

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO : HBC 210 of 2014

BETWEEN : **NIELU MEISAKE**
PLAINTIFF

AND : **SUVA PRIVATE HOSPITAL LIMITED**
FIRST DEFENDANT

AND : **DR IFEREIMI WAQAINABETE**
SECOND DEFENDANT

BEFORE : The Hon. Mr Justice David Alfred

Counsel : Mr V Maharaj (Mr Serulagilagi with him) for the
Plaintiff
Mr T Tuitoga for the First Defendant

Date of Hearing : 14 March 2016

Date of Decision : 5 August 2016

DECISION

1. This is a Summons by the Plaintiff (the Summons) to strike out the First Defendant's Statement of Defence on the grounds of its failure to answer Interrogatories pursuant to Order 26 rule 6 of the Rules of the High Court (RHC), and for the First Defendant to be cited for contempt of Court, pursuant to Order 26 rule (2)(sic) of the RHC, and ALTERNATIVELY for the First Defendant's Statement of Defence to be struck out pursuant to Order 18(a) – (d) (sic) of the RHC.

2. Judgment By Default had been entered against the Second Defendant on 21 October 2014.
3. When the matter came up for hearing before me, the Counsel for the Plaintiff submitted in essence that interrogatories were filed and served but no answer was filed and served. Therefore under Order 26 rule 6 of the RHC the defence should be struck out.
4. Counsel for the First Defendant then submitted. He said the Interrogatories were served on the First Defendant's solicitors on 7 July 2015. The Plaintiff did not apply for an order nor make an application to file Interrogatories. The Master did not make an Order on 17 November 2015 for the First Defendant to answer Interrogatories. He said their letter dated 16 November 2015 contained the answers to the Interrogatories.
5. The Plaintiff's Counsel in his reply said there was no appeal against the Master's Order dated 5 August 2015. The answers were not in the form of an affidavit.
6. At the conclusion of the hearing, I informed I would take time to consider my decision.
7. In the course of reaching my decision. I have perused:
 - (1) The Court Record.
 - (2) The Plaintiff's Written Notes of Submission.
 - (3) The Plaintiff's Authorities.
 - (4) The First Defendant's Written Submission and Authorities.
 - (5) The Affidavits of both parties.
8. I now proceed to deliver my decision. The Plaintiff in his Summons has asked for the following Orders:
 - (A) That the First Defendant's Statement of Defence be struck out and judgment entered against it with damages to be assessed.

(B) That the First Defendant be cited for Contempt of Court.

(C) Alternatively that the First Defendant's Statement of Defence be struck out.

9. This requires me, at the outset, to consider the relevant Orders made by the Master. The first is the Order made by him on 29 June 2015 for the Plaintiff to file its Interrogatories and for the matter to mentioned only on 8 July 2015. Nothing else. This Order was obtained after the Master heard both Counsel.
10. The second is the Order made on 9 July 2015, by consent of both Counsel, that the Interrogatories be treated as a Summons.
11. The third is the Order made on 5 August 2015, after the Master heard both Counsel, that the Plaintiff's Counsel can file an application to strike out the defence because the First Defendant had failed to file and serve their Affidavit to the Interrogatories although granted time to do so on 2 occasions. This Order was not appealed against. However I observe filing an application is not tantamount to it having to be granted.
12. I shall now consider the effect of Order 26. Rule 1(1) thereof states a party may apply to the Court for an order : (a) giving him leave to serve interrogatories on any other party, and (b) requiring that party to answer the interrogatories on affidavit, within such period as may be specified in the order.
Rule 1(2) states a copy of the proposed interrogatories must be served with the Summons.
Rule 6(1) states if that other party fails to comply with that order, the Court may make such order as it thinks just including, an order that the defence be struck out and judgment be entered accordingly.
Rule 6(2) states if a party against whom the order has been made fails to comply with it, then he shall be liable to committal.
13. The starting point for the Decision then is the Interrogatories. The Master on 29 June 2015 after hearing Counsel for the Plaintiff and Counsel for the First Defendant ordered the Plaintiff to file interrogatories. However he failed to order

that Defendant to answer the Interrogatories on affidavit, and he failed to specify the period within which it was to do so. All 3 in the equation failed to notice that the requirements laid down in Rule 1, had not been complied with.

14. Then on 9 July 2015 after hearing both Counsel, the Master ordered by consent the “Interrogatories be treated as Summons,” However, it was not stated under which Order of the RHC this was done.
15. Finally, on 19 August 2015 after hearing both Counsel, the Master ordered the Interrogatories be heard on 17 November 2015.
16. The Plaintiff then filed on 15 October 2015, the Summons.
17. The foundation for the Plaintiff’s Summons is the Order for interrogatories made on 29 June 2015. This was defective or deficient for it did not state, as required by Order 26 rule 1.(1)(b) the period within which the First Defendant was to answer the Interrogatories on affidavit. Nor was there any Summons with a copy of the proposed interrogatories, as required by rule 1(2). Thereafter, the Counsel for the Plaintiff, did nothing towards remedying the situation.
18. Because of this omission on Counsel’s part to comply with the rule and his further omission to rectify the situation brought about by his initial omission, I am of opinion and I so find and hold, that this failure to comply with the requirements of Order 26 rule 1 causes the foundation of the Summons to collapse.
19. It is necessary for participants in the legal equation to look at the RHC and to follow them. The RHC are not there for ornament but to serve a purpose. Nothing that transpired here thereafter can, in my opinion, fill the launa in the Order concerned.
20. The cases cited by Counsel on both sides are of no relevance to this particular Summons and I therefore think it would be inexpedient for me to discuss them in this Decision.

21. It therefore follows as the night the day that my decisions on the 3 parts of para 8 have to be as follows:

(A) The Statement of Defence cannot be struck out, nor can interlocutory judgment be entered against the First Defendant because the Plaintiff is applying for these predicated on the Master's Order which I have found to be deficient and defective.

(B) The First Defendant cannot be cited for contempt of court under a non-existent Order 26 rule (2) (sic) of the RHC. This mistake is repeated in the written Speaking Notes of the Plaintiff's Counsel. I suppose the Plaintiff's Counsel was actually thinking of Order 26 rule 6(2) of the RHC. In that case he should have clearly expressed this in his documents filed in court. In any event, for the reasons I have stated, the Plaintiff has no basis to cite the First Defendant for contempt.

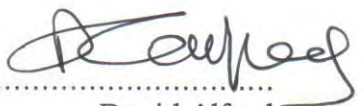
(C) The alternate prayer of the Plaintiff is for the First Defendant's Statement of Defence to be struck out under the non-existent Order 18(a) – (d) (sic). If the Plaintiff's Counsel was thinking of Order 18 rule 18(1) (a), (b), (c) and (d); then he should have said so explicitly in the Summons, but he did not. In my opinion, this lacuna cannot be made good in Counsel's Speaking Notes. Even if they could, this would not help the Plaintiff at all. This is because the Plaintiff has to show of the Defence under (a) that it disclose no reasonable defence; or under (b) that it is scandalous, frivolous or vexatious; or under (c) that it may prejudice, embarrass or delay the fair trial of the action; or under (d) that it is an abuse of the process of the court. However the Plaintiff's Counsel has not even attempted to show how in any way the Defence could be construed as satisfying the requirement under (a) or (b) or (c) or (d) to warrant it being struck out. On the contrary, the Plaintiff's Counsel stuck to the same ill founded grounds viz that the First Defendant failed to answer the interrogatories, which are not grounds at all where Order 18 rule 18 are concerned. These arguments therefore fall to the ground.

22. At the end of the day, I am left with no alternative but to dismiss the Summons, which I hereby do.

23. In the light of what has transpired, I shall order each party to bear their own costs of the Summons. This is because it would be a case of it never rains but it pours for the Plaintiff were I to order him to pay the costs as a result of my dismissing the Summons.
24. I order that this action be remitted to the Master so that both Counsel can appear before him with the objective of putting everything in order, so that the matter can be sent thereafter to the High Court for hearing.
25. I cannot end without saying that the Plaintiff should be made aware of what has actually transpired in this case so that he will be enlightened as to why it was not sent to the High Court in 2015 to fix a hearing date.

Delivered at Suva this 5th day of August 2016.




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David Alfred
JUDGE
High Court of Fiji