

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 61 of 2012

BETWEEN : FRANK BERT WHIPPY of Nayala, Kasavu, Savusavu, Farmer suing on behalf of himself and on behalf of and as representing the beneficiaries of the Estate of Samuel Whippy.

PLAINTIFF

AND : GLUCK WILLIAM PILOT WHIPPY of Suva, Fiji, Company Director as Administrator of the ESTATE OF SAMUEL WHIPPY pursuant to Court Order dated 25th day of June 2007 made in Suva High Court Civil Action No. 569 of 1998.

DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma

COUNSEL: Mr. Prasad. N - for the Plaintiff
Ms. Narayan. S - for the Defendant

Date of Hearing: 07th May, 2015

Date of Ruling : 08th June, 2015

RULING

BACKGROUND

1. The above named Defendant filed and served a Summons on 26th August, 2014 and sought for the following orders:-

- (i) *That the Writ of summons and the Statement of Claim filed by the Plaintiff on 28th February, 2012 be struck out for want of prosecution or as an abuse of process.*
 - (ii) *That the costs of this action be paid by the Plaintiff.*
 - (iii) *Any other order that this Court deems just and expedient.*
2. The application was made pursuant to *Or.18 r.3 (1) & (4), Or.18 r.18 (1) (d) and Or. 25 r.9 (1) & (2) of the High Court Rules 1988* and under *the inherent jurisdiction of the High Court.*
3. Before the Court proceeded with the formal hearing of the Defence Counsel's Summons in the matter, the Plaintiff Counsel raised a preliminary issue on the computation of time as to the filing of the pleadings, including the reply to the Defence, and, thereafter the Summons for Directions.
He added further, that the present Striking out Application pending before this court was prematurely filed by ten (10) tens on 26th August, 2014.
4. Upon the parties agreeing that this court hears and determines the Preliminary Issue first, and then the striking out application to follow, the court therefore proceeded to hear the preliminary issue as to the computation of time accordingly.
5. The striking out application was deferred to 08th June, 2015 at 2.30 pm..

THE LAW ON PLEADINGS

6. The law on pleadings is stipulated at *Order 18 of the High Court Rule 1988* which states as follows-

Service of statement of claim (O.18, r.1)

R.1. *Unless the Court gives leave to the contrary or a statement of claim is indorsed on the writ, the plaintiff must serve a statement of claim on the defendant or, if there are two or more defendants, on each defendant, and must do so either when the writ is served on that defendant or at any time after service of the writ but before the expiration of 14 days after that defendant gives notice of intention to defend.*

Service of defence (O.18, r.2)

R.2. *(1) Subject to paragraph (2), a defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for acknowledging service of the writ or after the statement of claim is served on him, whichever is the later.*

(2) If a summons under Order 14, rule 1, or under Order 86, rule 1, is served on a defendant before he serves his defence, paragraph (1) shall not have effect in relation to him unless by the order made on the summons he is given leave to defend the action and, in that case, shall have effect as if it required him to serve his defence within 14 days after the making of the order or within such other period as may be specified therein.

Service of reply and defence to counterclaim (O.18, r.3)

R.3. *(1) A plaintiff on whom a defendant serves a defence must serve a reply on that defendant if it is needed for compliance with rule 7 and if no reply is served, rule 13(1) will apply.*

(2) A plaintiff on whom a defendant serves a counterclaim must, if he intends to defend it, serve on that defendant a defence to counterclaim.

(3) Where a plaintiff serves both a reply and a defence to counterclaim on any defendant, he must include them in the same document.

(4) A reply to any defence must be served by the plaintiff before the expiration of 14 days after the service on him of that defence, and a defence to counterclaim must be served by the plaintiff before the expiration of 14 days after the service on him of the counterclaim to which it relates.

Pleadings subsequent to reply (O.18, r.4)

R.4. No pleading subsequent to a reply or a defence to counterclaim shall be served except with the leave of the Court.

Pleadings: formal requirements (O.18, r.5)

R.5. *(1) Every pleading in an action must bear on its face -*

- (a) the year in which the writ in the action was issued and the number of the action,
(b) the title of the action,
(c) the description of the pleading, and
(d) the date on which it was served.
- (2) Every pleading must, if necessary, be divided into paragraphs numbered consecutively, each allegation being so far as convenient contained in a separate paragraph.
- (3) Dates, sums and other numbers must be expressed in a pleading in figures and not in words.
- (4) Every pleading of a party must be indorsed -
- (a) where the party sues or defends in person, with his name and address;
(b) in any other case, with the name or firm and business address of the solicitor by whom it was served and also (if the solicitor is the agent of another) the name or firm and business address of his principal.
- (5) Every pleading must be signed by the party's solicitor or by the party, if he sues or defends in person.

Facts, not evidence, to be pleaded (O.18, r.6)

R.6. (1) --

Matters which must be specifically pleaded (O.18, r.7)

- R.7. (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality -
- (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
(b) which, if not specifically pleaded, might take the opposite party by surprise; or
(c) which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to paragraph (1), a defendant to an action for the recovery of land must plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant is not sufficient.
- (3) A claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies.

Denial by joinder of issue (O.18, r.13)

R.13. (1) If there is no reply to a defence, there is an implied joinder of issue on that defence.

(2) Subject to paragraph (3)-

(a) there is at the close of pleadings an implied joinder of issue on the pleading last served, and

(b) a party may in his pleading expressly join issue on the next preceding pleading.

(3) There can be no joinder of issue, implied or express, on a statement of claim or counterclaim.

(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is an implied or express joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.

PLAINTIFF' CASE

7. O.18, r.3 (1) requires the Plaintiff to serve a reply to defence if it is needed and if no reply is served then Rule 13(1) applies.
8. O.18, r.13 (1) and (2) specifies that there is an implied joinder of issue if no reply to defence is served and the pleadings is deemed to close.
9. O.25, r.1 (1) requires the Plaintiff to take out a summons for directions within one month after the pleadings are deemed to be closed.
10. O.25, r.1(4) specifies that the Plaintiff does not take out the summons for directions within one month after the pleadings are deemed to be closed then the Defendant may:
 - (a) File the same; i.e. summons for directions; or
 - (b) Apply to dismiss the action.

11. O.25, r.1 (5) specifies that if the Defendant opts to apply to dismiss then the court may-
- (a) Dismiss it on terms that may be just; or
 - (b) Treat the application to strike out as a summons for directions and make appropriate orders to further conduct of the action.
12. According to the Plaintiff, he has reflected the chronological events and steps that were taken in this case at paragraph B- 4 and upon his application of the above Rules as to the computation of time, he states that-
- (i) Defence was filed on 20th January, 2014, Reply to Defence was due on 4th February, 2014, when the pleadings would have been deemed to be closed. Summons for directions was to be filed within a month which would expire on 4th March, 2014. Therefore the time to calculate 6 months required under O.25, r.9 commenced on 4th March, 2014 and 6 months expired on 4th September, 2014.
 - (ii) The present application was filed on 26th August, 2014 and was 10 days premature in terms of the Rules.

DEFENDANT'S CASE

13. The Defence Counsel adopted her written submissions as to the question of the preliminary issue raised and reiterated the laws applicable in terms of the pleadings stipulated at Order 18 of the High Court Rules 1988.
14. She stated that the defence was filed on 20th January, 2014.

15. After the service of the Defence, the Plaintiff should have then served a reply on that defendant if it is needed for compliance with rule 7 and if no reply is served, rule 13(1) will apply.
16. Whenever a party decides not to file a reply to defence, then how will the other party as to the proceedings know of the defendant's intentions that he/she does not want to file a reply to defence?
17. The Plaintiff after filing his defence on 20th January, 2014, did not file any reply to defence which then resulted in over a 6 months delay.
18. The Defence Counsel referred to a letter dated 30th April, 2014 which was annexed to the defence affidavit in support deposed on 25th August, 2014.

ANALYSIS and DETERMINATION

19. The procedure for filing of pleadings is very clearly stipulated in terms of *Order 18 of the High Court rules 1988*.
20. To summarise the *Order 18 Rules*-
 - After the **Service of a statement of claim** (O.18, r.1)- step 1;
 - **Service of defence** (O.18, r.2) then takes place as step 2;
 - Next step would be to **Serve a reply and defence to counterclaim** (O.18, r.3)- Step 3.
21. In terms of *ORDER 18, Rule 3.-(1)* A plaintiff on whom a defendant serves a defence must serve a reply on that defendant if it is needed for compliance with rule 7 and if no reply is served, rule 13(1) will apply.
22. *Order 18 Rule 13* deals with **Denial by joinder of issue** and Rule 13(1) states that *If there is no reply to a defence, there is an implied joinder of issue on that defence.*

- FURTHER, Order 18, Rule (2) (a) (b), (3) and (4) must be read in its entirety to understand the denial by joinder of issue.
23. The Writ and the Statement of Claim was filed by the Plaintiff on 20th February, 2012.
24. The Defence was filed on 20th January, 2014.
25. In terms of *Order 18 Rule 3(1)*, a plaintiff on whom a defendant serves a defence must serve a reply on that defendant if it is needed for compliance with rule 7 and if no reply is served, rule 13(1) will apply.
26. Further, a reply to any defence must be served by the plaintiff before the expiration of 14 days after the service on him of that defence, and a defence to counterclaim must be served by the plaintiff before the expiration of 14 days after the service on him of the counterclaim to which it relates.
27. I have cited the correspondence dated 30th April, 2014 which was annexed to the defence affidavit in support deposed on 25th August, 2014 which reads as follows-

'We refer to the above and to your letter dated 15th January, 2014.'

'We regret to advise that our client does not intend to discuss settlement in this matter, as such we request that your office files a Reply to Defence to move this matter forward.'

'In addition, we note that your client is yet to pay the costs of \$1500 that was ordered by the court on 07th November, 2013 and we request if the same could be paid to our Trust Account within the next 7 days.'

Yours faithfully

Diven Prasad Lawyers

Per

Swastika Narayan.

28. The contents of this correspondence give a clear indication that the Defendant does not have any intention whatsoever of settling the matter rather move

forward with the next cause which invited the Plaintiff counsel to file and serve a Reply to their Defence.

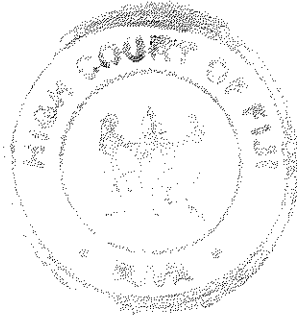
29. It can be concluded from this letter that as at 30th April, 2014 (*date of letter*), there was no Reply to Defence filed and that the Plaintiff upon making a decision not to file and serve any Reply to Defence should therefore have moved on to file a Summons For Direction (O.25, r.1 (1) and O.25 r.1(4) were applicable) accordingly, allowing the court to make further directions in terms of the set down law and procedure for consequent cause of action and the matter to be finally determined.
30. Unfortunately, this was not done for the reasons best known to the Plaintiff and his Counsel.
31. Further, I must state that there was nothing stopping the Defendant from pursuing this case further by filing a Summons for Directions and seek for necessary orders, but for obvious reasons because the counsel representing the Defendant and that the matter is instituted against her client that she would not want to file a Summons for Directions as per the rule but to resort to the alternative Rules to counter the Plaintiff's action which she has done now by filing a summons to strike out the Plaintiff's Writ of Summons and the Statement of Claim.
32. The Plaintiff after filing his defence on 20th January, 2014, did not file any reply to defence which then resulted in over a 6 months delay as to the consequent cause of action.
33. Henceforth, the Defendant Counsel thought fit to file and serve a timely striking out Application for the Plaintiff's Writ and the Statement of Claim in terms of the law which is now pending before this court for hearing and determination.

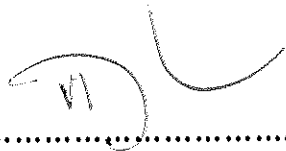
34. Accordingly, for the aforesaid rational, I make the following final orders as to the Preliminary Issue raised herein.

Final Orders

1. The application for striking out of the Plaintiff's Writ of Summons and the Statement of Claim dated 26th August, 2014 was not prematurely filed but after a lapse of over a 6 months rule within the law and is in order for this court to hear and determine.
2. This court to proceed to hear and determine the Defendant's striking out application accordingly.
3. No order as to costs now but to be determined upon the final determination of the striking out application.

DATED at Suva on 08th June, 2015




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VISHWA DATT SHARMA
Acting Master of High Court, Suva

cc. *Mr. Nilesh Prasaad*, Mitchell Keil Lawyers, Suva.

Ms. Swastika Narayan, Diven Prasad Lawyers, Suva.