known as Cawa having an area of twelve and one half (12 ½) acres. (hereinafter referred to as the said land)

(b) THAT the said land is used for agricultural purpose and has been so utilized by the Plaintiff's grandfather the late Lal Singh who had a lease from the Nominal Defendant since 1946 and upon his death to his wife and the Plaintiff's grandmother Ram Raj sometime in 1977 and since 1984 by the Plaintiff.

(c) THAT the Plaintiff has been paying rental to the Nominal Defendant on an annual basis for the said twelve and one half acre.

(d) THAT the Nominal Defendant has accepted and continues to accept rental from the Plaintiff for the said property and recognizes the Plaintiff as its legal tenant of the said property.

(e) *THAT the said Plaintiff allowed the Defendant to occupy a portion of the said property which is less than one quarter acre for residential basis upon pleas by the Defendant for temporary shelter as the Defendant had no place to go but would move out when asked to move or once they found alternative accommodation.*

(f) *THAT the Plaintiff felt sympathetic about the Defendant's predicament and agreed to give temporary shelter until they found a place of their own free of rental.*

(g) *THAT the Defendant after sometime refused to vacate and became a nuisance to the Plaintiff and his family.*

(h) *THAT the Plaintiff did cause notice dated on 3rd day of March, 2009 and 29th day of September 2009 to be served on the Defendants but they have refused to vacate.*

(i) *THAT the Plaintiff has revoked and withdrawn or terminated any permission, authority or invitation given to the Defendant and his family.*

(j) *THAT as a consequence of the occupation by the Defendant and his family the Plaintiff is suffering loss of use of the said property and claims damages for such loss.*

(3) The Plaintiff is seeking following orders;

a) *Order that the Defendant and his family give up vacant possession of the land occupied by the Defendant.*

b) *That the Defendant pay damages to the Plaintiff.*

c) *Costs.*

(4) The Defendant in his Statement of Defence states inter alia that;

a) *As to paragraph 1 of the Statement of Claim, the Defendant denies the contents and state that they both are living in squatter.*

b) *As to paragraph 2 of the Statement of Claim, the Defendant denies the contents and state that the late Lal Singh is his father and the Plaintiff is his nephew.*

c) *As to paragraph 3 of the Statement of Claim, the Defendant denies the contents and state that the lease is expired. There is no lease of the said land.*

d) *As to paragraph 4 of the Statement of Claim, the Defendant denies the contents and state that when the lease of the said land expired, the Nominal Defendant allowed us to occupy the present land.*

e) *As to paragraph 5 of the Statement of Claim, the Defendant denies the contents and state that the land was given to him by the late Lal Singh when lease was valid until to date. That lease land was for the whole family but now the Plaintiff claim as his.*

f) *As to paragraph 6 of the Statement of Claim, the Defendant denies the contents and state that the Nominal defendant allowed the Defendant to stay on the land after the lease was expired.*

g) *As to paragraph 7 of the Statement of Claim, the Defendant denies the contents. The Plaintiff blocked the access road to the Defendant's house.*

h) *As to paragraph 8 of the Statement of Claim, the Defendant admits receiving notice but such notice was illegal. The Plaintiff does not hold any title of the said land.*

i) *As to paragraph 9 of the Statement of Claim, the Defendant states that the Plaintiff has no title of the land. He has no right to institute this action.*

j) *As to paragraph 10 of the Statement of claim, the Defendant states that the Plaintiff does not hold any right to evict or seek orders to give vacant possession. Hence this action be dismissed with costs.*

(C) THE LAW

(1) Provisions relating to striking out are contained in Order 18, rule 18 of the High Court Rules. Order 18, rule 18 of the High Court Rule reads;

18. – (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) *No evidence shall be admissible on an application under paragraph (1)*

2. Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

"It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in Hubbuck v Wilkinson(1899) 1 Q.B. 86, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T. 512, CA). See also Kemsley v Foot and Qrs (1952) 2KB. 34; (1951) 1 ALL ER. 331, CA. affirmed (195), AC. 345, H.L .The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable " (Att – Gen of Duchy of Lancaster v L. & N.W. Ry Co (1892) 3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts and Salmon L.JJ in Nagle v Feliden (1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association (1970)1 WLR 688 (1970) 1 ALL ER 1094, (CA).

Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

"*On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).*

It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in Dyson v Att. – Gen [1911] 1 KB 410 p. 419)."

(3) In the case of ***Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641***, it was held;

"The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has ***all the requisite material to reach a definite and certain conclusion;*** *the Plaintiff's case must be so clearly untenable that it could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct"*

(4) In the case of National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000), it was held;

"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"

(5) In Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008 (28 January 2010), Master Tuilevuka (as he was then) summarised the law in this area as follows;

"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General -v- Shiu Prasad Halka 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney -v- Prince Gardner [1998] 1 NZLR 262 at 267."

(6) His Lordship Mr Justice Kirby in **Len Lindon -v- The Commonwealth of Australia (No. 2) S. 96/005** summarised the applicable principles as follows:-

a) *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*

b) *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious...*

c) *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

d) *Summary relief of the kind provided for by O.26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer.... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

e) *If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading.*

f) *The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.*

(7) In Paulo Malo Radrodro vs Sione Hatu Tiakia & others, HBS 204 of 2005, the Court stated that:

"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:

a) *A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered - Lord Pearson in Drummond Jackson v British Medical Association [1970] WLR 688.*

b) *Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable - Lindley Li in Attorney General of Duchy of Lancaster v L.N.W Ry [1892] 3 Ch 274 at 277.*

c) *It is only in plain and obvious cases that recourse would be had to the summary process under this rule - Lindley MR in Hubbuck v Wilkinson [1899] Q.B 86.*

d) *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*

e) *The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed - ESSO Petroleum Company Limited v Southport Corporation [1956] A.C*

at 238" - James M Ah Koy v Native Land Trust Board & Others - Civil Action No. HBC 0546 of 2004.

f) A dismissal of proceedings "often be required by the very essence of justice to be done"..... - Lord Blackburn in Metropolitan - Pooley [1885] 10 OPP Case 210 at 221- so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation - Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"

(8) In Halsbury's Laws of England Vol 37 page 322 the term "abuse of process" is described as follows:

"*An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court.*"

(9) The term "**abuse of process**" is summarized in *Walton v Gardiner (1993) 177 CLR 378* as follows:

"*Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness*"

(10) In Stephenson -v- Garret [1898] 1 Q.B. 677 it was held:

"It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata."

Domer –v- Gulg Oil (Great Britain) (1975) 119 S.J 392;

"Where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure, they may be dismissed as being an abuse of the process of the court"

Steamship Mutual Association Ltd -v- Trollope and Colls (city) Ltd (1986) 33 Build L.R 77, C.A;

"*The issue of a writ making a claim which is groundless and unfounded in the sense that the plaintiff does not know of any facts to support it is an abuse of process of the Court and will be struck out"*

(D) ANALYSIS

(1) Mr R. Singh for the "Nominal Defendant" stressed that the action against it be struck out as it discloses no reasonable cause of action.

(2) In reply, counsel for the Plaintiff contended that a reasonable cause of action is pleaded against the "Nominal Defendant" and the action is not frivolous and vexatious.

(3) The crux of Mr Singh's argument is Order 18, rule 18 (1) (a) of the High Court Rules which reads as follows;

(a) "It discloses no reasonable cause of action or defence, as the case may be; or

(4) The following notes to Order 18, r.19 of the Supreme Court Practice (U.K) 1979 Vol-01 or 18/19/11 defines the term 'a reasonable cause of action" as follows;

"..... A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummon Jackson v British Medical Association [1970] 1 WLR, 688; [1970] 1 All E.R. 1094 C.A.). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 Q.B. 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 T.L.R. 418, C.A.; Wenlock v Moloney [1965] 1 W.L.R 1238 [1965] 2 All E.R 871, C.A.)..."

(5) An application of this type does not require evidence in support. It requires the court to make its determination based upon a perusal of the pleading itself.

(6) When one looks at the Statement of Claim, it is apparent that the only reference to the "Nominal Defendant" is in paragraph 03 and 04.

(7) The Plaintiff in paragraph three (03) of the Statement of Claim pleads;

"That the Plaintiff has been paying rental to the Nominal Defendant on an annual basis for the said twelve and one half acre"

(8) The Plaintiff in paragraph four (04) of the Statement of Claim pleads:

"That the Nominal Defendant has accepted and continues to accept rental from the Plaintiff for the said property and recognizes the Plaintiff as its legal tenant of the said property"

(9) There does not appear to be any pleading with respect to specific breach, negligence, fraud or duty of care alleged against the "Nominal Defendant". Moreover, there is no relief claimed against it. No any adverse allegations against it. There are no issues between the Plaintiff and the Nominal Defendant deserving to be aired out properly at the trial of this case. Therefore, it can be said here beyond doubt that there is no cause of action against the Nominal Defendant. This leads to the pleading being scandalous, frivolous and vexatious. This amounts to gross abuse of the Courts process. The Court has an inherent jurisdiction to control proceedings and thus prevent an abuse of process. This jurisdiction is quite apart from that conferred by the rules of the court to strike out frivolous and vexatious pleadings and actions where a cause of action is not revealed.

(10) Moreover, I bear in mind the **"caution approach"** that the Court is required to exercise, when considering an application of this type.

(11) I remind myself of the principles stated clearly in the following decisions;

Megarry V.C in Gleeson v J. Wippell & Co. [1977] (1) W.L.R. 510 at 518 said;

"First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 of [1970] Ch.506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial".

Lindley M.R. in Hubbuck & Sons, Ltd v Wilkinson, Heywood & Clark Limited [1899 1 Q.B. 86] at page 91 said:

"...summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases".

In Attorney General v Shiu Prasad Halka [1972] 18 FLR 210 Marsack J.A. said;

"...I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 rule 18 should be very sparingly exercised where legal questions of importance and difficulty are raised".

Master Tuilevuka (as he then was) in ***Sugar Festival Committee 2010 v Fiji Times Ltd*** *(2012) FJHC 1404; HBC 78. 2010 (1 November 2012) held;*

"Courts rarely will strike out a proceeding on this ground. It is only in exceptional cases where, on the pleaded facts, the plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed -will the courts act to strike out a claim. If the facts as pleaded do raise legal questions of importance, or a tribal issue of fact on which the rights of the parties depend, the courts will not strike out the claim.

(12) Lastly, on behalf of the Plaintiff and the Defendant it is contended that the "Nominal Defendant" as the landlord of the property should be a party to the claim since it will enable Court to decide in fair manner.

(I confess that when I first heard this submission I was utterly unimpressed.)

(13) In rebuttal, Mr Singh strenuously argued that what is required from the "Nominal Defendant" is a matter of evidence in relation to the legal standing of the Plaintiff on the subject land. Therefore the "Nominal Defendant" does not need to be a party to the proceedings.

(14) I entirely agree with the contention of Mr Singh. The Plaintiff's claim is against the Defendant for vacant possession. The Plaintiff is a tenant at will of the "Nominal Defendant". The "Nominal Defendant" is not directly involved in the dispute. The Courts have a responsibility to limit proceedings to those directly involved in a dispute. Therefore, the "Nominal Defendant" cannot be allowed to remain a party to the action and if allowed it would be a miscarriage of justice. If need arises, the "Nominal Defendant" can be summoned to court to establish the legal standing of the Plaintiff on the subject land.

(15) The argument put forward by the Plaintiff and the Defendant is devoid of any merits as such is rejected. On the facts and circumstances of this case and applying the above principles I can shut the door on the Plaintiff by dismissing the action.

(16) In this case, Counsel for the "Nominal Defendant" submits that the circumstances amount to abuse of process by the Plaintiff justifying an award of cost to the "Nominal Defendant" on a solicitor indemnity basis.

(17) I entirely agree with the contention of the counsel. The inherent jurisdiction of the court to regulate its procedures by preventing abuse of its process is well recognized. While the court is generally reluctant, except in exceptional cases, to award costs on an indemnity basis, a clear abuse might well justify an award of full indemnity costs.

(18) I hold that the Plaintiff had acted unreasonably as the action is frivolous and vexatious. This amounts to gross abuse of the courts process. I am satisfied that an award of indemnity costs should be made in this case.

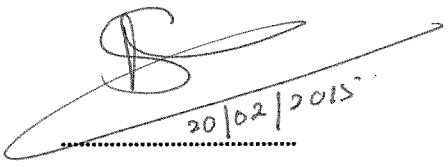
E. CONCLUSION

After considering the facts of this case, the submissions made to Court and in light of the authorities, notwithstanding the "caution approach" that the Court is required to take, I am satisfied that the pleading against the Nominal Defendant discloses no reasonable cause of action, which in itself leads to the pleading being scandalous, frivolous, and vexatious.

(F) ORDERS

(1) The Plaintiff's Writ of Summons and the Statement of Claim against the "Nominal Defendant" is struck out.

(2) The Nominal Defendant is directed to file and serve its detailed costs for the assessment of the indemnity costs within 14 days from the date hereof.



Jude Nanayakkara
Acting Master of the High Court

At Lautoka

20/02/2015