

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 61 of 2012

BETWEEN : FRANK BERT WHIPPY of Nayala, Kasavu, Savusavu, Farmer suing on behalf of himself and on behalf of and as representing the beneficiaries of the Estate of Samuel Whippy.

PLAINTIFF

AND : GLUCK WILLIAM PILOT WHIPPY of Suva, Fiji, Company Director as Administrator of the **ESTATE OF SAMUEL WHIPPY** pursuant to Court Order dated 25th day of June 2007 made in Suva High Court Civil Action No. 569 of 1998.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Nilesh Prasad - for the Plaintiff
Ms. Swastika Narayan - for the Defendant

Date of Hearing: 09th May, 2016
Date of Ruling: 23rd August, 2016

RULING

[Application to strike out the Plaintiff's Summons and Statement of Claim pursuant to Order 18 Rule 18 and Order 25 Rule 9 of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honourable Court]

INTRODUCTION

1. The above named **Defendant** filed and served a **Summons** on 26th August, 2014 and sought for the following orders-:

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- (i) *That the Writ of summons and the Statement of Claim filed by the Plaintiff on 28th February, 2012 be struck out for want of prosecution or as an abuse of process.*
 - (ii) *That the costs of this action be paid by the Plaintiff.*
 - (iii) *Any other order that this Court deems just and expedient.*
 2. The application was made pursuant to **Or.18 r.3 (1) & (4), Or.18 r.18 (1) (d) and Or. 25 r.9 (1) & (2) of the High Court Rules 1988** and under **the inherent jurisdiction of the High Court.**
 3. On 07th May, 2015 this Court delivered a ruling in favour of the **Defendant** on a **Preliminary Issue** raised by the **Plaintiff's Counsel** on the **computation of time as to the filing of the pleadings**, including the **reply to the Defence**, and, thereafter the **Summons for Directions**. He added further, that the present **Striking out Application** pending before this court was **prematurely filed** on 26th August, 2014.
 4. The **Striking Out application by the Defendant** was still **opposed** by the **Plaintiff**.
 5. Following Affidavits have been filed in respect of this application-
 - (i) Affidavit in Support by the Defendant on 26th August, 2014;
 - (ii) Affidavit in Reply by the Defendant on 18th November, 2014;
 - (iii) Affidavit in Answer by the Plaintiff on 03rd November, 2014; and
 - (iv) Supplementary Affidavit on behalf of the Plaintiff deposed by Barbara Whippy on 31st October, 2014
 6. Both Counsels representing the parties to the proceedings **adopted** their earlier **written submissions** filed for consideration of the **Striking Out application**.

7. This Court will now deliberate and determine the **Defendant's striking out application** accordingly.

BACKGROUND OF CASE

8. On 28th February, 2012, the Plaintiff filed a Writ of Summons with Statement of Claim together with an application for Injunction by way of Notice of Motion and an Affidavit in Support.
9. The Plaintiff alleged **breach of duties** on the part of the **Defendant as the Administrator of the Estate of Samuel Whippy**. The Plaintiff sought **restraining orders against the Defendant** and that the **Defendant** to provide **accounts** and his cooperation towards surveying and valuation of the Estate property; and as an **alternative orders**, the Plaintiff is **seeking appointment of new Trustees**.
10. On 11th October, 2013, the application for Injunction was heard by the Court and on 07th November, 2013, the Court **declined the interim relief** sought by the Plaintiff with \$1500 costs.
11. The **Statement of Defence** to the Substantive proceedings was filed on 20th January, 2014.
12. Thus, the **Defendant** filed this present **Striking out Application against the Plaintiff's** action, accordingly.

THE LAW

Principles relating to striking out application

13. The Application to strike out the Plaintiff's action is made pursuant to **Order 18 Rule 18 (1) (d), Rule 3(1) & (4) AND Order 25 Rule 9 (1) & (2) of the High Court Rules, 1988 and the Inherent Jurisdiction of this Court which provides as follows:**

Or.18 r.18 (1) the Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

- (a); or*
- (b); or*
- (c); or*
- (d) It is otherwise an abuse of the process of the court:*

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph 1(a).

O.18 r.3 (1) a plaintiff on whom a defendant serves a defence must serve a reply on that defendant if it is needed for compliance with rule 7 and if no reply is served, rule 13(1) will apply.

O.18 r.3 (1)(4) a reply to any defence must be served by the plaintiff before the expiration of 14 days after the service on him of that defence, and a defence to counterclaim must be served by the plaintiff before the expiration of 14 days after the service on him of the counterclaim to which it relates.

Order 25 Rule 9 (1) & (2) of the High Court Rules 1988, inter-alia states as follows:

"(1) 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.

(2) Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions.'

DEFENDANT'S CASE

14. The **Defence Counsel** adopted her earlier written submissions filed in this proceedings and in summary can be stated as follows-

- (a) The Plaintiff had filed 2 affidavits pertaining to the present application.
- (b) The Statement of Defence was filed on 20th January, 2014.
- (c) The Plaintiff was supposed to move the matter forward by filing a Reply to the Defence. The Defence wrote to the Plaintiff on 30th April, 2014 indicating Defence stance in the matter. The Plaintiff failed to file a Reply to Defence despite being given further opportunity to do so. The striking out application was filed after 7 months delay upon the Plaintiff's failure to file a Reply to Defence.
- (d) The Plaintiff alleges that the reason for not filing any further documents in Court after the Statement of Defence was filed was due to his attempts to meet with the Defendant and explore settlement in the matter. The Plaintiff only attended the meeting with the view to discuss the matter with the Defendant in September, 2014, which was after the application to strike out was filed by the Defendant.
- (e) Further, neither the Plaintiff himself nor through his Solicitors at any time informed the Defendant and his Solicitors about his intentions to withhold further proceedings in light of any settlement talks.
- (f) The Plaintiff on previous occasions filed similar proceedings in Court and all have turned out to be futile. The Defence made reference to paragraph 15 of the Affidavit in Reply filed on 18th November, 2014 stating ' ever since my appointment in 2007, series of legal suits have been filed against me over the years questioning my role as an Administrator so being-
 - (i) **HBC Case No. 272 of 2008- Bert Bow Whippy v Gluck William Pilot Whippy- Dismissed with costs** on 31st January, 2012;
 - (ii) **HBC 61 Of 2012- Frank Bert Whippy v Gluck William Pilot Whippy- on 17th February, 2015 struck out for want of prosecution ; and**
 - (iii) **HPP 48 of 2014- Frank Bert Whippy v Gluck William Pilot Whippy** relating to extension of caveat. Matter is pending Ruling before the High Court Judge.
- (g) *If the Plaintiff had genuine interests to pursue this matter or his rights over the Estate property, he would have acted promptly in the matter. The Defence adds that the Plaintiff is only restricting his rights as an Administrator in administering the Estate property freely.*
- (h) *The Plaintiff has failed to provide any justifiable reasons as to why there was delay in moving the Writ action further in Court and the delay is an inordinate one and an inexcusable as the present action relates to an Estate matter which ought to be dealt with in a speedy manner.*
- (i) *The Defendant is seeking for the striking out of the matter with costs.*

PLAINTIFF' CASE

15. The **Plaintiff** also adopted his earlier Written submissions filed in this proceedings and in summary can be stated as follows-

- (a) The Plaintiff's explanation for the **reason of delay is plain and simple** as deposed under paragraphs 9, 10, and 11 of Frank's Affidavit. This is conceded by the Defendant in paragraph 10 of the Defendant's 2nd Affidavit stating-' that both **myself and the Defendant attempted to explore the possibility of resolving this action amicably out of Court.....**I met with the Defendant briefly to discuss the possibility to resolve this dispute, however, nothing formal could be worked out."**..."****settlement talks and negotiations carried on most of January to May, 2014**, as and when the Defendant travelled to Kasavu, Savusavu." .." Both I and my aunt Barbara Whippy, who is also a beneficiary through the lineage of Fredrick Whippy, have made attempts thereafter to have discussions with the Defendant with a view to resolving this matter without litigation since it is becoming **increasingly costly for the beneficiaries to continue with Court action**. We held hopes to persuading the Defendant to do the thing and distributing the **Estate property to all beneficiaries.**"
- (b) The **breach of duty and gross abuse of powers by the Defendant as an Administrator is significant and cannot be overlooked by the Court.**
- (c) The **Defendant has done very little or nothing** in order to perform his administrative duties rather the little the Defendant has done has been to secretly sell the **Estate property for the benefit** of only a small part of the Whippy family.
- (d) If this **matter is struck out the, the Defendant's role or gross abuse of that role as an Administrator in this matter will never be tested out.** He will then have a free pass to do whatever he pleases at the detriment of the beneficiaries at large.
- (e) The Plaintiff prefers to avoid filing any **fresh application** since it will **delay** the adjudication of the dispute further.
- (f) The Plaintiff is seeking that this Summons be treated as summons for direction and orders be entered accordingly and seek costs for the premature application.

ANALYSIS and DETERMINATION

16. I have perused the **Defendant's Striking Out application, affidavit in support and opposition** together with an **affidavit in reply** and the **written submissions** filed herein.

17. The **issue** that this Court needs to determine is whether the **Plaintiff's Writ of Summons** coupled with the **Statement of Claim** should be **struck out** on the grounds that it is an **abuse of the process** or for want of prosecution?

18. **Order 18 Rule 1 (d) - Whether the Plaintiff's Claim is an abuse of process of the court-**

It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process and reference is made to paragraph 18/19/18 of the *Supreme Court Practice 1993 Vol. 1*.

At paragraphs 18/19/17 and 18/19/18 of *Supreme Court Practice 1993 (White Book) Vol 1* it is stated as follows:-

"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."

"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite [1990] 2 E.R. 990, C.A)."

"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665). (para 18/19/18).

19. The Court of Appeal in *National MBf Finance (Fiji) Limited v Nemani Buli, (Civil Appeal No. ABU 0057 of 1998)* very clearly enunciated and determined the principles of striking out. At page 2 of the judgment their Lordships said:-

"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention..."

20. In Halsbury's Laws of England Vol 37 page 322 the phrase "abuse of process" is described as follows:

"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court.

21. The phrase "abuse of process" is summarized in Walton v Gardiner (1993) 177 CLR 378 as follows:

"Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness".

22. Upon the perusal of the current Court file, it reveals that the Plaintiff had initially sought for injunctive and disclosure orders on 28th February, 2012, in terms of **Order 29 Rule 1 and Order 32 of the High Court Rules, 1988.**
23. On 07th November, 2013, the ruling was delivered declining the interim relief sought with costs.
24. Subsequently, the **Defendant** filed its **Defence** on 20th January, 2014.

25. The **Plaintiff** was then supposed to file and serve its **Reply to Defence** in order to complete and or close the pleadings stage.
26. **However**, I find the correspondence written by the Defence Counsel to the Plaintiff's Counsel dated 30th April, 2014 which is annexed to the defence affidavit in support deposed on 25th August, 2014 which reads as follows-

'We refer to the above and to your letter dated 15th January, 2014.'

'We regret to advise that our client does not intend to discuss settlement in this matter, as such we request that your office files a Reply to Defence to move this matter forward.'

'In addition, we note that your client is yet to pay the costs of \$1500 that was ordered by the court on 07th November, 2013 and we request if the same could be paid to our Trust Account within the next 7 days.'

Yours faithfully

Diven Prasad Lawyers

Per

Swastika Narayan.

27. The contents of this correspondence give a clear indication that the **Defendant** does not have any intention whatsoever of **settling the matter** rather move forward with the **next cause**. The **Defence Counsel** is inviting the **Plaintiff counsel** to **file and serve a Reply to their Defence** and instead of filing and serving the Reply to Defence, the Plaintiff complains of the **breach of duty** and the **gross abuse of power** by the **Defendant** as an administrator. Further he complains that the **Defendant** in his role as an administrator has done very little or nothing and is secretly selling the Estate property for the benefit of only a small part of the Whippy family.
28. It can be concluded from this letter that as at 30th April, 2014 (*date of letter*), there was no **Reply to Defence** filed and that the Plaintiff upon making a decision not to file and serve any Reply to Defence should

therefore have moved on to file a **Summons For Direction (O.25, r.1 (1) and O.25 r.1(4)** were applicable) accordingly, allowing the court to make further directions in terms of the set down law and procedure for consequent cause of action and the matter to be finally determined.

29. Further, the allegations made against the **Defendant** of doing very little or nothing and is secretly selling the Estate property for the benefit of only a small part of the Whippy family is rather a very serious matter. If this was true or the Plaintiff had any evidence whatsoever to substantiate this claim or allegation, this then gave the Plaintiff more reason to expedite this matter and ask Court to make an expedite decision in the matter.
30. Unfortunately, this was not done for the reasons best known to the Plaintiff and his Counsel which then prompted the Defendant to file and pursue with the current **striking out application**.
31. This case was initiated by the **Plaintiff in early 2012** and he had all the opportunity to prosecute this case **expeditiously** bearing in mind that it was an Estate matter and that the administration of the Deceased Estate needed to be fully administered in the **interest** of the Plaintiff and all the **beneficiaries** accordingly.
32. The court record shows that the matter moved at a **snail pace** and a **delay** of 7 months lapsed and still the Plaintiff had not sought the extension of time to file and serve his **Reply to Defence** nor has he done anything even when written reminders were communicated to him by the Defence Counsel. This was indicative of the fact that the **Plaintiff had no interest in the case**. If the **Plaintiff** had any **genuine interest** in order to ensure that his Counsel brings this matter to a conclusion or an expedite decision, then the Plaintiff would have continuously knocked the doors of his Counsel and found out the status of this case. If there was any **delay caused**, which is obvious in this matter, then he would have instructed his Counsel to **expedite** the matter and bring it to a conclusion.

33. Similar stance was taken in another case *HBC 272 of 2008*, whereby the matter was dismissed with costs due to the **failure on the part of the Plaintiff** to deal with the matter diligently in the **interest** of the Plaintiff.
34. Further, the **injunction application** filed in the current action (*HBC Case No.61 of 2012*), is very much **similar** to what the Plaintiff is seeking within the **Writ of Summons** and the **Statement of Claim**. The injunctive relief that was sought had been declined in *HBC Case No. 272 of 2008*. I would in the circumstances pause and ask myself a question; whether the current action is somewhat a duplicity of orders that was being sought in *Case No. HBC 61 of 2012*? Does this then tantamount to an **abuse of Court process**?
- The answer is yes. The action was initiated in early 2012. Service was effected on the Defence and the Defendant filed its Defence in time on 20th January, 2014. The Plaintiff failed in its bid to file and serve any Reply to Defence, hence caused a delay of up to 7 months. The Plaintiff should have prosecuted this case diligently to avoid any hiccups and ensure that the matter is rather heard and dealt with appropriately in a just and fair manner.
35. **Order 25 Rule 9- Whether the Plaintiff's Writ of Summons and the Statement of Claim should be struck out for want of prosecution?**
36. It is noted that *Order 25 Rule 9* is inapplicable to cases where there has been **default of filing of pleadings**.
37. It appears that according to *Order 25 r 9*, the court is allowed to **strike out** an action on the **reasons of the failure to take steps for six months on two grounds**.

The **first ground** is for **want of prosecution**; and
The **second** is an **abuse of the process** of the court.

38. The applicable principles for strike out an action on the grounds of "want of prosecution" and "abuse of the process of the court" have expounded

in Birkett v James (1978) AC 297 at 318) (1977) 2 All E.R 801 where Lord Diplock held that

"the power should be exercised 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 is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party".

39. In view of this observation of Lord Diplock in Birkett v James (supra), it appears to me that the judicial approach to exercise its discretionary power pursuant to order 25 r 9 has two pronged stages. The first stage is to consider whether the delay or default of the Plaintiff to take necessary steps for six months is either an intentional and contumelious default or an inordinate and inexcusable delay. The second stage is to consider whether such delay will give rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or to have caused serious prejudice to the Defendant.
40. The Fiji Court of Appeal in Pratap v Christian Mission Fellowship (ABU 0093 of 2005) has approved and adopted this celebrated passage of Lord Diplock in Birkett v James (supra) in to the legal domain of Fiji Islands in respect of application made pursuant to Order 25 r 9.
41. The scope of the definition of abuse of the process of the court and the intentional delay in respect of the application of this nature was further discussed and elaborated in Grovit v Doctor and Others (1997) 1 WLR 640), (1997) 2 All E.R 417 where Lord Woolf held that;

"The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if the justice so requires (which will frequently be the case) the court will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the Plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James".

42. **Inordinate Delay-** In this case there is no doubt that the Plaintiff did not file and serve the Reply to Defence, which was the next cause to complete and conclude the pleadings so that the matter can then be expeditiously pursued to bring it to a conclusion. This was not done and because of the Plaintiff's inactivity for a period of 7 months (delay) even when the Defence Counsel communicated in writing to him that '**he should file and serve his Reply to Defence since there was no settlement between the parties**', there was no response by the Plaintiff whatsoever which prompted the Defendant to file a striking out application.

Inexcusable Delay- The excuse or the explanation provided by the Plaintiff as to delay caused was in two folds-

- i. That there was settlement talks ongoing between the parties; and
- ii. That there are allegations of breach on the Defendant's role as an Administrator of the Estate.

There is no evidence of any settlement talks that had even taken place, if any as the Plaintiff seems to suggest. On 30th April, 2014, Defence Counsel communicated in writing to the Plaintiff's Counsel '*We regret to advise that our client does not intend to discuss settlement in this matter, as such we request that your office files a Reply to Defence to move this matter forward.*'

'In addition, we note that your client is yet to pay the costs of \$1500 that was ordered by the court on 07th November, 2013 and we request if the same could be paid to our Trust Account within the next 7 days.'

It was then 4 months after that this correspondence was written to the Plaintiff and receiving no response prompted the Defence to file and serve a Striking Out application of the Plaintiff's Claim. So this delay added to further delay on the part of the Plaintiff to pursue its own case.

43. Justice Scott cited Cross J in *Zimmer Orthopaedic Ltd v Zimmer Manufacturing Co, (1968) 2 All ER 309*, who stated that-

'It is for the Plaintiff and his legal Advisers to get on with the action and to see that it is brought to trial with reasonable despatch.'

44. **Abuse of Court process-** It can be ascertained from the Counsel's submissions that another case HBC No. 272 of 2008 was also filed and had to be dismissed by the Court because the Plaintiff failed in its bid to deal with the matter diligently and not complying with the peremptory orders of the Court. The present action was filed which was seeking almost similar relief as per the injunctive orders and the same relief is contained within the current Writ of Summons and the Statement of Claim. It is noted that the present relief sought was already determined in action HBC 272 of 2008 which was accordingly dismissed. Therefore, the Plaintiff cannot refile another case and seek the similar relief already dealt with. It tantamounts to an abuse of the court process because also because the court process herein has not been used in good faith and for proper purpose rather misused.
45. In **Conclusion**, I have taken heed of the fact that the Defendant filed the Summons seeking an order to strike out the Plaintiff's Wit of Summons and the Statement of Claim. Before this Court proceeded to hear and determine the striking out application, the Plaintiff's Counsel raised a **preliminary issue** within the same application on the **computation of time as to the filing of the pleadings, including the Reply to the Defence**. The **preliminary issue could have been heard and determined together with the striking out application, rather it was the decision by the Counsels for the Court to hear the application separately**. This Court then heard the arguments and delivered a ruling on 08th June, 2015. The issue of the preliminary hearing further delayed the conclusion of the substantive matter. For this very reason, this Court must impose substantial costs.

FINAL ORDERS

1. The Defendant's application for striking out of the Plaintiff's Writ of Summons and the Statement of Claim filed on 28th February, 2012 succeeds.
2. The Plaintiff's Writ of Summons and the Statement of Claim is hereby struck out accordingly.
3. Costs against the Plaintiff is summarily assessed at \$1,000 and to be paid with 14 days.

DATED at Suva on 23rd August, 2016




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: *Mr. Nilesh Prasad, Mitchell Keil Lawyers, Suva*
Ms. Swastika Narayan, Diven Prasad Lawyers, Suva