

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 163 of 2015

BETWEEN : RABENDRA KUMAR of Valley Drive, Sacramento, California, United States of America.

PLAINTIFF

AND : PRAVEEN KUMAR of Bau Street, 9 Miles, Nausori.

1ST DEFENDANT

AND : MATELITA ROKOVI of Bau Street, 9 Miles, Nausori.

2ND DEFENDANT

AND : HOUSING AUTHORITY a body corporate constituted by the Housing Act (Cap 267) having its head office at 23 Saqa Place, Valelevu, Nasinu.

3RD DEFENDANT

AND : THE REGISTRAR OF TITLES OFFICE a Statutory Body established pursuant to the Land Transfer Act of Fiji (Cap 13).

4TH DEFENDANT

BEFORE: Master V. D. Sharma

COUNSEL: Ms. Devan for the Plaintiff
Ms. Jackson. L for the 1st & 2nd Defendants
Mr. Lajendra. N for the 3rd Defendant
Mr. Sherani for the 4th Defendant

Date of Hearing: 14th March, 2016

Date of Ruling: 23rd September, 2016

RULING

[Application by the 1st & 2nd Defendants seeking an order to strike out the Plaintiff's Writ and the Statement of Claim pursuant to Order 18 Rule 18(d) of the High Court Rules, 1988 & the Inherent Jurisdiction of this Honourable Court]

APPLICATION

1. The 1st and 2nd Defendants filed the Summons on 21st May, 2015 seeking an order to **Strike Out** the Plaintiff's Writ of Summons and the Statement of Claim on the following Ground: -
 - (a) *That the Plaintiff's Claim is otherwise an abuse of the process of the court.*
2. The application was made pursuant to *Order 18 Rule 18 (1) (d) of the High Court Rules 1988* and under *the inherent jurisdiction of the High Court*.
3. The Plaintiff opposed the Defendant's Striking out application and filed an Affidavit in Reply in the initial application accordingly.
4. On 13th July, 2015, the 1st and 2nd Defendants Summons was struck out for non-appearance.
5. Consequently, the Summons was reinstated by consent to the List on 12th August, 2015 and adjourned for hearing and determination accordingly.
6. Parties have filed the following Affidavits:
 - (a) Affidavit in Support filed on 21st May, 2015;
 - (b) Supplementary Affidavit on Praveen Kumar filed on 6th July, 2015;
 - (c) Plaintiff's Affidavit in Reply of Rohinesh Kumar on 9th July, 2015; and
 - (d) Affidavit in Reply of Praveen Kumar filed on 26th August, 2015.
7. The Plaintiff, First and Second Defendants have filed the above Affidavits in respect of the strike our application. The Third Defendant supports the strike out application and will not file an Affidavit in the matter.

8. Also the Fourth Defendant's position is the matter involves the First, Second and Third Defendants. The Fourth Defendant will not be filing an Affidavit
9. The application was heard in terms of the affidavit evidence filed coupled with the written and oral submissions made in this proceedings.

BACKGROUND

10. **In Summary**, the Plaintiff on 23rd April, 2015 filed his Writ of Summons together with his Statement of Claim.
11. The Plaintiff subsequently amended its Statement of Claim and filed the same on 24th April, 2015.
12. The subject matter of the present action relates to transfer of a property legally described as Native Lease No. 22838 being Lot 4 on SO 1596 ('the said property').
13. The Plaintiff alleges that the First Defendant wrongfully, unlawfully and fraudulently under a power of attorney transferred the said property to the Second Defendant without the prior knowledge, consent and authority of the Plaintiff.
14. The Plaintiff was the registered lessee of the said property until it was fraudulently under the hand of the first Defendant transferred on 16th October, 1998.
15. The Plaintiff further alleges that the Second Defendant being the defector partner of the first Defendant clouded with him to fraudulently obtain the transfer of the said property.
16. The Plaintiff vide its action also alleges that the Third named Defendant colluded with the first and Second Defendants and granted several loan advances to the Second Defendant without a due diligence process. It also wrongfully/fraudulently encumbered he said property without the knowledge, assent and authority of the Plaintiff.
17. The Plaintiff seeks in this action inter alia a number of declaratory orders, general damages; reversal of the transfer of lease no. 450992 dated 17th September, 1998 and registered on 16th October, 1998.

THE LAW

18. The law on striking out pleadings and endorsements is stipulated at *Order 18 Rule 18 of the High Court Rules 1988* which states as follows-

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) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; 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).

First and Second Defendant's Case

19. In support of their striking out application, the First and Second Defendant are relying on the Affidavit in Support sworn on 15th May, 2015, the Supplementary Affidavit in Support sworn by the First Defendant on 6th July, 2015 and the Affidavit in Reply sworn by the First Defendant on 25th August, 2015.
20. The Plaintiff opposes the First and Second Defendant's application and has filed his Affidavit in Reply sworn by Rohinesh Kumar (hereafter; the "Plaintiff's Affidavit") and filed on 9 July 2015.
21. The Plaintiff had filed an earlier Action HBC 141 of 2010 by an Originating Summons and an Affidavit in Support on 16th April, 2010, seeking an order that the Transfer of the Property be declared null and void due to a breach of 'Fiduciary Duty' by the First Defendant.
22. On 13th August, 2010, HBC 141 of 2010 was struck out after three consecutive non-appearances by the Plaintiff/Counsel.

23. Consequently, 7 months after HBC 141 of 2010 was struck out, the Plaintiff then filed an application on 02nd March, 2010, have the matter reinstated to the list.
24. On 21st July, 2011, the Court dismissed the reinstatement application of the Plaintiff.
25. Subsequently, the Plaintiff filed the current fresh Claim on 23rd April, 2015 seeking similar reliefs and/or orders.
26. The Defendants are asking this Court to strike out the application accordingly.

Third Defendant's Case

27. This application is filed by the First and Second Defendants seeking to strike out the Plaintiff's Claim for abuse of process.
28. The Plaintiff filed the strike out supplication on 21st May, 2015 with an Affidavit in Support deposed by the First Defendant.
29. The Plaintiff based on the same facts seeks the same relief in the current action as he did in Civil Action No. 141 of 2010.
30. The First and Second Defendant defended the earlier action filing their Affidavit in Opposition on 19th May, 2010.
31. Thereafter parties failed to appear in Court on 30th July, 2010. The Court issued a Notice of Adjourned Hearing for both parties to appear in Court on 13th August 2010. On 13th August, 2010 the parties failed to appear and the matter was struck off.
32. On 02nd March, 2011 the Plaintiff filed a motion to reinstate the matter. The Plaintiff's application for reinstatement was refused by the Court.
33. The Plaintiff did not appeal the Court's decision; instead the Plaintiff after 4 years filed a fresh action based on the same facts seeking similar relief as in Civil Action No. 141 of 2010.
34. The Plaintiff's actions amount to abuse of process and therefore the within named action is to be struck out.
35. In reply the Plaintiff deposed as follows:

- (a) *Civil Action No. 141 of 2010 was filed by the deponent Rohitesh Kumar;*
- (b) *The deponent was not properly advised that he did not have the requisite locus to seek orders 3 and 4 under Civil Action No. 141 of 2010.*
- (c) *The Plaintiff in the present action is the only person who can challenge the transfer dated 16th October, 1998. If the deponent would have been properly advised the Plaintiff would have filed the action instead of the deponent;*
- (d) *The relief sought in Civil Action No.141 of 2010 could not be granted on an originating summons procedure and the application was doomed to fail in any event; and*
- (e) *No grounds have been made out by the first and Second Defendant for the within action to be struck out.*

ANALYSIS and DETERMINATION

36. The only **issue** which requires the determination by this honourable court is-
 - (a) Whether the Plaintiff's Writ of Summons and Statement of Claim is an **abuse of the process of the Court?**
37. It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional cases: **Timber Resource Management Limited v. Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).
38. In **National MBF Finance (Fiji) Ltd v. Buli** Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows: -

"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. It follows that an application of this kind must be determined on the pleadings as they appear before the Court...."

39. It is also 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)

40. 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."

41. 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"

42. The First and Second Defendants have filed an application by way of a Summons dated 15th May, 2015 seeking that the within action be struck out essentially on the grounds that the present action filed by the Plaintiff tantamount to an **abuse of court process**.
43. The First and Second Defendants contention is that the Plaintiff has **abused the court process** by filing an identical court action vide **Action No. 141 of 2010**.
44. The Plaintiff submitted that his present action does not tantamount to an abuse of court process because:
- (a) Civil Action No. 141 of 2010 was filed by the Plaintiff's son to secure his and his mother's interest in the property described as Native Lease No. 22838, being lot 4 on SO. 1596 on which they had been residing with the Plaintiff's other children.
 - (b) The cause of action(s) pleaded in Civil Action No. 141 of 2010 is materially distinct from the causes of action pleaded by the Plaintiff in the within action.
 - (c) The relief sought in Civil Action No. 141 of 2010 in any event could not be granted on an originating summons procedure and thus that application was doomed to fail in any event.

(d) The Plaintiff named in Action No. 141 of 2010 was Rohinesh Kumar whereas the present action is filed by Rabendra Kumar who was the true locus to file the within proceedings against the Defendants in respect of his property.

45. I have perused the earlier Civil Action No. HBC 141 of 2000, and the current action HBC 163 of 2015. It can be concluded that the Plaintiff sought a similar relief in both cases herein.
46. Civil Action No. HBC 141 of 2000 reveals that the Plaintiff failed to prosecute the claim in the matter, and the matter was then struck out accordingly.
47. A subsequent application for the reinstatement of the matter to the list was made on 02nd March, 2011 but was dismissed by the Court on 21st July, 2011.
48. After the Dismissal of the matter, the Plaintiff did not think appropriate to Appeal the Court's decision of 21st July, 2011, instead, thought fit and proper to file a fresh or new action HBC 163 of 2015 some 4 years later, accordingly. This action of the Plaintiff is clearly an abuse of the process of the Court.
49. I make reference to the Case of Deo Raj Raju v. Housing Authority & others [2007] FJHC 85; HBC 411. 2007 (30 November, 2007)-

In the abovementioned case, the Plaintiff commenced an earlier Action but failed to prosecute the same and bring it to its conclusion. The Matter was struck out. Thereafter, the Plaintiff filed an application to extend the time to file an Appeal. The Plaintiff failed to appear in Court on the scheduled date of the hearing. The matter was struck out by the Court.

Then, the Plaintiff filed a fresh Action and sought an order for injunction against the 1st Defendant Housing Authority in the matter. The Court allowed the striking out application and stated that the Plaintiff's action was a clear abuse of the process of the Court.

50. Having perused and analyzed the submissions raised by the Plaintiff and the Defendants coupled with the principles dealing with the present application to **Strike out the Plaintiff's Writ of Summons and the Statement of Claim**, this court arrives at the conclusion that Plaintiff's Writ of Summons and Statement of Claim is an abuse of the process of the Court.

51. Accordingly, I make the following orders-

- (i) That the First and Second Defendant's Summons seeking the Striking Out of the Plaintiff's Writ of Summons and the Statement of Claim hereby succeeds.
- (ii) The Plaintiff's Writ of Summons and the Statement of Claim is accordingly struck out.
- (iii) The Plaintiff is hereby ordered to pay the First, Second, Third and Fourth Defendants Costs summarily assessed at \$300 each. A total sum of \$1200 costs.
- (iv) Above ordered Costs to be paid within 14 days and or before any consequent further action in the matter accordingly.

Dated at Suva this 23rd day of September, 2016



MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: *Neel Shivam Lawyers, Suva.*
Faktaufon & Bale Lawyers, Suva.
Lajendra Law, Suva.
Attorney General Chambers, Suva.