

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 35 of 2016

BETWEEN : **VIRENDRA SINGH** of Valley Road, Sigatoka, in the Republic of the Fiji Islands.

PLAINTIFF

AND : **CHINA GENHOUBA GROUP (FIJI) LIMITED** a limited liability company having its registered office at 18 Rukua Street, Nailuva Road, Suva.

DEFENDANT

BEFORE: Master V. D. Sharma

COUNSEL: No-appearance - for the Plaintiff
Mr. Filipe - for the Defendant

Date of Ruling: 29th March, 2018

RULING

[Summons by the Defendant for the Plaintiff to show cause why the statement of claim should not be struck out for want of prosecution and abuse of the process of the Court pursuant to Order 25 Rule 9 of the High Court Rules, 1988]

(A) INTRODUCTION

1. The Defendant filed the Summons pursuant to *Order 25 Rule 9 of the High Court Rules, 1988* for the following orders-
 - (i) That the action herein be struck out and dismissed for *want of prosecution* and/or Nonpayment of costs.
 - (ii) Such further or other order as this Honourable court thinks fit.
 - (iii) Costs be paid by the Plaintiff to the Defendant on an indemnity basis.

UPON THE GROUNDS as appearing in the affidavit of Andy Hsu a.k.a Xu Lei filed in support of this application.

2. The Plaintiff did not file any Affidavit opposing the striking out application nor did he make any appearance at the hearing.
3. Written submissions was filed by the Defendant only and the matter proceeded for hearing on an undefended basis.

(B) THE LAW AND PRACTICE

4. *Order 25 Rule 9 of the High Court Rules 1988, which inter-alia states as follows:*

"9. - (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.'

(C) ANALYSIS and DETERMINATION

5. The Plaintiff is required to show cause herein and the Court to determine as to why the Plaintiff's action ought not to be struck out for *want of prosecution* and/or nonpayment of costs.
6. The principles to be applied on the basis upon which the discretion to strike out proceedings for want of prosecution should be exercised is well established in the decision of the House of Lords in the case of *Birkett v James [1978] AC 297* and in particular the statement by Lord Diplock at 318:

"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."

7. In the present case, this Court is rather concerned with the application of principle (1) within the *Birkett v James [1978] AC 297*- "intentional and contumelious default" since the Plaintiff has disobeyed the cost orders of this Court.

8. Upon the perusal of the Court file, the records reflect and confirm that the cost orders made as mentioned hereunder has not been paid by the Plaintiff to the Defendant-

(i) 30th November, 2016 By consent upon payment of \$300 costs, the Plaintiff to file and serve amended writ of summons within 14 days.

(ii) 26th June, 2017- No appearance by the Plaintiff and costs of \$500 ordered to be paid within 7 days.

A total of \$800 costs was imposed against the Plaintiff.

9. This Court also notes that on four separate occasions, 02nd March, 10th May, 01st June and 20th June, 2017, the Plaintiff failed to appear in court.

10. This Court is also concerned with the application of principle (2) within the *Birkett v James [1978] AC 297* case:

'Inordinate' and *'inexcusable'* within *Birkett v James* have their ordinary meaning. Whether delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case. *The New India Assurance Company Limited -v- Rajesh K. Singh and Anr. Civil Appeal no: ABU 0031 of 1996S (26 November 1999) C.A.*

11. Where principle (2) is relied on, both grounds of inordinate and inexcusable delay needs to be established before an action is struck out. There must be both delay of the kind described and a risk of an unfair trial or serious prejudice to the defendants.

12. Reference is therefore made to the case *Department of Transport v Smaller (Transport) Limited [1989] 1 All ER 897.*

The House of Lords did not accept a submission that the decision in *Birkett* should be reviewed by holding that where there had been inordinate and inexcusable delay, the action should be struck out, even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay.

Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ delay will either make a fair trial impossible or prejudice the defendant. He went on to affirm the principle that the burden is on the defendant to establish that serious prejudice would be caused to it by the delay. (*In this case the burden is on the Defendant to establish any prejudice.*)

13. I have perused the court file in terms of the documents filed as required by the set down procedures and the *High Court Rules 1988* and set out hereunder the *summary of Chronology of Events filed in terms of the pleadings only* that has taken place in this case accordingly:

SUMMARY of CHRONOLOGY OF EVENTS

- 12th February, 2016- Writ of Summons filed.
- 07th October, 2016- Statement of Defence filed.
- 04th January, 2017- Amended Writ of Summons filed.
- 20th March, 2017- Reply to the Statement of Defence filed.

The Delay

14. In considering whether delay of the kind required in terms of *Birkett v James* case has been established, the court is concerned only with delay on the part of the Plaintiff or her lawyer. It is that delay which must be shown to be inordinate and inexcusable.
15. I now take my mind back to the Defendant's Summons filed pursuant to Order 25 Rule 9 seeking the striking out of the Plaintiff's Writ of Summons and the Statement of Claim on the grounds of want of prosecution and nonpayment of costs.
16. The Law in terms of *Order 25 Rule 9 of the High Court Rules, 1988* states as follows-

"9. - (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.' (Underline mine for deliberation).
17. It can be clearly ascertained from the above mention law that any party who fails to take any proactive step in the pending proceeding before the court for a period of six (6) months, on application may list the 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.
18. In the current case, on 12th September, 2017, the Defendant filed his Summons pursuant to Order 25 Rule 9 seeking the striking out order.
19. The last and/or final step taken by the Plaintiff in this proceeding was when he filed his "Reply to the Statement of Defence" on 20th March, 2017.
20. If one calculates from the time the Plaintiff filed his Reply to the Statement of Defence to the time the Defendant filed the Order 25 Rule 9 Summons, it comes to a period of less than six (6) months' time frame. To be exact in the calculation, it tallies up to 5 months 3 weeks and 4 days; short by eight (8) days.
21. As explained above, the delay by the Plaintiff did not add up to six (6) months' timeframe as per the requirement of the Law in terms of Order 25 Rule 9. I find that the Defendant's Summons was filed pre-mutually, some seven (7) days prior to the expiration of the six (6) months' timeframe and therefore the Defendant's application fails on the grounds of want of Prosecution.

22. With regards to the nonpayment of the total costs of \$800 as ordered by this Court, firstly, I must say that the Courts are not the debt collecting agents for costs ordered by court. The party in whose favour costs has been granted is responsible to ensure that he is able to recover the same upon the appropriate execution of the same.
23. However, since this court has been appraised of the nonpayment of costs, and since the Plaintiff has defied and not complied with the orders of this Court, it is only prudent that I make an appropriate order in the circumstances to ensure that the Plaintiff complies with the orders.
24. I direct that the SCO, High Court Civil Registry, Suva serves the Plaintiff/Counsel with a Notice of Adjourned hearing to appear before this court and show cause why this Court should not impose an "Unless Order" for nonpayment of the total costs of \$800, and subsequently activate the same upon the non-compliance accordingly. The case stands adjourned to a date to be fixed.
25. The Plaintiff at the Hearing of the Defendant's Summons not only failed to appear but also failed to file and serve his affidavit in opposition.
26. Accordingly, I am in the circumstances inclined to order costs against the Defendant summarily assessed at \$650 to be paid within 14 days.
27. I now proceed to make the Final Orders.

FINAL ORDERS

- A. The Defendant's summons seeking striking out of the Plaintiff's Writ of Summons and the Statement of Claim on the grounds of want of prosecution fails and is dismissed.
- B. The SCO High Court Civil Registry, Suva to serve the Plaintiff/Counsel with a Notice of Adjourned Hearing.
- C. The Plaintiff/Counsel to show cause why an "Unless Order" in terms of the total outstanding Costs of \$800 should not be imposed and activated upon noncompliance.
- D. The matter is adjourned to 17th April, 2018 at 9 am.
- D. Orders accordingly

Dated at Suva this 29th Day of March, 2018



cc: Samson Datt Sharma, Labasa
Haniff Tuitoga, Suva


VISHWA DATT SHARMA
Master