

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

CIVIL ACTION NO. HBC 176 OF 2007

BETWEEN : **BARRY ARCH MOLLISON GARDNER** of Vunaviavia Gounder
Road, Nadi, Businessman.

Plaintiff

AND : **PRIME LAND DEVELOPMENT LIMITED** a limited liability
company having its registered office at Suva.

Defendant

Counsel : Mr. E. Sailo for the Plaintiff
Mr. S. Krishna for the Defendant

Date of Hearing : 9th May 2018

Date of Ruling : 22nd May 2018

Ruling by : Justice Mr. Mohamed Mackie

RULING

[Summons to vacate Trial dates]

1. This ruling pertains to the Summons filed by the Defendant's Solicitors on 26th of April 2018 and supported before me on 9th May 2018 in the presence of the Plaintiff's learned Counsel, (plaintiff's Counsel) seeking to vacate the trial of this action, which stands fixed for 4th, 5th and 6th of June 2018.
2. The Summons is supported by the affidavit of Ms. Kamini Kartika Singh, the Secretary to the Defendant Company and the application is objected by the plaintiff's Counsel.
3. In her affidavit in support, Ms. Kamini Kartika Singh, among other things, avers as follows.
 - a. *THAT the Director of the Defendant Company, Mr. Vijay Kumar who is the primary witness has recently passed away. A copy of the Death Certificate is annexed herein marked KKS-1.*

- b. *THAT the claim filed by the Plaintiff raises some serious issues. Mr. Vijay Kumar was the prime witness for the Defendant as he was the one who negotiated with the Plaintiff. Since he has passed away recently, we need to investigate if there are any other witnesses currently available to give evidence on behalf of the Defendant.*
- c. *THAT the Defendant requires further time to look for other witnesses who are aware of the matter and due to Mr. Vijay Kumar recently passing away, the Defendant did not have reasonable time to look for the witnesses, hence this application is made by the Defendant.*
- d. *THAT as soon as the Defendant came to know that its material prime witness has passed away, it immediately wrote to the Plaintiff's Solicitors about the death of the witness and putting them on notice that the Defendant will seek adjournment and if they are consenting to the same or not. A copy of the email is annexed as annexure marked KKS-2.*
- e. *THAT after several follow up with the Plaintiff's Solicitors by the Defendant's Solicitors on whether they consenting to the adjournment, the Plaintiff's Solicitors advise our solicitors that they will not be consenting to the adjournment. A copy of the email annexed as KKS-3*
- f. *THAT our Solicitors had no option but to file the Summons seeking vacation of the trial date*
- g. *THAT the Defendant will be greatly prejudiced should the hearing not be vacated because the Defendant will not be able to tell their side and /or put their defence so soon.*

4. The plaintiff's Counsel, without opting to file any reply affidavit, moved for 7 days' time to file relevant documents to show the expenses the plaintiff said to have incurred for the Air fares and other related arrangements to enable the presence of the plaintiff and his wife for the impending trial, all the way from the United States of America and Iraq respectively. Court granted 7 days, but no such documents were filed.

5. Learned Counsel for both the parties made oral submissions and Mr. Krishna, Counsel for the Defendant filed helpful written submissions as well.

6. The Defendant makes this application pursuant to Orders 32 and 35 Rule 3 of the High Court Rules, 1988 and the Inherent Jurisdiction of the High Court. Order 35 Rule 3 of the High Court Rules gives a judge the discretion to adjourn a trial in the interest of justice as follows.

"The judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit."

SUBMISSION BY COUNSELS DURING THE HEARING

7. The Consul for the Defendant contends that the claim filed by the Plaintiff raises some serious issues and Mr. Vijay Kumar who was to be the prime witness for the Defendant since he only had negotiated with the Plaintiff, is dead now. The Defendant will be greatly prejudiced should

the hearing not be vacated because the Defendant will not be able to adduce his defense via oral evidence and what the truth is. The claim filed by the Plaintiff is over 2 million dollars.

8. The Counsel states further that Mr. Vijay Kumar, after his Surgery in New Zealand came back to Fiji, was working and all of a sudden died in New Zealand, when he went to see his Son and as they came to know about this they informed Plaintiff's Lawyers, but they have indicated that they will be objecting the move for vacation of trial dates.
9. The learned Counsel for the plaintiff by his submissions in response highlighted that this is a matter pending from 2007 and both the plaintiff and his wife too being a witness have to travel from overseas and particularly, the plaintiff's wife who works for U.S. Department of Defence being based in Iraq, has already applied for leave in January 2018, six months in advance for her to attend the trial in June, and she has been granted leave accordingly.
10. The Plaintiff's Counsel States further that both the Husband and wife have already incurred expenses to attend this matter in June this year in terms of Air fares and for other connected arrangements.
11. The Plaintiff's Counsel also states that the Defendant in this matter is a Company and though they claim that Mr. Vijay Kumar was to be the primary witness, his passing away was not sudden, he was sick for some time with a life threatening illness, the Defendant should have anticipated this situation and got ready with the witnesses. He says that they should not have any difficulty in availing other witnesses to attend the forthcoming trial .
12. In reply, Mr. Krishna while agreeing that the Defendant is a Company and this matter was filed in the year 2007 states that, he came on record only in 2015 and if the plaintiff was serious enough, a hearing date should have been taken many years ago since the copy pleadings was filed in the year 2011. Counsel drew my attention to the often cited Fiji Court of Appeal decision in *Golden west Enterprises v Pautogo [2008]FJCA 3;ABU 0038.2005 (3 March 2008)*
13. The learned Counsel went on to say there is no fault on their part and since the primary witness is now dead, the defendant will have to search for new witnesses who were with Mr. Vijay Kumar, when he was having discussions with the Plaintiff in the year 2005. Counsel says that the Defendant is prepared to pay reasonable cost to the Plaintiff.
14. Mr. Krishna was also heard to say, if they fail to find new witnesses, they will have to either amend the Defence or file application for non-prosecution as the plaintiff has failed to have the matter fixed for trial many years ago.

DETERMINATION

15. The power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter. This discretion is to be exercised judicially and in the interest of justice. The Defendant is seeking an adjournment since its Director Mr. Vijay Kumar, who was to be the Main witness as he had, purportedly, negotiated the matters with the Plaintiff, has suddenly passed away compelling the Defendant to look for new witnesses.
16. It was on 28th September 2017, the trial dates were fixed before me, after much deliberations to ascertain suitable dates for both the parties, as the plaintiff and his wife were to travel from two far overseas locations as stated above and the Defendant's main witness Mr. Vijay Kumar was said to be in New Zealand, taking rest and recovering after a Surgery for a life threatening illness.
17. The record also reveals that this is not the 1st time an application for vacation of trial dates is being made by the Defendant. It is observed that when this matter stood fixed for trial on 13th and 14th September 2016 before my predecessor, a similar application being made by the Defendant by Summons dated 15th July 2016 and same being objected by the plaintiff's Counsel, my predecessor, after hearing the matter, by his ruling dated 26th August 2016 vacated the trial date subject to payment of cost and filing of the quarterly Medical reports of Mr. Vijay Kumar.
18. It is in record and undisputed that Mr. Vijay Kumar, prior to his death, was recovering after a surgery for life threatening illness and had been advised to rest for about one year, which was the reason for the vacation of the previous trial dates. This major operation was carried out on 24 May, 2016 around 3 months prior to the earlier trial dates. My brother judge at the end of his ruling dated 26th August 2016 had specifically ordered for Mr. Vijay Kumar's quarterly Medical reports to be submitted to court commencing from November 2016, obviously, to ascertain Mr. Vijay Kumar's Medical condition. But, this order has been complied with only on two occasions, in November 2016 and February 2017, and not thereafter.
19. Learned defence counsel was heard to accuse the plaintiff for not having the matter fixed for on an early date. Counsel was saying that Mr. Kumar, having recovered, was back in Fiji, working and he was ready to face the trial, but when went back to New Zealand to see his Son, died there all of a sudden. There is no such Medical certificates confirming his good health condition or at least his passport to show that Mr. Vijay Kumar was back in Fiji with favorable health condition to face the trial.
20. After completion of pleadings, before the fixing of the matter for trial, the defendant made an application for security for cost where order was made in favour of the Defendant and this too has substantially delayed the fixing of the trial as per the case record.

21. Thereafter, though the matter had been mentioned on several dates to fix the trial dates, solicitors for both the parties have obtained several mention dates to consult their clients to have the suitable dates for them as it was extremely difficult to agree upon suitable dates due to the health condition of Mr. Vijay Kumar and the placement of the plaintiff and particularly his wife, in two far away locations. Hence, learned Defence Counsel now cannot point the finger on the plaintiff alone for not having an early trial date.
22. The Plaintiff on the other hand is ready for the hearing having filed his claim in 2007. Though, his Counsel under took to file the relevant documents to prove the financial repercussions in respect of the air fare and other connected arrangements, he did not file such documents, seemingly, due the limited time of 7 day period given for that purpose. However, today the Plaintiff and his wife were present in Court and the Plaintiff's counsel indicated that the plaintiff is not agreeable for any adjournment and their position to have the trial on the forthcoming days remains unchanged.
23. If this court grants the adjournment, when the Plaintiff and his wife are present in Fiji, they will have to come again all the way from U.S.A and Iraq respectively incurring further expenses of a colossal amount of Money for the Ari Tickets and other arrangements. The Plaintiff's wife will have to apply for leave once again following the procedure. The Plaintiff is waiting to have his day in court for over 10 years.
24. Mr. Vijay Kumar's death was not a sudden or unexpected one. He was 82 years at the time of death. He had been suffering from a life threatening illness for around 1 year and 10 months, as per the Certificate of Death. Mr. Vijay Kumar had undergone a major surgery, which made him to be under post-Surgery weekly Chemotherapy treatment and finally died on 23rd February, 2018. This action is pending since 2007, Mr. Vijay Kumar and his family members, being the shareholders of the Defendant company, were aware of the nature of this claim and should have made necessary arrangements to face the trial.
25. The Defendant has already identified four or five witnesses. The other shareholders in the Defendant Company are said to be Mr. Vijay Kumar's Sons, Wife and Daughter who is said to be the Secretary of the Defendant Company. If there were other witnesses, other than the witnesses so far identified, those witnesses could have been identified and necessary instructions should have been given long time ago.
26. The Defendant has had enough time to ascertain from Mr. Kumar and identify any other witnesses, if anyone had in fact participated along with Mr. Kumar at the negotiations with the Plaintiff, and could have instructed the Solicitors accordingly. The copy pleadings were filed in early part of February 2011. If there was/were any other witness/s, Mr. Vijay Kumar would have undoubtedly, instructed the Solicitors accordingly in order to face the trial successfully.

27. Mr. Vijay Kumar passed away on 23rd February 2018. This was informed to the Plaintiff's Solicitors only on 29th March 2018 by way of an email, which the plaintiff's Solicitors claim did not reach them. Subsequently on 17th April 2018 the plaintiff's solicitors were duly informed of the death of Mr. Vijay Kumar. The trial is on 4th and 5th June 2018. The Defendant being a Company has had 3 clear months to ascertain the availability of any other witnesses. But, they have failed. If there was any witness, who in fact took part in the negotiations, it could not have been a difficult task for the Defendant Company to locate such a witness.
28. The learned Defence Counsel was heard to accuse the plaintiff for the delay in having the matter fixed for trial. The record shows that when the matter was mentioned to fix trial dates before me and my predecessor, the Plaintiff's solicitors had consented for several short adjournment on the request of the Defence Counsel and the much awaited trial on 13th and 14th September 2016 was also vacated on the Application of the Defendant's Solicitors due to the illness of Mr. Vijay Kumar. This seems to have escaped the attention of the learned Defence Counsel.
29. Counsel says that if the Defendant fails to identify new witnesses, the defendant will have to file an application to strike out the matter on the ground of non-prosecution. The grievance of non-availability of any other witness is not something new to the Defendant Company. They knew about the absence of any other witnesses from the inception. If not, the Defendant would have named such a witness long time ago. Now, it appears that the defendant is in a bid to buy time to make the things further difficult for the plaintiff and frustrate him.
30. I find that the case record is pregnant with number of affidavits sworn by Mr. Vijay Kumar, with full of facts and counter affidavits of the Plaintiff thereto. The written agreement entered between the parties is also a part of the record. There cannot be any difficulty for the Defence Counsel to duly confront the Plaintiff. There can be other witnesses from the Defendant Company, who happen to be Mr. Vijay Kumar's immediate family members, and stake holders in the Defendant Company. The absence of Mr. Vijay Kumar need not necessarily place the Defendant Company at a disadvantaged or vulnerable position. The Court is not all out to guzzle the evidence adduced by the Plaintiff as it is. It will be subjected to due process of the Court.

LAW

31. In coming to a decision, I have given my thought to the principles formulated in the Court of Appeal decision in *Goldenwest Enterprises Ltd vs Timoci Pautogo, Civil Appeal Number ABU 0038 of 2005* in particular paragraph 37:

“Generally, this is the principle covering courts’ discretion to adjourn or not to adjourn. If refusal to grant an adjournment amounts to a denial of a fair hearing and hence denial of natural justice or procedural fairness, or where a refusal to

adjourn would cause definite and irreparable harm to the party seeking it, adjournment should be granted ...”

32. It is to be noted that in the appeal of *Goldenwest Enterprises Ltd (supra)* the Court of Appeal also took into account the case of *Dick vs Piller* [1943] All ER 627 at paragraph 41 the Court of Appeal made an important observation as follows:

“In Dick v. Piller in issue was whether the appeal was on point of law or fact. It was a question of law, said the Court, for by refusing the adjournment the judge ‘caused a serious miscarriage of justice, and ..., in doing so, rejected the first principle of law, for he deprived the defendant of his very right to be heard before he was condemned’: at 628”

33. In view of the principles enunciated in *Goldenwest Enterprises Ltd (supra)* the test for adjournment of trial dates can be stated as follows:

- A. will refusal to grant an adjournment amount to a denial of a fair hearing and hence denial of natural justice or procedural fairness; or
- B. where a refusal to adjourn would cause definite and irreparable harm to the party seeking it; and
- C. Is there any ‘fault’ on the part of the party seeking the adjournment?

A. WILL REFUSAL TO GRANT AN ADJOURNMENT AMOUNT TO A DENIAL OF A FAIR HEARING AND HENCE DENIAL OF NATURAL JUSTICE OR PROCEDURAL FAIRNESS

34. It is the Defendant’s argument that if the hearing date is not vacated it will cause a serious miscarriage of justice since the Defendant will be deprived of a fair hearing hence a denial of natural justice and procedural fairness because the Director of the Defendant Company who is the prime witness is now dead. I see that the Defendant had enough time to identify and bring a witness, if in fact a third person had taken part at the discussions with the Plaintiff. The Defendant should have foreseen this situation long before.
35. The Defendant does not even indicate the existence of such a witness and a probable time frame the trial can commence after locating such an invisible witness. The next move the Defendant is likely to make as indicated by the Counsel is to file an application for amendment or summons for non-prosecution, relying on some ground that may have existed earlier where the matter remained stagnated by not being fixed for trial, for which the Defendant also should be held responsible. Whatever the outcome of such an application, if such a one is made even at this late stage, it is the Plaintiff who is going to be taxed and frustrated at the end of the day due to any possible delay, which also could be denial of justice.

36. The plaintiff and his wife have come all the way from faraway places incurring a colossal sum on money and if the trial is once again vacated on a ground of this nature, it will undoubtedly put the plaintiff at a vulnerable position resulting denial of justice.

WHERE A REFUSAL TO ADJOURN WOULD CAUSE DEFINITE AND IRREPARABLE HARM TO THE PARTY SEEKING IT

37. Mr. Krishna argues that the Defendant had informed the plaintiff's solicitors about this and filed this application well in advance to the hearing date. However the Defendant has had ample time to identify the relevant witness and need not have waited till the death of 82 years old, cancer stricken patient, who was suffering nearly for two years. Hunting for such a witness, who had in fact took part in discussions, could have started at the commencement of the action.
38. I am of the view that the Defendant still can face the trial with the available witnesses and documents in the record and denial of the adjournment will not harm the Defendant or deny a fair hearing. The Defendant has had sufficient time for the preparation of the trial and granting of an adjournment will undoubtedly place the plaintiff at a disadvantaged position, who is seeking an end to his protracted litigation.

IS THERE ANY 'FAULT' ON THE PART OF THE PARTY SEEKING THE ADJOURNMENT

39. In respect of this limb of the test the Court of Appeal in Goldenwest Enterprises Limited (supra) at paragraph 42 stated:
- "There is, however, a requirement that there be no 'fault' on the part of the party seeking the adjournment: Piggott Construction v. United Brotherhood (1974) 39 DLR (3d) 311 (Sask. CA)..."*
40. Mr. Krishna, Counsel for the Defendant submits that the Mr. Vijay Kumar had a sudden death while he was ready to take part at the trial and the Plaintiff's Solicitors were given notice of this in advance. The Defendant filed only two quarterly Medical Reports of Mr. Kumar, out of which the last one dated 25th January 2017 filed on 17th February, 2017 does not indicate that Mr. Kumar was fit and proper to attend his normal duties or attend the Court Proceedings.
41. Defendant's position that Mr. Kumar was back to normal and was in Fiji to attend the Court proceedings is unsubstantiated. They failed to file the quarterly Medical Certificates as per the order of the Court, by which the Court and the plaintiff's Solicitors would have been in a position to assess the situation.
42. The impending 3 days trial for 4th to 6th of June 2018 was fixed on 28th September 2017 with the consent of both the parties. Though, the Defendant had enough time, they have not acted

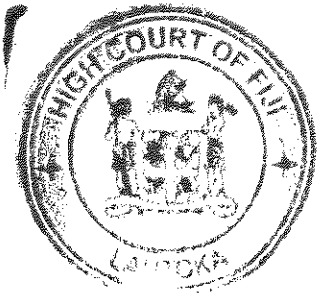
diligently in their purported, attempt of looking for a new witness to substitute Mr. Vijay Kumar in Court.

CONCLUSION

43. I have carefully considered the evidence put before the Court and the submissions made by both the Counsels and I am satisfied that the Court should exercise its discretion in disallowing the Defendant's application for an adjournment. I am also of the view that any monetary compensation to the Plaintiff on account of an adjournment under these circumstances will not serve the justice and it would cause injustice to the Plaintiff and add further delay to this protracted litigation.

ORDERS

- (i) The application for adjournment filed by the Defendant is disallowed.
- (ii) The trial dates fixed for 4th to 6th June 2018 will remain intact.
- (iii) Considering the circumstances no cost is ordered.



A handwritten signature in black ink, appearing to read "A.M. Mohammed Mackie".

.....
A.M.Mohammed Mackie

Judge

**At Lautoka
22nd May, 2018**

Solicitors

M/s. K. Law for the Plaintiff

M/s. Krishna & Co. for the Defendant