

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 75 of 2014

**BETWEEN** : **LAISENIA SAU** of Rakiraki, Fiji sugar Corporation worker suing as the intended Administrator of the Estate of his late wife Senimili Kaveni Dauveiqaravi

PLAINTIFF

**AND** : **MINISTRY OF HEALTH** a statutory organisation sued for vicarious liability as an employer and duly responsible for the administration of Public Health at various hospitals in Fiji.

1<sup>ST</sup> DEFENDANT

**AND** : **THE ATTORNEY-GENERAL OF FIJI** is being sued pursuant to the State Proceedings Act.

2<sup>ND</sup> DEFENDANT

**BEFORE:** Master Vishwa Datt Sharma

**COUNSELS:** Mr. Valenitabua - for the Plaintiff  
Ms. Bali L - for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**DATE OF RULING:** 24<sup>th</sup> May, 2018

**RULING**

*[Defendant's Inter Parte Summons 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's filed an Inter-Parte Summons pursuant to *Order 25 Rule 9 of the High Court Rules, 1988* for the Plaintiff to show cause as to why the action ought not to be struck out for *want of prosecution or an abuse of the process of the Court since no action was taken for a period of six (6) months.*
  2. The application was filed in support of an affidavit deposited by Ajay Singh.
  3. The Plaintiff did not file any Affidavit showing cause rather only made oral submissions opposing the striking out.
- (B) The Plaintiff only filed the written submissions and the Defendants failed to file any written submissions although this court directed the Plaintiff to do so within 14 days.

(C) 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.'*

(D) 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 or an abuse of the process of the Court.*
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 before this Court, the **Defendants** application is asking the Plaintiff to show cause why the matter should not be struck out for *want of prosecution* or as *an abuse of the process of the Court* for there being no action taken in this matter for six (6) months. The **Defendants** further submitted that there was a failure on the part of the Plaintiff to comply with **pre-emptory orders** of the court and or flagrant disregard of the High Court Rules amounting to **contumaciousness**.
8. Therefore the court is concerned with the application of both **principles (1) and (2)** within the *Birkett v James [1978] AC 297* case.
9. '**Intentional**' and '**Contumelious**' default 'within *Birkett v James [1978] AC 297* in the context of want of prosecution refers to the **disobedience of any orders or directions** of this court or the conduct as such amounting to an abuse of the process of the court.
10. '**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 also 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 cited the *Chronology of Events* that has taken place in this case accordingly.
  - 13<sup>th</sup> March 2014- Writ of Summons filed.
  - 01<sup>st</sup> April 2014 - Acknowledgment of Service filed.
  - 22<sup>nd</sup> April 2014 - Statement of defence file.
  - 04<sup>th</sup> July 2014 - reply to Defence filed.

- 29<sup>th</sup> January 2015-Inter-Paerte Summons filed seeking striking out (O25, R9) by Defendants.
- 19<sup>th</sup> March 2015 - Plaintiff's Notice of Intention to Proceed filed.

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 his lawyer. It is that delay which must be shown to be **inordinate** and **inexcusable**.
15. It can be clearly ascertained from the court record in terms of the **chronology of events** that the Plaintiff did not take any proactive action after filing his Reply to Defence and therefore the matter was left unattended to until the Defendants filed for striking out **for want of prosecution** in terms of *Order 25 Rule 9*.
16. The **Defendant** filed his Notice of Intention to Proceed with the matter in terms of *Order 3 Rule 5 of the High Court Rules, 1988* and stated that "the Plaintiff intends to proceed in this action n herein after the expiration of one year from the date hereof." Was this an indication to the Defendants that the that the matter will be delayed for one year and the Defendants have to wait for one more year henceforth?
17. The **Plaintiff** in his submissions **admitted** that there was **no activity** and therefore a **delay of 6 months and 25 days** by the Plaintiff from 04<sup>th</sup> July, 2014 until the AG's Chambers filed the current application for strike out for want of prosecution but he has since filed and served the Notice of his Intention to Proceed with the matter.
18. **Notice of Intention to Proceed** under *Order 3 Rule 5 of the High Court Rules, 1988* does not prevent an application to dismiss a case for want of prosecution. It buys no immunity from the exercise of the Court's inherent powers. The application of this rule could not be used for the perpetration of an action.
19. The perusal of the court record reveals that on the returnable date of 09<sup>th</sup> March, 2015 of the Defendant's **Order 25 Rule 9 Summons**, the **Plaintiff** was granted 7 days direction to file and serve his Affidavit showing Cause in terms of Delay and the matter was adjourned to 03<sup>rd</sup> March, 2015. The **Plaintiff failed** to file and serve any affidavit as directed by the Court. On this date, the Plaintiff again made further application to Court and sought for further 7 days to file the affidavit and this Court acceded to the application but set the matter for hearing on 08<sup>th</sup> July, 2015. On the hearing date, the Plaintiff notified this Court that he will not file any affidavit and the Defence Counsel pressed onto Court that the Plaintiff must file his affidavit and did not object for the matter to be vacated and adjourned for hearing to 16<sup>th</sup> September, 2015. On this date the matter was accordingly heard to determine the Order 25 Rule 9 Summons of the Defendant.
20. The **Defence** submitted that on the returnable date of the **Defendant's Summons** to strike out for want of prosecution, the Plaintiff sought to file his affidavit and failed to do so and thereafter again sought for further 7 days and this Court acceded to the Plaintiff's application.

21. The Defence added that the delay by the Plaintiff in prosecuting this case and especially in failing to comply with the Court orders and directions to file and serve the affidavit to show cause, amounts to an **abuse of the court process** and **contumelious behaviour**.
22. At the hearing date of the **Defendant's Summons**, the **Plaintiff** thought proper to inform Court that he will not file and serve any affidavit. His refusal to file and serve any affidavit in fact had deprived the Defendants of their opportunity to divulge and know what the **Plaintiff** had to say with regards to the striking out Summons for want of prosecution. By this action of the Plaintiff, it can only be concluded that he had kept the Defendants in suspense.
23. The **Plaintiff** made further reference to the case of *Bhawis Pratap v. Christian Mission Fellowship [2006] ABU 93/05 14 July 2006* and submitted that this matter ought not be struck out because the Court can give impose on the Plaintiff peremptory or unless orders to comply and failing with such compliance, the matter will be struck out.
24. The **Plaintiff** added that the AG's Chambers has not shown that the **delay** by the Plaintiff was **inexcusable** and that the **delay seriously prejudiced the Defendants** and the "delay" in itself is insufficient to warrant the striking out of this action.
25. Upon a careful perusal of the court record together with the chronology of events and the written submissions, I find that the the **Plaintiff** has **admitted** to the fact that there was a **delay on his part** for a period of **6 months and 25 days** until the **Defendants** filed the current striking out Summons before the court.
26. This matter was commenced by the **Plaintiff** on **13<sup>th</sup> March, 2014** and within an **expeditious period of 4 months**, the pleadings were closed. No doubt and the parties cannot deny the fact that the prosecution of this matter by the Plaintiff should have continued with the next cause of action until such time the matter was entered for trial before a Judge for hearing and determination.
27. The alleged substantive claim pending before this court is that of **Medical Negligence** and the Plaintiff had pleaded in his written submissions that he wants to proceed with this matter and is asking Court to make further directions in the matter.
28. The overriding objective of the **procedural rule** and the requirement in '*Birkett v James* is to `enable the court "**to deal with cases justly**". Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".
29. Further, these resources are not infinite and for every case which takes up time, another case is potentially delayed. If the case which takes up time and delays another case is, on any view, an utter waste of time and resources and stands in the way of other more deserving being heard at an earlier time, then that is a factor which the courts cannot ignore.

30. I find for the aforesaid rational that the Plaintiff has **admitted** the **Delay** of the shorter period of **6 months and 25 days** as mentioned herein. He supports his case as to why the Plaintiff's claim should not be struck out for want of prosecution with supporting case authorities.
31. Taking into consideration the case authorities cited herein, I therefore find that the period of inactivity is short and **excusable**. **Inexcusable** and **inordinate Delay** has not been established against the **Plaintiff** as per the requirement in *Birkett -v- James* by the Defendants accordingly.
32. It is only appropriate that the parties must now adhere to **expedite** the remaining cause of action and complete the pleadings. This will allow the matter to be entered for trial and then allocated to a Hon. Judge for hearing and determination once and for all.

*Prejudice and fair trial*

33. **Prejudice** can be of two kinds. It can be either specific that is arising from particular events that may or may not have occurred during the relevant period, or general, that is prejudice that is implied from the extent of the delay.
34. In order to establish **prejudice**, the **Defendants** are required to show that the **Delay** has prejudiced them in the conduct of their Defence. This will involve them in having to demonstrate, for example, that they have lost contact with their witnesses, their witnesses are untraceable, death of their witnesses, the witnesses recollections have been adversely affected, the destruction of documentary evidence without fault on the part of the Defendants.
35. Parties must note that the **presumption of prejudice** is not a **presumption of law**. It is a **presumption of fact** in the sense that, in most cases, it will only be the **Defendants** who are in a position to offer **evidence** as to the existence of **specific** or **actual prejudice**. The **presumption** is **rebuttable**.
36. The **Defendants** failed in its bid to mention anything as to how they will be prejudiced either in their **Affidavit in Support** filed on 29<sup>th</sup> January, 2015 nor in their **written submissions** filed before this court in order to establish any **prejudice** that may have caused and will cause them if this matter is allowed to proceed further, heard and determined accordingly.
37. However, I find that the **Plaintiff** has raised this issue within his written submissions that the **Defendants** have failed to show and establish any prejudice that will be caused to the **Defendants**.

He cited the case of *Batiluva Beach Resort Limited v. Native Land Trust Borad & Others [2011] HBC 359/03s & HBC 545/04s 29 September, 2011* where Hettiarachchi J held:

*"In an application for striking out for want of prosecution, the Defendant must show actual prejudice which is reasonably foreseeable. It is not sufficient to simply show likelihood of prejudice."*

38. The Defendant's Written Submissions which was relied upon by the Defendant's failed to mention anything in terms of **prejudice** and /or **establish prejudice** against the **Defendants**.

39. I have taken into consideration the nature of the substantive matter impending hearing and determination and reiterate that the **delay** by the Plaintiff has been for a shorter period of **6 months and 25 days**.
40. I find that the **Defendants** have not made out a case for **prejudice** against them in one way or the other.

Interest of Justice

41. The demonstration of **inordinate Delay**, **inexcusable Delay** and **Serious Prejudice** does not lead necessarily to a **dismissal of the action**. Further, even if the **Defendants** satisfy the requirements in *Birkett v James*, the courts in exercise of its jurisdiction must decide as to whether a **fair trial** is still possible. The Court of Appeal in *Chandar Deo v Ramendra Sharma and Anor: Civil Appeal No. ABU 0041* of (23 March 2007) (Unrep) stated as follows:-

*[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the Birkett v. James principles namely: 'In view of the delays which have occurred, is a fair trial now possible?' (Also case of Department of Transport v, Chris Smaller (Transport Limited [1989] AC 1197 refers.*

42. In *Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244 at 248*. Eichelbaum CJ reviewed the authorities and concluded:

'The applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and *at the end one must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.'*

43. Even the courts are reluctant to strike-out any matter summarily which has certain merits in it on the grounds of abuse of process. In *Dey v. Victorian Railway Commissioners* (1949) 78 CLR 62, at 91 Dixon J said:-

'26. This principle was restated by the Court of Appeal of Fiji in *Pratap v Kristian Mission Fellowship [2006] FJCA 41*. Also refer to: *New India Assurance Co Ltd v Singh [1999] FJCA 69*.

*The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include: Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James [1978] AC 297; Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde (2000) 201 CLR 552. Indeed the passage from Abdul Kadeer Kuddus Hussein v Pacific Forum Line reflects closely Birkett v James (above). These authorities also make the point that in exercising a peremptory power of the kind under*

*contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'*

44. I find from the contents of the Plaintiff's written submissions that the Plaintiff has the desire and concrete intention to pursue the litigation further expeditiously when stating and asking this Court to make further directions in the matter and get the process towards trial and its finality.
45. Taking into consideration the Plaintiff's and the Defendant's written submissions and the Defendant's Affidavit of 29<sup>th</sup> January, 2015, a fair trial is still very much possible in the interest of justice.
46. This Court will allow the matter to proceed but the Plaintiff must assure that the litigation is brought to its conclusion in terms of hearing and determination by the Court expeditiously.

Abuse of Court Process

47. **Inordinate** and **inexcusable** delay alone, however great, does not amount to an abuse of the Court process. Reference is made to *Abbuthnot Latham Bank Ltd v Trafalgar Holdings [1998] 1 WLR 1426 (per Lord Woolf)*.
48. For this purpose, **Delay alone**, even delay of 11 years does not amount to an abuse of process. Reference made to *Barclays Bank Plc v Mailing (Unreported) 23 April 1997; CA (Civil Division) cited in Abbuthnot (supra)* at pg 1432, para G-H.
49. However, **Delay** which involves complete, total or wholesale disregard of the Rules of the Court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground. Case Reference *Choraria v Sethia [1998] CLC 625 9 per Nourse LJ [1998] EWCA Civ 24*.
50. In the present case, I find from the pleadings and Affidavits that the Plaintiff has admitted **delaying** the matter for a period of **6 months' and 25 days'** timeframe, but has the intention of pursuing this matter and bring the litigation to its conclusion. It cannot be said in one way or the other from the evidence on the Court Record that the Plaintiff has **deliberately** commenced this action without any intention whatsoever of bringing it to a conclusion.
51. For the aforesaid rational, I find that there is no **abuse of court process**.
52. Bearing in mind the manner in which it has prompted this court to hear and determine the **Order 25 Rule 9 Notice** issued by the Court's own motion since there was a delay of 6 months and 25 days by the Plaintiff and upon admission of this delay obviously attracts Court to impose costs against the **Plaintiff summarily assessed at \$650 and to be paid within 14 days**.
53. Further, it has now become appropriate that I must impose some strict timetable in terms of the directions and an **unless order** against the Plaintiff in order to ensure that this matter is expedited on directions and costs and brought to its finality accordingly.



54. Following are the final orders of this court:-

**FINAL ORDERS**

- (i) The delay in terms of inordinate and intentional has not been established against the Plaintiff;
- (ii) The Plaintiff has admitted the delay of 6 months and 25 days and as such the Plaintiff has overcome the factor of inexcusable;
- (iii) The Defendants have not suffered any real prejudice; and
- (iv) In the interest of justice, a fair trial is still possible to the current.
- (v) There is no abuse of the Court process by the Plaintiff;
- (vi) The Order 25 Rule 9 Notice is hereby struck out accordingly; and
- (vii) The substantive matter remains very much intact.
- (viii) There will be an order for costs summarily assessed at \$650 and to be paid within 14 days timeframe.
- (ix) Matter stands adjourned to 24<sup>th</sup> May 2018 for further directions and the imposition of the "unless" orders accordingly.

Dated at Suva this 24<sup>th</sup> Day of May, 2018



Master  
VISHWA DATT SHARMA

cc: Toganivalu & Valenitabua, Suva  
Office of the Attorney General, Suva