IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 216 of 2012

BETWEEN : **THE ATTORNEY GENERAL**

Plaintiff

A N D : **AMELIA TURAGABECI**

Defendant

COUNSEL : Ms. S. Ali for the plaintiff
Ms. P. Salele for the Defendant

DATE OF HEARING : **29th September, 2015**

DATE OF RULING : **23rd October, 2015**

RULING

[1] The defendant-applicant was an employee of the Ministry of Health who was offered a scholarship to Japan. The defendant-applicant requested the Permanent Secretary of the Health Ministry for leave with full pay which was refused. She preferred an appeal against the said refusal but without success. She was advised by the Permanent Secretary to the Ministry of Health to inform him so that the permission could be obtained from the Public Service Commission for her release. However, without notifying the Permanent Secretary the defendant-applicant left for Japan but the Ministry's officials continued to pay her salary. Upon her return to Fiji she was asked to reimburse the salary paid to her while she was away in Japan and since there was no response from her, the plaintiff-respondent instituted this action to recover $ 66,191 with interest and costs. Judgment entered against the defendant-applicant by default which was sealed on 02nd November 2012.

[2] The defendant-applicant filed summons and supporting affidavit on 29th April 2013 (as per the summons it is dated 13th May 2013) seeking to have the judgment entered by default, vacated. After the plaintiff-respondent filed his affidavit in response the matter was fixed for hearing on 30th June 2014 and 01st July 2014. On 30th June 2014 the plaintiff-respondent was absent and unrepresented and the defendant-applicant appeared in person. The Court issued Notice of Adjourned Hearing to be served on the plaintiff-respondent. When the case was mentioned on 22nd September 2014 the parties were directed to file written submissions within 21 days and ordered that the matter to be mentioned on 28th November 2014. On that day the case was fixed for hearing on 31st March 2015. On 31st March 2015 the defendant was absent and unrepresented. The Court heard the submissions of the learned counsel for the plaintiff and the summons of the defendant-applicant was struck out with costs of $ 500.

[3] The defendant-applicant filed another summons on 21st April 2015 seeking to have the summons struck out on 31st March 2015, reinstated. In the affidavit filed in support of the motion it is stated that on 01st April 2015 the husband of the defendant-applicant came to the office of the solicitors and inquired about the case and the deponent had in turn inquired from Ms. Salele, the solicitor of the defendant-applicant, about it and she had informed the deponent that she had not entered the hearing date of this matter in her diary but had only made a note in the file maintained by the solicitors.

[4] The matter in issue here is whether the grounds adduced by the defendant-applicant are sufficient for the Court to reinstate the summons.

[5] The Judgment by default was entered against the defendant-applicant on 12th November 2012 and she made an application to have the default judgment set aside on 29th April 2013. Her application to set aside the judgment entered by default was struck out and the order was sealed on 14th April 2015. Thus it appears that the defendant has not exercised due diligence in defending the action or in prosecuting her application for reinstatement. She has taken almost six months to make an application to set aside the default judgment. The defendant-applicant has not been able to explain this delay.

[6] It is the position of the learned counsel for the defendant-applicant that her failure to enter the next date of the case in the diary was a mistake. However, there is no evidence on record in that regard except for the statement made from the bar table by Ms. Salele.

[7] The affidavit in support of the summons to reinstate the action is deposed to by the Legal Executive of the law firm, Salele Law and not by Ms. Salele. In my view the statement made by the Counsel from the bar table that she could not enter the next date of the case in the diary is not sufficient for the Court to act upon and conclude that it was an inadvertent mistake on her part. The submissions made by counsel from the bar table are not evidence. For the Court to act upon, the parties must adduce evidence. The only evidence on record is the affidavit of the Legal Executive of Salele Law who has no personal knowledge of what has been deposed to in the affidavit.

[8] If the learned counsel forgot to enter the next date of the case in the diary she should have later made inquiries from the Registry and obtained the necessary information about the next date of the case. It appears that even the defendant has not shown any interest in inquiring from her solicitor about what transpired in Court on the previous day.

[9] The principles of striking out an action was discussed in the case of **Birkett v. James (1978) A.C. 297 at page 318** where it was held that the power of the court to dismiss an action 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 it is likely to cause or to have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and a third party.

[10] In the case of **Grovit and Others v Doctor and Others [1997] 2 All E.R. 417** it was held:

> The court had power under its inherent jurisdiction to strike out or stay actions on the ground of abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of brining them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to establish want of prosecution by showing that

there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant.

[11] In this case there is a judgment entered for the plaintiff-respondent but because of the defendant-applicant's failure to prosecute her applications the plaintiff-respondent is deprived of the benefits of the judgment. The manner in which the defendant-applicant and her solicitor have conducted themselves does not show that the defendant-applicant has any interest in concluding these matters without delay.

[12] The learned counsel for the defendant-applicant submitted that there was delay in taking steps in this case by the defendant-applicant and in terms of Order 25 Rule 09 of the High Court Rules the matter can be struck out for not taking steps for a period of six months.

[13] Order 25 Rule 9(1) of the High Court Rules provides 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.

[14] Order 25 Rule 9 of the High Court Rules has no application to the matter before this Court for the reason that this is a matter which was once fixed for trial and the judgment has already been entered by default. Once the matter is fixed for trail Order 35 Rule 01 of the High Court Rules becomes applicable.

[16] Order 35 Rule 1 provides as follows;

(1) If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of a judge.

(2) If, when the trial of an action is called on, one party does not appear, the judge may proceed with the trial of the action or any counterclaim in the absence of that party.

[17] However, the above provisions too have no application to this matter since at the time of striking out the application of the defendant-applicant the judgment had already been entered.

[18] The matter before this Court does not come within the purview of any of the provisions referred to above. If an applicant to an application of this nature does not prosecute it with due diligence the Court in the exercise of its inherent jurisdiction can strike it out.

[19] In view of the reasons aforementioned I am not inclined to accept the position of the solicitor of the defendant-applicant that her failure to appear in Court on the day of the hearing was due to an inadvertent mistake on her part.

[20] For the grounds aforesaid I make the following orders.

ORDERS.

(1) The summons to reinstate the summons struck out on 15th March 2015 is refused.

(2) The defendant-applicant shall pay the plaintiff-respondent $ 1000 as (summarily assessed) costs.

HIGH COURT OF FIJI * SUVA *

Lyone Seneviratne

JUDGE

23.10.2015