

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 34 OF 2013**

**BETWEEN:**            **VUNIMOLI SAWMILL LIMITED**

**First Plaintiff**

**AND:**                    **BASHIR KHAN**

**Second Plaintiff**

**AND:**                    **MOHAMMED SHAMSHOOD** t/a Sam Civil Services

**First Defendant**

**AND:**                    **HOME FINANCE COMPANY LIMITED**

**Second Defendant**

**BEFORE:**                **The Hon. Mr. Justice David Alfred**

**COUNSEL:**             **Mr. P. Lomaloma appearing for Messrs Hanif Tuitoga for the  
First and Second Plaintiffs**

**Mr. A. Kohli for the First Defendant**

**Mr. A. Ram for the Second Defendant**

**Date of Hearing:      13 July 2015**

**Date of Interlocutory Judgment:    15 July 2015**



## INTERLOCUTORY JUDGMENT

1. This Notice of Motion first came up before me on 17 April 2015 when all 3 Counsel requested they be permitted to put in written submissions. Accordingly, I ordered there be filed and served written submissions by the respective dates that I set and that thereafter a date would be fixed by the Master, on which date I would hear the oral submissions of all Counsel. This was duly done and the matter came up before me on 13 July 2015 for me to hear the submissions of Counsel.
  
2. However on this date, no counsel for the First and Second Plaintiffs appeared before me. The solicitors for the Plaintiffs had sent a Counsel, who was not wearing a gown nor had a wig on, to appear before me in open court. More, he informed that he had less than 2 years practice. I adjourned the matter to enable a Counsel to be instructed to appear before me. When the hearing resumed, after the short recess, there was still no Counsel appearing for the Plaintiffs. So, I instructed Counsel for the Defendants, present before me, to make their oral submissions on behalf of their respective clients. At the conclusion of the hearing I reserved judgment to a date to be announced.
  
3. In the course of reaching my decision I have perused the following:
  - (i) Writ of Summons and Statement of Claim of the Plaintiffs.
  - (ii) Statement of Defence of the First Defendant.
  - (iii) Statement of Defence of the Second Defendant.
  - (iv) Plaintiffs' Reply to the Defence of the First and Second Defendants
  - (v) Notice of Motion filed by the First Defendant on 24 December 2014
  - (vi) Affidavit (in support) of the First Defendant sworn on 22 December 2014
  - (vii) Plaintiffs' Written Submission
  - (viii) First Defendant's Written Submission
  - (ix) Second Defendant's Written Submission
  - (x) An authority submitted by Counsel for the First Defendant, viz:

***Between: Kaiafa Biu Ledua... Plaintiff***

***And: Colonial Life Fiji Limited... Defendant***



Counsel for the Second Defendant did not submit any authority.

I now proceed to deliver my judgment.

4. **Factual outline:**

- (a) The Notice of Motion seeks an order that the Plaintiffs' claim be struck out on the grounds contained in the First Defendant's Affidavit (the Affidavit)
- (b) The Affidavit avers as follows:
  - (1) The parties in the instant Civil Action are the same as those in Suva High Court Civil Action No. HBC 8 of 2007 (the 1<sup>st</sup> action).
  - (2) Both the said Actions deal with the Sale and Purchase Agreement that he had entered into on 2 September 2006 (the Agreement).
  - (3) That the Plaintiffs in the 1<sup>st</sup> action had inter alia, prayed that the Defendants be ordered to return to the Plaintiffs, the plants, machineries, vehicles and equipment removed by the Defendants.
  - (4) That Anjala Wati J delivered judgment on 15 December 2011 and made, amongst other orders, the following orders:
    - (a) The only remedy the Plaintiffs were entitled to after their unlawful termination, of the Agreement on 23 December 2006, was the purchase price calculated at \$795,000.00;
    - (b) All other claims of the parties are unsustainable and are thus dismissed.
  - (5) That the instant action had been filed by the Plaintiffs claiming damages for alleged removal of goods, chattels, machines and equipment and for conversion of the same.
  - (6) The instant action has for determination the issue that had already been dealt with by the Court in the 1<sup>st</sup> action and is an abuse of process of court and the Plaintiffs are barred from bringing this action.



### The Decision

5. The issue before me is the issue of an alleged abuse of process of court put forward by the First Defendant in the Affidavit. Though separate from, this is tied up with the doctrine of res judicata. In the instant case before I can even begin to consider res judicata I have to consider whether the defences of the Defendants, by which they are bound, have pleaded either res judicata or abuse of process of court.
6. Going through the Defence of the First Defendant, with a fine toothcomb, discloses no mention of either res judicata or abuse of process at all.
7. The Defence of the Second Defendant raises, inter alia, the following contentions in paragraph 5 (a), (b) and (c) viz res judicata, that the Plaintiffs cannot claim by a second action for the same relief and that having elected for a money judgment, they are thereby precluded from any other action or claim.
8. The Notice of Motion which is what I concerned with here is filed by the First Defendant only. Since the application is by him alone, it follows, if it succeeds, that only the Plaintiffs' claim against him alone would have to be struck out. The Plaintiffs claim would then continue against the Second Defendant only.
9. The Plaintiffs submission which is entitled "(First Defendant's Application to strike out)" make reference to peripheral matters like defective application, absence of particulars etc and references to contended non-compliance with Order 5 rule 5, Order 7 rule 3 and Order 8 rule 3 (2) of the Rules of the High Court (the Rules).
10. The above contentions are easily disposed of, if one were to read Order 2 rule 1 (1) and (3) which provides that failure to comply with requirements of the Rules shall not nullify the proceeding.



11. The written submission of the First Defendant raises for the first time in paragraph 6.5 that “The law of res judicata applies”
12. The written submission of the Second Defendant starts by stating he concurs with the application and submission by the First Defendant, and essentially contends the Plaintiffs cannot hold a monetary judgment and also any of the subject assets.
13. The gist of the oral submission of counsel for the First Defendant was these proceedings were an abuse of process of court because they were a duplication of similar proceedings in the Suva action.
14. Counsel for the Second Defendant said he concurred with the First Defendant’s application for striking out because in the Suva action there was finality with the judgment of Wati J on the substantial issue and now here the Plaintiffs were trying to get a second bite of the cherry. He concluded by saying res judicata precluded the plaintiffs from another action.
15. At the end of the day, it appears to me, the sole ground for the Defendant’s move to strike out the Plaintiffs claims against them, is res judicata intertwined with abuse of process. The leading case on this twin issue is the decision of the English Court of Appeal in Greenhalgh v Mallard [1947] 2 All E.R. page 256 and 259, where their Lordships allowed the appeal and restored the order of the master who had made an order that the statement of claim in those proceedings be struck out on the ground that the causes of action therein are res judicata and that the same are frivolous and vexatious and an abuse of the process of court.
16. But is the First Defendant entitled to succeed on his application having pleaded neither res judicata nor abuse of process in his Defence?
17. The answer is to be found in the decision, again, of the English Court of Appeal in Edevain v Cohen; 43 Ch. D 187 where the Court held that on the



pleadings as they stood, the Defendant could not avail himself of the judgment in the former action, for it ought to have been pleaded. In other words as Odgers' Pleading and Practice in Civil Actions states the defence of res judicata cannot be raised, unless it is specially pleaded in the Defence. Neither in my opinion can abuse of process of court.

18. Accordingly, I shall have to dismiss the First Defendant's Notice of Motion with costs which I summarily assess at \$500.00 and which is to be paid to the Plaintiffs by the First Defendant only.
19. Since this Notice of Motion was not filed by the Second Defendant nor by the First Defendant on its behalf, I shall make no order as to costs as between the Plaintiffs and the Second Defendant.

Delivered at Labasa this 15<sup>th</sup> day of July, 2015.



**David Alfred**  
**JUDGE**  
**High Court of Fiji**  
**Labasa**

