

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No.: HBC 6 of 2007

BETWEEN: BAHADUR ALI
1ST PLAINTIFF

A N D: KAMRU DEAN
2ND PLAINTIFF

A N D: SAFIRA ALI
3RD PLAINTIFF

A N D: VALLEY ARTESIAN WATERS (FIJI) LIMITED
4TH PLAINTIFF

A N D: CREDIT CORPORATION (FIJI) LIMITED
1ST DEFENDANT

A N D: NALIN PATEL and PRADEEP PATEL
2ND DEFENDANT

A N D: THE DIRECTOR OF LANDS
3RD DEFENDANT

A N D: ATTORNEY GENERAL OF FIJI

4TH DEFENDANT

A N D: WESTERN BUILDERS LIMITED

5TH DEFENDANT

Counsel : Mr. Varunendra Prasad for the 2ND, 3RD& 4TH Plaintiffs

Ms Rakai for the 1ST & 2ND Defendants

Mr. R. Green for the 3RD& 4TH Defendants

Mr. O'Driscoll o/i A. K. Lawyers for the 5th Defendant

Date of Hearing : 11th September, 2014

Date of Ruling : 15th April, 2015

RULING

1. This is a notice issued by the Court of its own motion pursuant to Order 25 rule 9 of the High Court Rules, demanding the Plaintiffs and the Defendants to show cause why this action should not be struck out on the grounds of want of prosecution or an abuse of the process of the court.
2. Upon being served with this Notice, 2nd, 3rd and 4th Plaintiffs and all the Defendants appeared in court. The counsel for the 1st and 2nd Defendant informed the court that the first Plaintiff is deceased. They then filed a Summons pursuant to Order 15 r 8 & 9 seeking an order that the first Plaintiff

be struck out from this proceedings. Having heard that Summons, the first Plaintiff was struck out from this proceedings pursuant to Order 15 r 8&9.

3. Subsequently, the 2nd, 3rd and 4th Plaintiffs (hereinafter referred as Plaintiffs) filed their affidavit in show cause. The 1st and 2nd Defendants then filed their affidavit in reply for the Plaintiffs' show cause, which was followed by the Plaintiffs' reply affidavit. The 3rd, 4th and 5th Defendants opted not to file any affidavits. The Summons was then fixed for hearing on 11th of September 2014. The learned counsel for the Plaintiffs and the Defendants made their oral arguments and submissions during the cause of the hearing. All of them tendered their respective written submissions at the conclusion of the hearing. Having carefully considered the respective affidavits, submissions and the chronological background of this proceeding, I now proceed to pronounce my ruling as follows.

4. The Plaintiffs filed an affidavit of Niwaz Ali to show cause pursuant to Order 25 r9. Mr. Ali deposed in his affidavit that subsequent to the order made by Justice Hettiarachi on 25th of March 2011, the Plaintiffs delivered to the solicitors of the defendants their draft minutes of pre-trial conference for their consideration. It is bizarrely confusing that the Plaintiffs have circulated some minutes calling them pre-trial conference minutes even without having any form of conference. This court and higher courts of this country have repeatedly been condemned and refused to accept this practice, though yet it has been the practice of many practitioners. The Plaintiffs have circulated these so called pre-trial conference minutes on 18th and 28th of November 2011. The Plaintiffs claim that they have not received any positive responses from the respective Defendants.

5. While they were waiting for the responses from the Defendants for their so called circulated pre-trial conference minutes, the first Plaintiff passed away in December 2011. A few months later, in March 2012, the executrix of the estate of the late first Plaintiff was also passed away. The Plaintiffs claim that they were not in a position to take this proceedings forward as the estate of first Plaintiff left un-administered. The Plaintiffs appointed their present solicitors in January 2013. The new solicitors filed a notice of intention to proceed and notice requesting a pre-trial conference on 17th of January 2013. The Plaintiffs deposed in their affidavit that the 1st and 2nd Defendants objected for this notice requesting a pre-trial conference on the ground of pre-maturity as the status of the first Plaintiff has to be determined ahead of the pre-trial conference.

6. The 1st and 2nd Defendant filed an affidavit of NeelamKavita Sharma in opposition of the affidavit of show cause filed by the Plaintiffs. Their objection is founded on two main grounds. The first ground is that the Plaintiffs have filed clusters of litigations on the same cause of action but involving various parties. They allege that the Plaintiffs have no intention of taking these clusters of litigations to a conclusion. The intention of the Plaintiffs are visible from the protracted nature of this proceedings. The second ground is the prejudice caused to them due to the delay. The 1st and 2nd Defendants stated that most of their staffs who effectively involved in this alleged transaction have now left the organization. Apart from that the long passage of time since the occurring of the cause of action may affect the memories of the witnesses. Hence, the 1st and 2nd Defendants claim that the delay of this proceedings have prevented the possibility to have a fair trial in this action.

7. The 3rd and 4th Defendants opted not to file any affidavits, so did the 5th Defendant. However, the learned counsel for the 3rd, 4th, and 5th Defendants

made their oral and written submissions during the course of the hearing of this summons.

8. It appears that the objections of the 3rd and 4th Defendants are mainly founded on the ground that they were wrongly included into this action. The learned counsel for the 3rd and 4th Defendants submitted that the proper cause would be to file a judicial review against the decision of the director of land than filing of this action by way of writ of summons.
9. The 5th Defendant basically supports the contentions of the 1st and 2nd Defendants and supported this motion issued by the court pursuant to Order 25 r9.
10. Having briefly discussed the background and the contentions of the respective parties in this motion, I now turn to discuss the applicable laws and principles pertaining to the striking out of proceedings under Order 25 r9.
11. Order 25 rule 9 states that ;

"If no step has been taken in any cause or matter for six months then any party on application or the court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the court,

Upon hearing the application the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions.

12. Accordingly, it appears that O 25 r 9 is only allowed the court to strike out an action on two grounds if the parties failed to take steps to move the proceedings forward for six months. The first ground is for want of prosecution and the second is an abuse of the process of the court.

13. The applicable principles on strike out an action on the ground of “want of prosecution” and “abuse of the process of the court” have discussed in Birkett v James (1978) AC 297 at 318) (1977) 2 All E.R 801 where Lord Diplock found that;

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

14. The scope of the definition of “abuse of the process of the court” and “the intentional delay” in respect of the application of this nature has further discussed and elaborated in Grovit v Doctor and Others (1997) 1 WLR 640), (1997) 2 All E.R 417 where Lord Woolf held that;

“the court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if the justice so requires (which will frequently be the case) the court will dismiss the action.

The evidence which was relied upon to establish the abuse of process may be the Plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James".

15. Lord Griffiths in Department of Transport v Chris Smaller (Transport) Limited (1989) AC 1197 has discussed the scope of the second limb enunciated in the celebrated passage of Lord Diplock in Birkett v James (supra), that is an inordinate and inexcusable delay and the existence of substantial risk that it is not possible to have a fair trial of the issue. Lord Griffiths held that the existence of mere inordinate and inexcusable delay is not enough to strike out an action. The court must be satisfied that the inordinate and inexcusable delay have caused substantial risk for the conduct of fair trial and also caused prejudice to the defendant. Lord Griffiths found that;

" what would be the purpose of striking out in such circumstances? If there can be a fair trial and the defendant has suffered no prejudice, it clearly cannot be to do justice between the parties before the court; as between the plaintiff and defendant such an order is manifestly an injustice to the plaintiff. The only possible purpose of such an order would be as a disciplinary measure which by punishing the plaintiff will have a beneficial effect upon the administration of justice by deterring others from similar delays.

To extend the principle purely to punish the plaintiff in the illusory hope of transforming the habits of other plaintiff solicitors would, in my view, be an unjustified way of attacking a very intractable problem".

16. The principles enunciated in Brikett and Chris Smaller (Transport) Limited have approved and applied in Pratap v Christian Mission Fellowship (ABU 0093 of 2005), where the Fiji Court of Appeal held that ;

“ In New India Assurance Co Ltd v Rajesh Kumar Singh (ABU 0031/1996 – FCA B/V 99/946) this court emphasized that while inordinate and inexcusable delay might be established, these factors were not, on their own, sufficient to warrant the striking out of the action. What additionally had to be clearly demonstrate (and could not be presumed) was that the Defendant had been or would be materially prejudiced by the delay that had occurred. Although the categories of prejudice are not closed (see, for example, remarks by Lord Denning in Biss v Lambeth Southwark and Lewisham Health Authority (1978) 2 All ER 125) the principle consideration is whether, in view of the delay, a fair trial can still be held (Department of Transport v Chris Smaller (Transport) Ltd (1989) AC 1197)”.

17. Lord Griffiths in Department of Transport(supra) has discussed the scope of “prejudice”, where his Lordship found that the prejudice should not be limited to the prejudice cause in the conduct of the litigation. Lord Griffiths held that;

“ these authorities clearly establish that prejudice may be of varying kinds and it is not confined to prejudice affecting the actual conduct of the trial. It would be foolish to attempt to define or categorize the type of prejudice...”

18. In respect of the anxiety accompany with the delay of litigation, Lord Griffiths approved the observation of the Court of Appeal in Egail Trust Co Ltd. V Pigott –Brown (1985) 3 All ER 119, 124, where the Court of Appeal held that;

“ any action is bound to cause anxiety, but it would as a general rule be an exceptional case where that sort of anxiety alone would found a sufficient ground for

striking out in the absence of any particular prejudice. Biss's case is an example of such an exceptional case, the action hanging over for 11 ½ years, with professional reputations as stake".

19. Having discussed the applicable legal principles and laws pertaining to the issue of strike out of action pursuant to Order 25 r9, I now draw my attention to this instant case.

20. The 1st and 2nd Defendants' objections are mainly founded on two grounds. The first ground is that the Plaintiffs have filed clusters of actions on the same cause of action with no intention to take them to speedy conclusions. It appears that the parties have already concluded their pleadings and discoveries. It has now reached to the pre-trial conference stage. It is my view that, subsequent to the removal of first Plaintiff, the matter is now ready to proceed without any hindrance.

21. I now turn to the second ground of objection, which is the issue of prejudice. The Defendants claim that the inordinate and inexcusable delay of the Plaintiffs has endangered the possibility of fair trial of the issues. 1st and 2nd Defendants deposed in their affidavit in opposition that many of their staff who handled this alleged transaction in year of 2000 has already left the company.

22. I do concur with the Defendants' allegation that this action has been moving at snail's speed. The Plaintiffs claim that the delay was mainly caused by the negative response of the Defendants for their circulated draft pre-trial conference minutes and the subsequent deaths of the first Plaintiff and his executrix. I do not find these excuses have any form of merit. As I have already indicated above, it is an unacceptable practice to circulate so called

pre-trial conference minutes without actually conducting any form of conference, which has been repeatedly condemned and warned by this court and other higher courts.

23. Order 15 of the high court rules have provided a procedure to follow in the event of a death of Plaintiff, however, it appears that none of the parties in this proceedings have taken any steps under Order 15 until the court issued this motion pursuant to Order 25 r9. It is my view that all parties have contributed their part into this delay, but it was mainly the Plaintiffs' culpability, that has caused this protracted delay since 2011. I accordingly find this is an inordinate and inexcusable delay.

24. I now turn to determine whether this inordinate and inexcusable delay has prejudiced the Defendants and also obstructed the possibility of fair trial of the issues.

25. The 1st and 2nd Defendants claim that two of their main officers who have handled this transaction in 2000 have already left the company and would be difficult to summons them for the hearing. However, they have not explained that how and why they claim that it would be difficult to summons them for the hearing. It is the onus of the Defendants to satisfy the court that the delay has prejudiced them on conducting a fair trial.

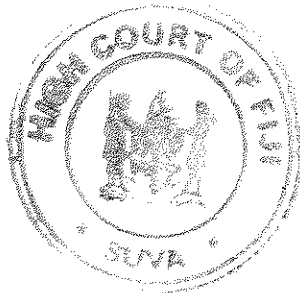
26. Moreover, the Defendants claim that the long passage of time since the occurring of this alleged cause of action in 2000, might affect the memories of their witnesses in giving evidence. However, the Plaintiffs argue that this disputed issue is mainly depends on documentation evidence, therefore, it won't adversely affect the fairness of the hearing.

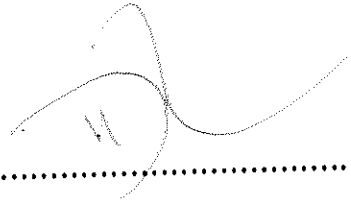
27. Having considered the nature of this dispute, it appears that the witnesses could be able to refresh their memory by referring documents. Any transaction in this nature, which is the subject matter of this action, is mainly constituted with documentations and records. These documents and record would assist the witnesses to refresh their memories.

28. In view of these findings, it is my opinion that this protracted delay could not affect the possibility of conducting a fair trial. I further find that this delay has not prejudiced the Defendants. I accordingly make following orders that;

- i. The Summons issued by this court of its own motion pursuant to Order 25 r 9 is hereby dismissed,
- ii. The Plaintiff is hereby ordered to convey a pre-trial conference within 21 days of this order.

Dated at Suva this 15th day of April, 2015.




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R.D.R. Thushara Rajasinghe
Master of High Court, Suva