

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 211 OF 2000**  
**CONSOLIDATED WITH CIVIL ACTION**  
**NO. HBC 6 OF 2007**

**BETWEEN** : **GURSAMY** of Wailailai, Ba, Fiji, Cultivator and Administrator of  
the Estate of Gurappa son of Gurwaiya, Deceased.

**APPELLANT**  
**[ORIGINAL PLAINTIFF]**

**AND** : **GANGAMMA** (wife of Chindora) of Wailailai, Ba, Fiji, Domestic  
Duties.

**FIRST RESPONDENT**  
**[ORIGINAL FIRST DEFENDANT]**

**AND** : **NATIVE LAND TRUST BOARD** a corporate body duly incorporated  
under the Native Land Trust Act Cap. 13 of the Laws of Fiji.

**SECOND RESPONDENT**  
**[ORIGINAL FIRST DEFENDANT]**

**AND** : **RAJESH** of Wailailai, Ba, Fiji, Driver.

**THIRD RESPONDENT**  
**[ORIGINAL SECOND DEFENDANT]**

**Before** : Hon. Mr. Justice Sunil Sharma

**Counsel** : Mr. R. Charan for the Appellant  
Mr. S. K. Ram for the First Respondent  
Mr. T. Duanasali for the Second Respondent  
No Appearance by the Third Respondent

**Date of Ruling** : 16 February, 2017

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**R U L I N G**

[Appeal – Decision of the Master of the High Court]

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## **BACKGROUND INFORMATION**

- [1] By order granted on 12 March, 2014 Saraswati Devi also known as Saraswati of Wailailai, Ba, Fiji, Domestic Duties in her capacity as sole Executrix and Trustee of the Estate of Gursamy of Wailailai, Ba, Fiji, Cultivator and Administrator of the Estate of Gurappa son of Gurwaiya, Deceased was substituted as the Plaintiff in the action.
- [2] By order granted on 8 June, 2016 Bimal Prakash of Auckland, New Zealand, Mechanic as the Executor and Trustee of the Estate of Gangamma (wife of Chindora) of Wailailai, Ba, Fiji, Domestic Duties, Deceased was substituted as the First Respondent (original First Defendant) in the action.
- [3] The First Respondent Gangamma made an application pursuant to Order 25 Rule 9 of the High Court Rules 1988 to have the Appellant's action struck out for want of prosecution. The application filed by the First Respondent was heard by the learned Master of the High Court.
- [4] On 27 June 2014 the learned Master of the High Court allowed the application of the First Respondent as follows:

*“Plaintiff's action is dismissed and struck out for want of prosecution with summarily assessed costs of \$300.00 payable by the substituted plaintiff to the first defendant. Order accordingly.”*

- [5] The substituted Plaintiff, (hereinafter referred to as the Appellant) being dissatisfied with the order of the learned Master of the High Court filed her grounds of appeal on 16 July 2014.
- [6] The Appellant's grounds of appeal are as follows:
- “1. The Master erred in law and/or in fact in striking out the Plaintiff's two Actions and did not take into account the following:-

- a. *The default complained of by the First Respondent from the 24<sup>th</sup> of February, 2012 till the 12<sup>th</sup> of December 2013 (date of summons) had not been intentional and/or contumelious and did not warrant a striking out*
  - b. *There had no inordinate or inexcusable delay on part of the Appellant*
  - c. *The delay did not give rise to a substantial risk that a fair trial and issues and the action would not be possible and there was no evidence of any loss of witnesses or any reason why a trial could not take place*
  - d. *When there was no serious prejudice shown by the First Respondent and when there was an injunction protecting both sides.*
2. *The Master erred in law and/or in fact in striking out the Plaintiff's action or actions for want of prosecution and did not take into account the following:-*
- a. *That there were two actions by the Plaintiff and a Counter-Claim by the Defendant and when it was not clear whether the Counter-Claim was sought to be struck out or has also been struck out or whether the claim against NLTB is struck out and which action has been struck out or whether both actions has been struck out.*
  - b. *Neither the Third Respondent (Second Defendant Rajesh in Action No. 211 of 2000) and the Second Respondent in Action No. 6 of 2007 (the First Defendant) had applied for striking out. Nor is it clear that the action has been struck out against these parties when they had not applied for a striking out and the Master had no jurisdiction to strike out the same without an application being before it.*
  - c. *That some delay was due to the fact that the Plaintiff (Gursamy) died and further the Estate takes time regarding instructions regarding beneficiaries and associated matters and that the Estate was prepared to proceed and take a hearing date.*
  - d. *The matter was set down for hearing on one occasion the First Respondent Gangamma had not been ready and had applied for*

*an adjournment which had been opposed by the Plaintiff and adjournment was allowed despite the Plaintiff's opposition.*

3. *The Learned Master erred in law and/or in fact in striking out the action when the summons to strike out had not been served on Third Respondent Rajesh in Action No. 211 of 2000 and 6 of 2007."*

[7] Counsel for the Appellant and the First Respondent have filed helpful written submissions and also made oral submissions for which the court is grateful. The Second Respondent, Native Land Trust Board (ITLTB) had made an appearance at the hearing but did not participate in this appeal or file any written submissions although they had sought an order to do so.

**SUBMISSIONS ON BEHALF ON THE APPELLANT**

[8] Mr. Charan, counsel for the Appellant in support of ground one submitted that the onus was on the First Respondent to show cause why the action filed by the Appellant should be struck out for want of prosecution. Mr. Charan further stated that the First Respondent must show that there was unreasonable and contumelious delay on the part of the Appellant which may cause prejudice or embarrass or delay the fair trial or that it was an abuse of process. Counsel submitted that the First Respondent had not shown the above by way of sufficient evidence in her affidavit.

[9] Mr. Charan referred to paragraphs 10, 11 and 12 of the learned Master's Ruling and submitted that the learned Master had incorrectly shifted the onus on the Appellant to show cause why the action filed by the Appellant should not be struck out.

[10] Counsel further submitted that the delay of one year nine months was a mere delay and not culpable as determined by the learned Master after the death of the original Plaintiff.

- [11] In support of ground two counsel argued that there were two actions filed by the Plaintiff and a Counter-Claim by the First Defendant and it was not clear from the Ruling of the learned Master whether the claim by the Plaintiff against Native Land Trust Board was struck out as well.
- [12] Counsel also stated that neither the Second Defendant, Rajesh in Action No. 211 of 2000 and the First Defendant, Native Land Trust Board in Action No. 6 of 2007 had applied for striking out and that the learned Master had no jurisdiction to strike out the same without any application before him.

**SUBMISSIONS ON BEHALF OF THE FIRST RESPONDENT**

- [13] Mr. Ram, counsel for the First Respondent argued that the application filed by the First Respondent to strike out the Appellant's cause of action was in fact second in time. On 28 October, 2009 Justice Inoke in an Interlocutory Judgment had already made a comment about the inaction or failure of the Plaintiff Gursamy in prosecuting his action expeditiously. At paragraph 7 Justice Inoke had stated:

*"The action lay dormant and in 2007 this Court issued a notice under Order 25 rule 9 of the High Court Rules for Gursamy to show cause why his action should not be struck out for want of prosecution ..."*

- [14] Counsel argued that the onus to show cause was on the Appellant as per Order 25 Rule 9 of the High Court Rules which provided a time limit of six months hence the delaying party to the litigation had to show cause.
- [15] It was further submitted that on 24 February, 2012 the matter was taken off the cause list because the Plaintiff Gursamy had died and substitution had to take place despite Probate already been obtained by the Appellant on 28 December, 2011.

- [16] Counsel drew the court's attention to the affidavit in reply of the Appellant Saraswati Devi also known as Saraswati sworn on 26<sup>th</sup> February, 2014 in particular paragraphs 7 and 8 as follows:

Paragraph 7

*"Fresh hearing dates were given for 5<sup>th</sup> and 6<sup>th</sup> days of September, 2011. Hearing did not commence on those days as my husband the late Gursamy died on the 8<sup>th</sup> June, 2011."*

Paragraph 8

*"I have instructed my Solicitors to file an application for substitution and to oppose the application to strike out. I and my family have not been creating tension and I ask that I be allowed to bring this action to a conclusion."*

- [17] Counsel stated that no explanation was given as to why the application for substitution of the deceased Plaintiff had not been filed before the matter was taken off the cause list.
- [18] Counsel finally submitted that the Appellant had failed to provide any reasons about the two year delay from 24 February, 2012 when the matter was taken off the cause list to 12 February, 2014 when the Appellant filed for substitution of the original Plaintiff.

**ANALYSIS AND DETERMINATION**

**GROUND ONE**

- [19] The original Plaintiff Gursamy died on 8 June 2011, hence the two actions filed in his name were lying dormant in anticipation that a substitution application would be filed.

- [20] In absence of such an application made to court on 24 February, 2012 the matter was taken off the cause list. Probate no. 51593 had already been obtained by the Appellant on 28 December, 2011 see affidavit of Ranjini Devi sworn on 12 February, 2014 filed in support of the Appellant's application for substitution marked as annexure "A". However, when the matter was called in court on 24 February, 2012 before the then Master Mr. Tuilevuka the court was misled by counsel on behalf of the Appellant that Probate had not been granted (page 13 of the copy record in civil case no. HBC 06 of 2007).
- [21] On 4 December, 2013 the First Respondent filed an application to strike out for want of prosecution the Appellant's action filed against her. It was only after becoming aware of the First Respondent's application the Appellant on 12 February, 2014 made an application for substitution of the original Plaintiff.
- [22] It is obvious the matter was taken off the cause list due to the inaction of the Appellant to provide probate documents prompting the First Respondent to file her application to strike out on 4 December, 2013. By this time the delay was about one year and nine months from 24 February, 2012 to 4 December, 2013.
- [23] For completeness Order 25 Rule 9 of the High Court Rules 1988 states:

*"(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."*

- [24] The wordings of Order 25 Rule 9 of the High Court Rules makes it clear that if no steps have been taken in any cause or matter for six months the party which has taken no steps is to show cause why the matter should not be struck out for want of prosecution. The application was filed by the First Respondent which meant it was for the Appellant to show cause why the matter should not be struck out for want of prosecution.
- [25] The learned Master had correctly interpreted Order 25 Rule 9 that it was for the substituted Plaintiff now the Appellant to show cause why the action before the court should not be struck out for want of prosecution. The submission by counsel for the Appellant that it was for the First Respondent to show cause why the action should be struck out for want of prosecution is misconceived.
- [26] At paragraph 5 of his Ruling the learned Master had taken the above into consideration as follows:

*“In this case the matter has been listed on the application of the first defendant for the plaintiff (substituted plaintiff) to show cause why it should not be struck out for want of prosecution.”*

## **LAW**

- [27] The law relating to striking out application for want of prosecution is well settled, the principles stated in *Brikett vs James* [1978] AC 297, [1977] 2 All ER 801 were adopted by the Court of Appeal in *Bhawis Pratap vs Christian Mission Fellowship*, civil appeal no. ABU 0093 of 2005 at paragraph 23 as:

*“The power should be exercised only where the court is satisfied either:*



- (i) *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*
- (ii) (a) *that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers; and*
  - (b) *that such delay would 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.”*

[28] The matter was taken off the cause list on 24 February, 2012 due to delay caused by the Appellant who had despite having obtained the probate document on 28 December, 2011 failed and/or neglected to make any application for substitution. It was the First Respondent’s striking out application that prompted the Appellant to make the application for substitution.

[29] I also note from the affidavit in reply of the Appellant sworn on 26 February, 2014 that she has not given any explanation for the delay caused in filing the substitution application. It appears from the Appellant’s affidavit that she had instructed her solicitors to file an application for substitution, however, it is not known when such instructions were given. At paragraph 8 of her affidavit in reply the Appellant had stated as follows:

*“I have instructed my solicitors to file an application for substitution and to oppose the application to strike out. I and my family have not been creating tension and I ask that I be allowed to bring this action to a conclusion.”*

[30] The above paragraph and the entire affidavit of the Appellant does not give any explanations for the delay caused by the Appellant in filing her application for substitution and for not informing the court that Probate had already been issued about two months prior to the matter been taken off the cause list. The learned Master at paragraph 11 of his Ruling mentioned the following about the delay of one year nine months and the lack of any explanation by the Appellant to justify the delay:

*“A year and nine month delay must, in my view, be considered culpable delay, and that remains unexplained.”*

[31] The proceedings were filed in the years 2000 and 2007 respectively hence it was incumbent upon the Appellant to make progress in the actions filed expeditiously and with diligence. At paragraph 13 of his Ruling the learned Master made the following observations:

*“There has been inordinate and inexcusable delay on the part of the substituted plaintiff in the progress of the matter with reasonable diligence and expedition. That has given rise to the substantial risk that a fair trial would not be possible.”*

[32] The learned Master had properly directed his mind to the affidavits filed and the law. The onus was on the Appellant to show cause why the two actions filed against the First Respondent should not be struck out for want of prosecution which she failed to do.

[33] This ground of appeal fails due to lack of merits.

## **GROUND TWO**

[34] In respect of this ground of appeal the Appellant’s argument is that since there were two actions filed by the Plaintiff it was not clear from the Ruling

of the learned Master whether the claim filed by the Plaintiff against Native Land Trust Board had been struck out as well.

- [35] The learned Master in his Ruling at paragraph one (1) made it clear that the application before him was a striking out application for want of prosecution filed by the First Respondent Gangamma as follows:

*“This is an application made by Gangamma, first defendant pursuant to Order 25 Rule 9 of the High Court Rules 1988 and the Inherent Jurisdiction of the court to have the action struck out for want of prosecution. The application is supported by an affidavit of first defendant sworn on 2 December 2013 and filed on 4 December 2013.”*

- [36] The order of the learned Master was that the Plaintiff’s action was dismissed and struck out for want of prosecution.

- [37] I am unable to understand the logic behind this ground of appeal when counsel at paragraph 42, page 8 of his written submission states in my view the answer to the ground of appeal as follows:

*“The other Defendants which are the ITLB and Mr. Rajesh the Third Respondent had not had applied for striking out and as the judgement stands the action is on foot against these Defendants...”*

- [38] From the Ruling of the learned Master it is clear that he had only ruled upon the application which was filed by the First Respondent to strike out the actions filed by the original Plaintiff against her (after consolidation of files). There was no other application before the learned Master and the order made by the learned Master also confirms this. This ground of appeal also fails due to lack of merits.

### **GROUND THREE**

*“The Learned Master erred in law and/or in fact in striking out the action when the summons to strike out had not been served on Third Respondent Rajesh in Action No. 211 of 2000 and 6 of 2007.”*

- [39] The issue in this ground of appeal should have been raised by counsel for the Appellant before the learned Master. There is nothing in the court record which would suggest to me that this was done. However, counsel for the Appellant in his written submission at paragraph 43, page 8 states:

*“It seems also that Rajesh was not served with the application to strike out and this is in itself another reason why the appeal should be allowed. It was the First Respondent’s responsibility to serve all the parties.”*

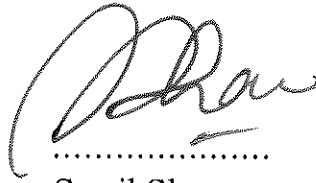
- [40] Service of the Summons for striking out application filed by the First Respondent on the Third Respondent Rajesh is a non-issue considering the fact that the application filed by the First Respondent Gangamma was to strike out the original Plaintiff’s actions against her. The issues argued between the First Respondent and the Appellant before the learned Master had nothing to do with the Third Respondent Rajesh.

- [41] How service of the First Respondent’s Summons on the Third Respondent Rajesh would have assisted or enhanced the Appellant’s cause was not argued by counsel before the learned Master. This ground of appeal also fails due to lack of merits.

### **ORDERS**

- 1) The appeal filed by the Appellant is dismissed;

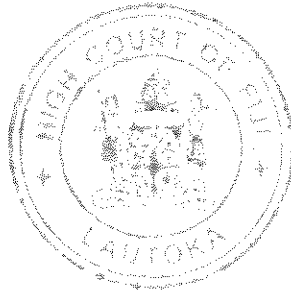
2) The Appellant is to pay costs to the First Respondent summarily assessed at \$1,000.00.



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Sunil Sharma

**JUDGE**

At Lautoka  
16 February, 2017



Solicitors

**M/s. Mishra Prakash and Associates for the Appellant.**

**M/s. Samuel K. Ram for the First Respondent.**

**Office of the ITLTB, Legal Department for the Second Respondent.**