

IN THE HIGH COURT
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 247 of 2015

BETWEEN : **QUEST INVESTMENTS LIMITED** (a limited liability company giving having its registered office in Suva in the Republic of Fiji).

PLAINTIFF

AND : **KOLINIO BAIVOU and Others** of Raravidau Squatter Settlement, Khalsa Road, Tacirua in the Republic of Fiji, Security Officer (Tin No.Ministry of Finance, 310 Victoria Parade, GPO Box 784, Suva.

DEFENDANTS

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Valenitabua - for the Plaintiff
Ms. Renee Lal & Ms. Malani - for the Defendants

Date of Hearing: 22nd April, 2016
Date of Ruling: 11th July, 2016

RULING

(Notice of Discontinuance filed by the Plaintiff and whether Costs should be awarded to Defendants on Discontinuance Pursuant to Order 21 Rule 2 (5) of the High Court Rules, 1988)

INTRODUCTION

1. The Plaintiff filed a Notice to Discontinue proceedings against the Defendants on 26th January, 2016.
2. The matter was listed for further directions on the substantive cause on 04th February, 2016.
3. The Defence Counsels on 04th February, 2016 submitted to Court that the filing of the Notice of Discontinuance by the Plaintiff was improper for the following reasons-

- (i) That the Plaintiff had filed an application for substitution wherein an order was being sought that 'Ridgeview Estate Limited' be substituted as the Plaintiff in place of Quest Investments Limited.
- (ii) Instead, the Plaintiff went ahead and filed this Notice of Discontinuance.
- (iii) Therefore, costs were sought accordingly.

4. The Plaintiff's contention was that he had correctly filed a Notice of Discontinuance and Defendants are not entitled to any costs.

THE LAW

5. Order 21 of the High Court Rules, 1988, deals with withdrawal and discontinuance of action as follows-

Discontinuance of action, etc., without leave (O.21, r.2)

- 2. (1).....
- (2).....
- (3).....
- (4).....

(5) The plaintiff in an action begun by originating summons may, without the leave of the Court, discontinue the action or withdraw any particular question or claim in the originating summons, as against any or all of the defendants at any time not later than 14 days after service on him of the defendant's affidavit evidence filed pursuant to Order 28, rule 2 or, if there are two or more defendants, of such evidence last served, by serving a notice to that effect on the defendant concerned.

(6) When there are two or more defendants to an action begun by originating summons not all of whom serve affidavit evidence on the plaintiff, and the period fixed by or under these Rules for service by any of those defendants of his affidavit evidence expires after the latest date on which any other defendant serves his affidavit evidence, paragraph 5 shall have effect as if the reference therein to the service of the affidavit evidence last served were a reference for the expiration of that period.

(7) If all the parties to an action consent, the action may be withdrawn without the leave of the Court at any time before trial by a written consent to the action being withdrawn signed by all the parties.

Discontinuance of action, etc., with leave (O.21, r.3)

3.(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

(2) An application for the grant of leave under this rule may be made by summons or motion or by notice under Order 25, Rule 7.

Effect of discontinuance (O.21, r.4)

4. Subject to any terms imposed by the Court in granting leave under rule 3, the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action.

6. *Order 28 of the High Court Rules 1988, deals with Originating Procedure as hereunder-*

Application (O.28, r.1)

1. The provisions of this Order apply to all originating summonses subject, in the case of originating summonses of any particular class, to any special provisions relating to originating summonses of that class made by these rules or by or under any Act; and, subject as aforesaid, Order 32, rule 5, shall apply in relation to originating summonses as it applies in relation to other summonses.

Affidavit evidence (O.28, r.2)

2.-(1) In any cause or matter begun by originating summons (not being an ex parte summons) the plaintiff must, before the expiration of 14 days after the defendant has acknowledged service, or, if there are two or more defendants, at least one of them has acknowledged service, file with the Registry the affidavit evidence on which he intends to rely.

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ANALYSIS AND DETERMINATION

7. The issue for this court to determine is whether the Defendants are entitled to any costs after the Plaintiff filed a Notice to discontinue the current proceedings against all the Defendants?

8. The Plaintiff commenced the substantive application by an *Originating Summons and an Affidavit in Support* on 15th July, 2015 against a total of 132 Defendants.
9. The application sought for *summary possession* and made pursuant to *Order 113 of the High Court Rules, 1988*.
10. As per the requirements of the *Originating Summons Procedure*, the Plaintiff must, before the expiration of 14 days after the defendant has acknowledged service, or, if there are two or more defendants, at least one of them has acknowledged service, file with the Registry the affidavit evidence on which he intends to rely. The Plaintiff in fact had filed *Affidavit evidence* concurrently on the 15th July, 2015 with the *Originating Summons*.
11. The Application was served together with the Affidavit in Support on the majority of the Defendants and acknowledgment of service was filed accordingly.
12. The Defendants who in fact filed an *Acknowledgment Of Service* were Defendants No.1, 16, 17, 19, 23, 26, 34, 35,36,43,46,47,48,54,56,60,61,62,121, 123,124, 130,131 and 132.
13. It is noted from the Court records that the Defendants who were served with the Application, only filed an *Acknowledgment of Service* and did not file and serve any Answering Affidavit and or any Response to the Plaintiff's Originating Summons and Affidavit in Support, with the exception of Defendants Jasaia Cabemaibulu and Luisa Ravunisa. These two (2) Defendants filed their Answering Affidavit on 08th December, 2015 and 18th January, 2016 respectively. (O28, r.2 (4) refers).
14. Therefore, Defendant, Luisa Ravunisa's affidavit evidence filed on 18th January, 2016 was the evidence last filed according to the Court records.
15. The Plaintiff decided to discontinue the Originating Summons against all the Defendants and filed his *Notice of Discontinuance* on 26th January, 2016, eight (8) days after the last affidavit evidence filed on 18th January, 2016.
16. From the time of the filing of the last affidavit evidence by Defendant Luisa Ravunisa, and service of the same on the Plaintiff, 14 days time period had not expired when the Plaintiff had filed his *Notice of Discontinuance* on 26th January, 2016.

17. In terms of the law, the Plaintiff was therefore entitled to Discontinue the Matter against all the Defendants without any leave of this Court and costs.
18. Reference is made to *Order 21 Rule 2(5) of the High Court Rules* which provides as follows-
- (5) The plaintiff in an action begun by originating summons may, without the leave of the Court, discontinue the action or withdraw any particular question or claim in the originating summons, as against any or all of the defendants at any time not later than 14 days after service on him of the defendant's affidavit evidence filed pursuant to Order 28, rule 2 or, if there are two or more defendants, of such evidence last served, by serving a notice to that effect on the defendant concerned.*
19. Having cited *Order 21 Rule 2(5)* as hereinabove, the Plaintiff acted within the ambits of the Rule that is he filed a Notice of Discontinuance against all the Defendants within the time frame and therefore the Defendants are not entitled to any costs as sought for herein.

FINAL ORDERS

- (i) The substantive matter is hereby Discontinued.
- (ii) There will be no order as to costs to the Defendants.

DATED AT SUVA THIS 11th DAY OF JULY 2016



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VISHWA DATT SHARMA
Master of the High Court
Suva

cc: Toganivalu & Valenitabua....

Lal Patel Bale Lawyers