

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

**CIVIL APPEAL NO. HBA 19 OF 19**

**BETWEEN** : **RAJENDRA PRASAD** of Vuda Point, Lautoka, Farmer.

**APPELLANT/ORIGINAL PLAINTIFF**

**A N D** : **KALISITO MAISAMOA** of Rakiraki Town, Legal Practitioner.

**RESPONDENT/ORIGINAL DEFENDANT**

**Appearances** : Mr S. Nand for the appellant  
Respondent in person

**Date of Hearing** : 13 August 2019

**Date of Judgment** : 21 October 2019

## **J U D G M E N T**

### **Introduction**

[01] This is an appeal from the Magistrates Court sitting at Lautoka. The Learned Magistrate (*the Magistrate*), by his order dated 19 June 2019 dismissed the appellant's second claim brought on the same facts of first claim, which was dismissed for default of appearance of both parties on a call over date.

[02] At the appeal hearing, both parties made oral submissions and they have also filed their respective written submissions. I was greatly assisted by their written submissions. I am grateful to both parties for their efforts.

### **Background**

[03] Mr Rajendra Prasad, the plaintiff (*the appellant* in these proceedings) issued a writ of summons out of the Magistrates Court against Mr Kalisito Maisamoa (a

legal practitioner), the defendant (*'the respondent'* in these proceedings) on 20 September 2018.

[04] On 24 September 2018, the respondent filed his notice of intention to defend together with his statement of defence and counterclaim. The appellant filed reply to defence and defence to counterclaim.

[05] On 23 October 2018, the matter was listed for first call. Both parties defaulted in appearance and the Magistrate struck out the matter for non-appearance.

[06] Thereafter, the appellant commenced a new action arising out of substantially the same facts as were in the struck-out claim (Civil Action No. 119 of 2018 or *'the second action'*).

[07] On 10 April 2019, the second action was called for mention, when the respondent appeared in person and informed the Court that the appellant ought to have sought leave for reinstatement of the action that was struck out for non-appearance rather than filing a new action.

[08] The appellant argued that that was not an application for reinstatement but was rather a fresh writ and that the appellant was at liberty to file a new action as the first action has not been dealt with on the merit of the case but was only struck out due to non-appearance by both parties.

[09] The Magistrate then directed the parties to file written submissions on the issue. Both parties accordingly filed their respective submissions. On 19 June 2019, the Magistrate delivered his ruling and made the following orders:

1. That the new writ filed by the plaintiff is struck out.
2. Plaintiff to apply for leave of this Court to reinstate Civil Action No. 102 of 18.
3. Parties to bear their own cost.

[10] The appellant appeals to his Court.

### *Reasoning in the court below*

[11] The Magistrate sets out his reasons for his decision as follows:

*"I find that nowhere in the rules that contain provisions which allows a new writ can be filed whilst the same matter is struck out. Filing of a new writ will certainly lead to duplication of file kept by the Court which does not augur well and may create confusion. This could be avoided only if the rules 6 of Order XXX are complied with and the plaintiff formally making application for a reinstatement in Court.*

*I am also minded that this matter has not been dealt with on the merits. The principle of as outlined in **Pople v Evans** [1968] 2 ALLER 743 applies in this case where the plaintiff's claim was no barred to another action of the same kind as it has not been decided on the merits.*

*To avoid the duplication of files kept in the Court Registry and may create future problems in terms of file management. The Magistrate Court is a creature of statute and the Magistrates Court rules are binding upon litigants to comply with. It is clearly an abuse of process if the litigants failed to comply with the procedures and adopt their own".*

### *Grounds of Appeal*

[12] The appellant has preferred this appeal on the following grounds:

1. That the Learned Magistrate erred in law and in fact in dismissing the plaintiff's Writ of Summons on the basis that an application for reinstatement of an earlier dismissed Writ of Summons in Civil Action No. 109 of 2018 for want of Appearance of counsel precluded the filing of a fresh Writ.
2. That the Learned Magistrate erred in law and in fact in misdirecting himself as to the rules relating to *Res Judicata* and *stare decisis*.

## *The Law*

[13] The Magistrates Court Rules, as amended ('MCR'), Order 30, Rule 1 states:

### *"Non-appearance of both parties*

*1 Where a civil cause on the cause list has been called, if neither party appears, the court shall, unless it sees good reason to the contrary, strike the cause out of the cause list."*

[14] O 30, R 6 of MCR provides:

### *"Re-listing of cause struck out*

*6 Any civil cause struck out may, by leave of the court, be replaced on the cause list, on such terms as to the court may seem fit."*

## **The submissions**

### Appellant

[15] It was submitted on behalf of the appellant that: the Magistrate erred in law and in fact when he failed to correctly apply the principles outlined in the case of *Pople v Evans* [1968] 2 ALL ER 743 which he relied on in his Ruling dated 19 June 2019. The case authorities are clear in that any dismissal or as in this case striking out the plaintiff's case without it being dealt with by the Court on its merits is not a bar to another action of the same kind being filed. It is further submitted that the Magistrate misdirected himself in his ruling as he gave considerations to authorities on *res judicata* which principles are clear and yet struck out the plaintiff's new writ action anyway on the basis that it is "*to avoid the duplication of files kept in the Court Registry and may create future problems in terms of file management.*"

[16] The appellant conversely submits that: the appellant himself was saying the reason why the writ was dismissed because the Magistrate wanted to prevent himself from filing fresh writ on the basis for the appellant to make an

application to reinstate the earlier writ of summons bearing the file No. 102 of 2018. The Magistrates Court is a creature of statute and the Magistrates Court Rules are binding upon litigants to comply with. It is clearly an abuse of process if the litigants failed to comply with the procedure and adopt their own. The Magistrate was correct in his ruling by applying the mandatory requirements of the Magistrates Court Rules and there was no error in law and in fact in relation to the two grounds of appeal. The appeal should be dismissed with costs.

### Discussion

- [17] The appellant brought a Magistrates Court action by way of writ of summons (No. 102 of 2018) against the respondent seeking damages for trespassing upon the appellant's land and assaulting the appellant causing injuries on 13 September 2018. (*the first action*).
- [18] The first action was struck out of the cause list as both parties failed to appear on a mention date. The Magistrate was entitled to do so if neither party appears where a civil case on the cause list was called (see MCR, O 30, R 1).
- [19] MCR, O 30, R 6 states that: "*any civil cause struck out may, by leave of the court, be replaced on the cause list, on such terms as to the court may seem fit.*"
- [20] Under R 6, the Magistrate has power to reinstate any civil case struck out on such terms as he or she may seem fit.
- [21] It will be noted that the first action was struck out for non-appearance of both parties, not on merits. The Magistrate correctly identified that the principles of *res judicata* would not apply to the first action as it was struck out for default of appearance by both parties on a call over date.
- [22] The appellant did not make an application to replace the struck out first action on the cause list but he commenced a fresh action (No. 119 of 2018) on substantially same facts as that of the first action (*the second action*). In other words, the appellant refiled the same writ as in the first action instead of making an application for reinstatement of the first action.
- [23] The Magistrate dismissed the second action on the basis that the appellant has failed to make an application to replace the first action which was struck out for

non-appearance of both parties back to the cause list as required by MCR, O 30, R 6 and on the basis that there will be duplication of files in the Court Registry and may create future problems in terms of file management.

[24] In *Pople v Evans* (above), a case cited by the Magistrate, it was held that:

*“... unless the merits of the case have been dealt with, the dismissal is not a bar to another action of the same kind.”*

[25] The Magistrate correctly said the principles of *res judicata* do not apply to the first action as it was struck out of the cause list without dealing with its merits.

[26] The second claim, arising out of substantially the same facts as those forming the basis of the struck-out first claim, has been filed within the limitation period.

[27] Rule 6 is a permissive provision. It allows any civil case to be replaced on the cause list with the leave of the court. However, this rule or any rule in the entire MCR does not prohibit commencing a second claim within a limitation period arising out of substantially the same facts as those forming the struck-out first action.

[28] In *Securum Finance Ltd v Ashton* [2001] Ch 291, it was said that a claimant's wish to have a 'second bite of the cherry' had to be weighed against the overriding objective, and in particular to the need to allot the court's limited resources to other cases.

## Conclusion

[29] The first claim filed by the appellant was struck out for non-appearance of both parties on a call over date. The appellant wished to commence a second claim based on the same facts as those forming the basis of the first claim. Neither the principles of *res judicata* nor limitation period apply to the second claim. There is no rule in the MCR which prohibits commencing a second claim, within the limitation period, arising out of the same facts as those forming the basis of the struck-out claim (the first claim). The appellant was entitled to commence a second claim within the limitation period on the same facts as pleaded in the first claim as it was struck out without dealing with its merits. In these circumstances, I hold that there is no basis for striking out the second claim. I would, therefore,

allow the appeal, set aside the Magistrate's order dated 19 June 2019 and replace the second claim (MC Civil Action No. 119 of 2018) on the cause list. I would make no order as to costs. The matter is to be sent back to Magistrates Court, Lautoka.

**The result**

1. Appeal allowed.
2. Magistrate's order dated 19 June 2019 set aside.
3. Second claim (MC Action No.119 of 2019) replaced on the cause list.
4. No order as to costs.
5. Matter remitted back to Magistrates Court, Lautoka.

*H.M. Mohamed Ajmeer*  
21/10/19  
.....  
**M H Mohamed Ajmeer**  
**JUDGE**



**At Lautoka**  
**21 October 2019**

Solicitors:

For the appellant/plaintiff: Fazilat Shah Legal, Barristers & Solicitors