

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 274 of 2011

BETWEEN

KALESI SEINI ADIDAMU of Delainavesi, Lami as the widow and
administratrix of the estate of her late husband Semiti Molilevu.

PLAINTIFF

AND

ELI AKIMO GUCA of Naimataga Settlement, Veisari, Police Officer.

1ST DEFENDANT

AND

COMMISSIONER OF POLICE, 3rd Floor, Ratu Sukuna House, Suva.

2ND DEFENDANT

AND

THE ATTORNEY GENERAL OF FIJI, 7th Floor, Suvavou House, Suva.

3RD DEFENDANT

Counsel : Mr. D. Singh for the plaintiff
Ms. K. Chetty for the 1st Defendant
Ms. T. Baravilala for the 2nd and 3rd Defendants

Date of Hearing : 14th October 2016

Date of Order : 27th October 2016

ORDER

- [1] The plaintiff on 02nd September 2011 filed writ of summons seeking to recover damages for death of her husband alleging that his death was caused by the negligent driving of the 1st defendant who, at the time of the accident was a police officer.
- [2] The 2nd and 3rd defendants filed their statement of defence on 12th September 2011 wherein they averred that the first defendant was not an employee of the 2nd defendant during the time of the accident as he was not on official duty and that he drove the police vehicle bearing registration No. GN 294 without obtaining the appropriate authorization from any senior Police Officer.
- [3] After the service of the writ of summons the 1st defendant has not appeared in court until 09th May 2014. On 09th May 2014 the 1st defendant had appeared in court and Mr. Green who represented the 2nd and 3rd defendant had informed court the 1st defendant was still in service and would appear for all three defendants. The matter had been adjourned on several occasions for the parties to peruse a settlement. On 30th September 2015 when the matter came up before this court the solicitor for the 2nd and 3rd defendants informed court that there was no possibility of settling the matter. The matter was thereafter mentioned on 25th November 2015 and it was fixed for trial on 23rd and 24th May 2016.
- [4] The 1st defendant on 23rd May 2016 sought time obtain services of a solicitor and the court taking into consideration the long delay in the matter granted time for the 1st

defendant to seek assistance of a lawyer subject to payment of costs to the plaintiff and the 2nd and 3rd defendants.

[5] On 11th July 2016 the 1st defendant through his solicitor filed summons seeking leave to file his statement of defence along with the proposed statement of defence which was objected to by the 2nd and 3rd defendants. The plaintiff did not object to the application of the 1st defendant.

[6] It was brought to the notice of the court by the learned counsel for the 2nd and 3rd defendant that the summons of the 1st defendant has been filed under Order 14 of the High Court Rules deals with summary judgments. The learned counsel did not object to the application of the 1st defendant on that ground but this irregularity was brought to the notice of the court. I have said time and again that the procedural law has been enacted to facilitate the proper administration of justice and this kind of technicalities should not be allowed to stand in the way of justice. However, it has to be considered whether the 2nd and 3rd defendants were misled by the error on the summons. It does not appear to be so from the submissions made by the learned counsel for the 2nd and 3rd defendants.

[7] Order 3 rule 4 of the High Court Rules 1988 provides as follows;

(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

[8] The identical provisions are found in Order 3 rule 5 of The Supreme Court Practice 1997 - Volume 1, Part 1. At pages 16 and 17 it is stated thus;

The object of the rule is to give the court a discretion to extend time with a view to the avoidance of injustice to the parties (*Shafer v. Blyth* [1920] 3 K.B.143, p. 143; *Saunders v. Pawley* (1885) 14 Q.B.D. 234, p. 237). "When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who failed to act within the proper time ought to be the sufferer, but in other cases objection to lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs" (per *Bramwell L.J.*, in *Atwood v. Chichester* (1878) 3 Q.B.D.722, p. 723, C.A.). A special circumstance, however, such as excessive delay may induce a court in its discretion to refuse to extend the time (per *Jessel M.R.*, *Eaton v. Storer* (1882) Ch. D. 91, C.A.,p.92).

Moreover an acceptable explanation requires more than a mere statement that the person in charge of the action forgot about it, or was too busy to get on with it; an acceptable excuse, such as illness, will prompt a more sympathetic response to the application than if the commission is caused by neglect (*Erskine Communications Ltd v. Worthington, The Times, July 8, 1991, C.A.*).

- [9] The issue here for determination is whether the 1st defendant has explained the delay to the satisfaction of the court.
- [10] It is the position of the 1st defendant that he genuinely believed that the solicitor of the 2nd defendant would represent him in court. As I have stated above it is clear from the minutes of 09th May 2014 that the counsel who represented the 2nd and 3rd defendants had informed court that he would appear also for the 1st defendant since he was still in service. The learned counsel for the 2nd and 3rd defendants submitted that after filing the statement of defence the 1st defendant could have known that the counsel for the 2nd and 3rd defendants was not representing him in court. I do not see merit in this submission for the reason that Mr. Green who represented the 2nd and 3rd defendant informed court that he also represents the 1st defendant more than 2 ½ years after the statement of defence was filed. In the circumstance the 1st defendant would not have had any reason to retain another solicitor to represent him. The 2nd defendant should have acted in a more responsible manner and informed the 1st defendant of his decision not to represent him in court.

[11] In his proposed statement of defendant the 1st defendant while admitting that he drove the vehicle involved in the accident denied having driven the vehicle carelessly, negligently and dangerously. Since it was the 1st defendant who was driving the vehicle at the time of the accident he must be given an opportunity to explain the manner in which the accident occurred.

[12] For the reasons aforementioned the Court is of the view that it is nothing but reasonable to allow the 1st defendant to file his statement of defence. The court accordingly makes the following orders.

ORDERS

1. The 1st defendant is granted two weeks time from today to file his statement of defence and serve it on the plaintiff.
2. No order for costs of this application.




Lyone Seneviratne,

JUDGE

27th October 2016.