

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA, FIJI ISLANDS

CIVIL CASE NO.: HBC 17 of 2006

BETWEEN : **VIJAY PRAKASH** of Lautoka, Joiner.

PLAINTIFF

A N D : **USMAN ALI** of Brisbane, Australia.

DEFENDANT

Appearances:

Ms. Lidise V. for the Plaintiff

Mr Naidu D. for the Defendant

RULING

1. Introduction

- 1.1 By the Notice of Motion filed on 7th March, 2016 the Defendant in this matter is seeking leave to file a Counter-Claim. The application is made pursuant to Order 15 Rule 2 of the High Court Rules 1988 and Inherent Jurisdiction of this Court.
- 1.2 The application is supported by the Affidavit sworn by Krishneel Kunal Kumar who is a law clerk in the employment of Messrs Pillay Naidu and Associates who is appearing for the Defendant in this matter.
- 1.3 The Plaintiff did not file an Affidavit in Opposition to the Affidavit deposed by Krishneel Kunal Kumar. However the Learned Counsel for the Plaintiff opposed the application of the Defendant when it was taken up for hearing on the basis that it

is an abuse of the Court process. She contended that the Affidavit of Kumar does not disclose any reason whatsoever as to why it has been deposed by an employee of the Defendant's Solicitor as opposed to the Defendant himself.

- 1.4 The second point she raised in her submission is that the Defendant has not filed a cross appeal to reinstate his Counter-Claim which was struck out by this Court on 25th September, 2013 including the Plaintiff's summon date 22nd March, 2012 to vary the Interlocutory Judgment dated 22nd February, 2012.

2.0 Background

- 2.1 When this matter had come up for trial on 8th September, 2010 after pleadings were filed including the Counter-Claim of the Defendant, parties had agreed to take up preliminary issue orders sought by a Notice of Motion dated 7th September, 2010 filed by the Defendant. The said issues were:

- (a) The Plaintiff's claim be dismissed as it is statute barred as per paragraph 16 of the Counter-Claim.
- (b) The Plaintiff has no locus standi.

- 2.2 By its Interlocutory Judgment dated 22nd February, 2012 the High Court dismissed the above preliminary issues subject to the following unless orders.

- (a) ***unless** the Plaintiff deposit in the Principal Probate Registry (Suva High Court) the alleged will referred to at paragraph 5 of the Statement of Claim with a copy of this judgment attached within **30 days** and submits proof of having done so, the Plaintiffs action and the Defendants Counter Claim shall stand struck out and dismissed, and*
- (b) ***unless** the Plaintiff makes application to ad as Defendants the intestate or testate heirs/beneficiaries of the deceased Paan Kumari **and** make application to ad a representative to represent the estate of Paan Kumari within **3 months** of this judgment, the Plaintiffs action, and the Defendants Counter Claim shall stand struck out and dismissed, and,*
- (c) ***unless** the Plaintiff amends his pleadings within **3 months** of this judgment to set out the date he came to*

*know of the alleged fraud **and** plead the manner by which the Plaintiff action is not time barred by the several provisions of Limitation Act, the Plaintiffs action and the Defendants Counter Claim shall stand struck out and dismissed.*

- 2.3 Subsequently the Plaintiff filed summons on 22nd March, 2012 (as day before the expiry of the first unless order) seeking to vary the first unless order by deleting the requirement for the Plaintiff to deposit the Will and to enable him to apply for letters of Administration on the ground that the Will of Paan Kumari cannot be located.
- 2.4 By its Ruling dated 25th September, 2013 this Court dismissed the summons filed by the Plaintiff to vary the Interlocutory Judgment dated 22nd February, 2012.
- 2.5 Having obtained leave of this Court the Plaintiff appealed to the Fiji Court of Appeal against the said decision; and the Court of Appeal has allowed the said appeal and send the case back to this Court to proceed with it.
- 2.6 The Court of Appeal in its Judgment dated 28th May, 2015 at paragraph 28 and 29 stated;

“[28] We also note that, the Defendant’s Counter-Claim also has been struck off and dismissed by the Learned High Court Judges impugned Judgment.”

“[29] The Defendant has not preferred any appeal to this Court against that, for which reason we will not go into that.”

3.0 Analysis and Determination

- 3.1 I will now consider the objection raised by the Plaintiff Counsel in respect of this application.
- 3.2 The Learned Counsel for the Plaintiff said in her submissions to Court that the Affidavit in Support sworn by Krishneel Kunal Kumar does not disclose any reason as to why it has been deposed by an employee of the Defendant’s Solicitors. In her written submissions the Learned Counsel had stated that the deponent Kumar has deposed that the Defendant will be prejudiced if he is not given leave to file a Counter-Claim.

- 3.3 It is surprising to note how a Clerk in a Law firm can make such a statement without any explanation as to how the Defendant will supposedly be prejudiced if the Defendant is not allowed to file a Counter-Claim. In my view it is the Defendant who can depose as to how he will be prejudiced if a Counter-Claim is not filed.
- 3.4 Second objection is that the Court has struck out and dismissed the entire action both the Plaintiff Claim as well as the Defendant's Counter-Claim filed on 31st May, 2007 and amended on 9th September, 2010. As such this Court became functus officio on the entire matter. The Plaintiff's Counsel argued that the Defendant has not filed a cross appeal against the said decision as such he cannot now circumvent the proper rules and procedure of the Court and the appeal process by making this application under Order 15 of the High Court Rules.
- 3.5 It is evident from the Judgment of the Court of Appeal that it had not dealt with the Ruling of this Court in regard to the dismissal of the Counter-Claim. In the said Judgment Court of Appeal has said as the Defendant has not preferred any appeal to the Court of Appeal against the decision of this Court to strike out the Counter-Claim it will not go into it. Therefore it is clear that the Order of this Court to strike out the Defendant's Counter-Claim remains and this Court has no power to set aside the said decision and grant leave for the Defendant to file a Counter-Claim.

4.0 **Conclusion**

- 4.1 In the outcome I hold that the Defendant's application seeking leave to file Counter-Claim should be dismissed. However, this decision will not prevent the Defendant from making a similar application in the event the Plaintiff is allowed to file an amended Statement of Claim.

4.1 **Final Orders**

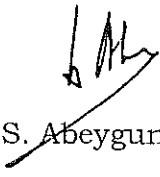
- (a) The Defendant's Notice of Motion dated 7th March, 2016 seeking leave to file Counter-Claim is dismissed.

(b) The Defendant to pay the Plaintiff \$300.00 costs summarily assessed.



At Lautoka

20th June, 2016


Lal S. Abeygunaratne
[Judge]