

IN THE HIGH COURT OF FIJI

WESTERN DIVISION AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 137 OF 2003

BETWEEN : **CHANDAR HANS** and **VIJAY KUMAR** of Bilolo, Ba, Fiji but presently of California, United States of America.

PLAINTIFFS

A N D : **BIRENDRA PRASAD** and **BIRJA NAND** both of Wailailai, Ba, Fiji Cultivators.

FIRST DEFENDANTS

A N D : **THE REGISTRAR OF TITLES**

SECOND DEFENDANT

A N D : **THE ATTORNEY GENERAL OF FIJI**

THIRD DEFENDANT

Appearances : Ms N. Khan for Plaintiff
Mrs M Lee for 2nd & 3rd Defendants

Date of Oral Ruling : 12 June 2017

Date of Written Reasons : 5 July 2017

WRITTEN REASONS

Introduction

[01] On 12 June 2017, upon hearing the submissions advanced by counsel, I orally ordered that the action stands struck out for want of prosecution pursuant to the court order dated 1 October 2012 and I also dismissed the Plaintiff's application to re-instate the matter to cause list which was taken off the list on 9 February 2015. These are my written reasons for making that order.

[02] Before me there is an application to reinstate the matter back to cause list.

[03] By a summons filed on 15 September 2015 and supported by an affidavit of Vijay Kumar, the second named Plaintiff (the application), the Plaintiffs seek an order:

1. **THAT** *the said action be reinstated and/or restored to cause list which was taken off the list on the 9th day of February 2015.*

[04] The application is made pursuant to Order 25 Rule 9 of the High Court Rules 1988 and under the inherent jurisdiction of the court. The Plaintiffs rely on an incorrect rule. O.25, r.9 does not deal with the reinstatement of action which was taken off the cause list for default of appearance. It deals with striking-out a claim for want of prosecution.

[05] The second and the third Defendants (the Defendants) filed an affidavit of John Pickering, a Senior Legal Officer at the Office of the Attorney General at Lautoka, in opposition.

Chronology of the Matter

[06] The chronology of the matter is as follows:

1. The Statement of Claim was filed on 25 April 2003. The cause of action arose in 2001.
2. The Statement of Defence for the Defendants was filed on 8 May 2003. The Plaintiff filed its reply to the Statement of Defence on 23 May 2003.
3. The Summons for Directions was filed on 20 June 2003.
4. The Pre-Trial Conference Minutes was filed on 15 August 2008.
5. The Agreed Bundle was filed on 1 September 2008.

6. Summons to Enter Action for Trial was filed on 17 September 2008. The Copy Pleadings was filed on 17 September 2008.
7. The Hearing of the matter took place on 24 November 2010. On 24 November 2011, the summons filed by the Plaintiff dated 9 November 2010 was struck out with costs.
8. The Plaintiff filed its written submissions on 28 January 2011. The submissions for all the Defendants were filed on the 8 February 2011.
9. The Oral Hearing for the matter was listed for 10 February 2011. The matter did not proceed but was adjourned to 11 February 2011.
10. On 18 February 2011, the Plaintiff was given leave to file the certificate of citizenship.
11. On 24 March 2011, the 1st Defendant filed a summons for setting aside of certain orders.
12. On 19 May 2011, the 1st Defendant filed a summons for setting aside of certain orders.
13. A notice of change of solicitors was filed by the Plaintiffs on 28 February 2012.
14. On 19 March 2012, a NOAH was sent to all parties for mention on the 28 March 2012. The Plaintiff failed to appear on the said date. The Court was to send another NOAH to the Plaintiff for mention on 16 April 2012.

15. On 16 April 2012, the Plaintiff failed to appear again. The matter was struck out for want of prosecution.
16. On 1 October 2012, Justice Priyantha Nawana set aside the Masters ruling dated 23 August 2012 and allowed the reinstatement subject to costs of \$350.00 payable within 2 weeks.

Plaintiff's Affidavit

[07] The matter was taken off the cause list on 9 February 2015 for default of appearance by the Plaintiffs and their Solicitor. The Plaintiffs explain their default in the affidavit as follows:-

- “3. We are originally represented in this matter by Messrs Sahukhan & Sahukhan of Ba. That firm went under receivership sometime in 2010 and thereafter Messrs Singh and Singh Lawyers of 94 Waimanu Road, Suva was appointed to act on our behalf.
4. I now understand and am informed after inquiries from Court and also searched conducted by my current Solicitors office that on 1st October, 2012 this Honourable Court ordered that we pay the cost in the sum of \$350.00 to the Attorney General's office.
5. I was not made aware of the cost orders by my previous Solicitors. Even in an email correspondence between us and our previous solicitors dated 30th October, 2014, he failed to inform us that we had to pay our cost.
6. It's only on 20th January, 2015, that we were emailed and asked by our previous solicitors if we had paid the cost and if so when and how. We were further informed that the matter was adjourned to 9th February, 2015. We were not informed at the stage that costs had to be paid by 9th February, 2015.
10. I am informed by Rajneel Chandra, a clerk at Messrs Natasha Khan Associates, that he called Farina at the Attorney General's Chambers stating that we would like to come in to pay the \$350.00 costs and was informed by her that Ms Lee

who had the conduct of the file was on sick leave and for him not to come in to pay the cost.

I am further informed that on 11th August, 2015, a sum of \$350.00 which was awarded in favour of the 3rd Defendant has been paid.”

- [08] In opposing the Application, the Defendants state in their affidavit at paras 7 & 8 that:

“[07] THAT Paragraph 4 is admitted to the extent that there was an Order of the Honourable Justice Priyantha Nawana dated 1/10/2012 and sealed on 15/10/2012 whereby the application by the plaintiff for reinstatement (which was objected to by the defendants) was allowed subject to costs of \$350.00 payable to the Office of the Attorney General within 2 weeks from that day.

[08] THAT I have no knowledge of the contents of paragraph 5 and 6 of the Affidavit save to say that costs were not paid within 2 weeks’ time in breach of the Order of the Court. Further that according to our file noted, the cause was not called on 11/11/2014 or on 9/2/2015. The Plaintiffs have failed to pay costs hence the matter could not be reinstated back to the cause list. This matter has not moved since 1/10/2012 when an “Unless Order” was made.”

Discussion

- [09] On 19 May 2011, the Master of the High Court made orders taking the matter off the cause list for default of the appearance by or for the Plaintiffs.
- [10] Thereafter, the court (Madam Justice Wickramasinghe (as she then was)) caused notice of adjourned hearing (NOAH) to be issued to both the parties to be present in Court to finalise this long-standing matter. The NOAH has been issued a few times on the parties. However, neither party appeared. As a result, on 16 April 2012, Wickramasinghe J struck out the matter for want of prosecution. By her order dated 16 April 2012, she states:-

“No appearance for the Plaintiff. NOAH issued on the Plaintiff. The Plaintiff did not appear on 28 March 2012 either. Both Kohli & Singh and his city agents had been issued with NOAH. Case struck out for want of prosecution”.

- [11] The Plaintiff subsequently on 16 May 2012 made an application by way of *inter partes* summons for the restoration of action. This application was heard by the Master and then by Nawana J (as then he was). On 1 October 2012, Nawana J reinstated the matter back to the cause list subject to the payment of costs to the Defendants. By his order dated 1 October 2012, Nawana J states:

“I accordingly set aside the Master’s ruling to the effect dated 23 August 2012. However, I have considered the application for reinstatement subject to the cost of \$350.00 payable to the office [of] AG within 2 weeks from today.”

- [12] The Plaintiff did not make any attempt to pay the cost ordered as a precondition for reinstatement of the action. According to the order delivered by Nawana J, the Plaintiff ought to have made payment of the costs on or before 15 October 2012. The costs were not paid until 28 February 2013. Then by a letter dated 28 February 2013 and addressed to the Registry, the Defendants queried whether the cost awarded by the court order dated 1 October 2012 has been paid and confirm whether the case is now struck out. Nawana J directed that the writer may move the court for such an order for striking out on the grounds of non-payment of costs with notice to all parties.
- [13] It is not clear whether the Defendants filed such an application and sought an order to strike out the action on the ground of non-payment of the cost made as a precondition for reinstatement of the action.
- [14] In the meantime, on 15 September 2014, the matter was allocated to Abeygunaratne J (as he was then) to consider the striking-out order. He, having issued NOAH on the parties and after a few adjournments,

finally adjourned the matter for mention at 9.30am on 9 February 2015, when Abeygunaratne J ordered that:

“The matter [has been] struck out by earlier order. No need to mention again. Taken off the cause list.”

- [15] On 1 September 2015, the Plaintiffs, through their current solicitor, filed an application to reinstate the action to cause list which was taken off the list on 9 February 2015. Abeygunaratne J struck out that application as notice of change of solicitor was not filed with the liberty to file a fresh application.
- [16] On 15 September 2015, the Plaintiffs filed another fresh application to reinstate the action which was taken off the list on 9 February 2015. That application is now before me for determination.

Whether Action stands struck out

- [17] It will be noted that the matter came on before Abeygunaratne J to consider the striking-out order made earlier by Nawana J, where he reinstated the matter that was struck out for want of prosecution by Wickramasinghe J subject to cost payable to the Defendant within 14 days from the date of the order, i.e. 1 October 2015. The Plaintiff must have paid the cost on or before 15 October 2015, the last day for the payment of cost awarded to the Defendants.
- [18] When reinstating the matter back to cause list subject to cost payable to the Defendants within 14 days, Nawana J did not make an order that if the cost were not paid within 14 days as ordered, the action will stand struck out. The cost was awarded in favour of the Defendants. They should have sought further order after 14 days that the matter stands struck out as a result of non-payment of cost ordered by the court as a precondition to reinstate the matter that was already struck out for want of prosecution. The Defendants did not make such an application for one reason or the other.

- [19] The Plaintiff in their affidavit now states that they on 11 August 2015, a sum of \$350.00 which was awarded in favour of the 3rd Defendant has been paid. It is to be noted that the Plaintiffs did not pay the cost until 11 August 2015, which is after around two (2) years and eight (8) month of the order that required payment. The delay in the payment of cost has been significant and cannot be simply ignored. There has been an inordinate delay on the part of the Plaintiffs.
- [20] The Plaintiffs appear to blame their former solicitors for the delay in the payment of cost. They say their former solicitors failed to inform them that they need to pay the cost of \$350.00 before further proceeding the matter.
- [21] The Plaintiffs are not allowed to put blame on their former solicitors for the delay. The Plaintiffs must bear responsibility for the actions of their former solicitors. The Plaintiffs are, therefore, to be blamed for their lateness in the payment of cost and for not taking steps and prosecuting the case to bring to termination within a reasonable time.
- [22] The Plaintiffs are not allowed to put the blame on their former solicitors for the delay. The Plaintiffs must bear responsibility for the actions of their former solicitors. In the case of *Karan Chand* [2013] FJHC 552; HBC43.2010 (22 October 2013), I cited an English case *Bank of Scotland v Pereira & Others* [2011] 3 All ER 392, where Lord Neuberger MR had this to say:
- "I reject the contention that **former solicitors** were to blame to delay the matter rather than, saying that '**this is a case where the normal rule shall apply that a party has to bear responsibility for delay whether it be caused by him or his solicitors**' (Emphasis added).*
- [23] The action was dormant until the court issued NOAH of 18 September 2014 on the parties returnable on 27 October 2014 to consider the striking-out order made on 1 October 2012 by Nawana J.

[24] There was ample opportunity for the Plaintiffs to make the payment of cost and to take the matter to trial and conclude the matter. The Plaintiffs failed to pay the cost within 14 days in compliance with Nawana J's order. By not making the payment of cost, which was ordered as a precondition for reinstatement of the matter, the Plaintiff had breached the court order. I would, therefore, order that the action remains struck out for non-payment of cost ordered within 14 days of the order dated 1 October 2012.

Conclusion

[25] On 16 April 2012, the action was struck out for want of prosecution. Following an application made by the Plaintiffs, the action was reinstated back to cause list subject to cost of \$350.00 payable to the Defendants within 14 days by an order dated 1 October 2012. The Plaintiff did not make the payment of cost until 11 August 2015. The Plaintiffs had taken nearly 4 months short of 3 years to make the payment and comply with the court order. The Plaintiff did not obtain a court order to make the payment outside the time prescribed in the order of the court. The delay in making the payment has been inordinate and indefensible. I am not satisfied with the explanation given by the Plaintiffs for the delay. The award of cost was ordered as a *sine qua non* (condition) for reinstatement of the action which was struck out for want of prosecution. The Plaintiffs failed to meet the precondition imposed by the court in restoring the matter back to cause list. For all these reasons, I would hold that the action stands struck out for non-payment of cost ordered by the court as a prerequisite for reinstatement of the action. The application for reinstatement of the action is a misconceived one. I accordingly dismiss that application, but without costs.

[25] Access to justice was available to the Plaintiffs. However, the Plaintiffs had waived their right to access to justice by their own conduct in

that they have failed to prosecute the claim with due diligence and to bring the action to termination within reasonable time.

The Result

1. The action remains struck out for non-payment of cost order made by the court on 1 October 2012.
2. Application for reinstatement is struck out.
3. No order as to costs.

M. H. Mohamed Ajmeer
5/7/17

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M. H. Mohamed Ajmeer

JUDGE

At Lautoka

05 July 2017

Solicitors:

For Plaintiffs: M/s Natasha Khan Associates, Barristers & Solicitors

For 2nd & 3rd Defendants: Office of the Attorney General, Lautoka

