

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 252 of 2012

BETWEEN: **JAGAT KUMARAN REDDY** retired person and trustee of the
Estate of Govind Reddy of Nadi, Fiji, but presently of New
Zealand.

PLAINTIFF

A N D: **MUN SAMI REDDY** also known as **MUN REDDY** previously
of Nadi, Fiji but presently residing at 9737 Toscano Drive,
Elgrove, Sacramento, CAL 95757 in the United States, Trustee of
the Estate of Parwatiammal.

DEFENDANT

Appearances: Mr. Janend Sharma for the Plaintiff
 Ms. Natasha Khan for the Defendant
Date of Hearing: 22nd November 2019
Date of Ruling: 26th November 2019

R U L I N G

INTRODUCTION

1. This is merely to clarify directions I made earlier in this case on 01 November 2019. I use the term "*formal proof*" to refer to a situation where a plaintiff is proceeding with his or her or its claim after the defendant's statement of defence has been struck out.

2. The High Court Rules 1988 gives the Court a discretion to strike out a statement of defence in certain situations where the defendant has failed:
 - (i) to comply with pre-trial discovery orders (Order 24 Rule 16(1)(b)); or
 - (ii) to give any information or produce any document after being required to do so by the Court at summons for directions (Order 25 Rule 6(3); or
 - (iii) to comply with interrogatories (Order 26 Rule 6(1) and (2)).
3. To re-state the obvious, all these provisions contemplate a situation where a defendant has failed to produce or discover documents and other evidentiary material of some probative value to the case.
4. Notably, whether or not the Court decides to strike out a defence in all the above situations, is a matter of discretion.
5. Notably also, in all three situations, notwithstanding any striking order made, the recalcitrant defendant is still liable to committal (see Order 24 Rule 16(2); Order 26 Rule 6(2)); Order 52).

PRE-TRIAL DISCOVERY ORDER

6. An Order against an executor-trustee to provide accounts is a pre-trial discovery order.
7. All pre-trial discovery orders pertain to the disclosure of relevant evidence which is either in the possession of a party, or is within that party's power to produce.
8. An action brought for an order requiring an executor, administrator or trustee to furnish and, if necessary, verify accounts, of course, is commenced under Order 85.
9. An order against an executor, administrator or trustee to provide accounts pertains to the performance of a well-established fiduciary duty to provide accounts. As I have said, if made before trial, it is a pre-trial discovery order in terms of Order 24 Rule 16.

STRIKING OUT OF DEFENCE BUT ALLOWING DEFENDANT TO CROSS-EXAMINE

10. As I have said, the striking out of a statement of defence on account of non-compliance with a pre-trial discovery order is made at the discretion of the Court.
11. It follows, in my view, that whether or not a court should allow a defendant to participate in cross-examination even after his or her or its defence has been struck out – is also a matter of discretion for the court.
12. When a defence is struck out, the defendant's right to defend his or her or its case is thereby extinguished.
13. However, the court still retains a discretion to allow a defendant or his or her or its counsel to cross-examine the plaintiff at formal proof.
14. The purpose of allowing the defendant to participate in cross-examination at formal proof is to assist the court to arrive, as close as possible, to achieving justice in the case. It is not to allow the defendant to cross examine for the purpose of advancing his or her or its case.
15. Otherwise, it would be totally absurd that, after a statement of defence is struck out, that a defendant should be allowed to cross-examine in the sense of establishing his or her defence or in, in any way, advancing his or her case. To do so would defeat the purpose of the sanction already imposed by the court in striking out the defence.

HOW I EXERCISE MY DISCRETION IN THIS CASE

16. This case involves a claim against an executor-trustee's failure to provide accounts and to protect the assets of the estate.
17. In exercising my discretion in this case, I take into account that this is not really a complicated case.
18. That the executor-trustee owes a fiduciary duty is well established in equity.

19. That the executor-trustee has not provided proper accounts, and that a certain asset of the estate was sold to a third party in circumstances questionable, are given facts.
20. The executor-trustee has failed to provide accounts to the standard required, as the plaintiff has highlighted every now and then. That this is so is attested to by the fact that the defendant himself has acknowledged over and over again in these proceedings that the accounts were kept by the solicitors Pillay Naidu & Associates and that the said accounts have been destroyed in the floods.
21. However, the defendant has never ever bothered to join Pillay Naidu & Associates as a party, despite highlighting the need to do so on many occasions, and when it was clearly within his powers to take steps to join Pillay and Naidu as a party.
22. In my last ruling, I accepted the plaintiff's counsel's submission that, as a matter of general principle, a defendant ought not be allowed to cross-examine the plaintiff or his witnesses in the "formal proof" of the case if the defendant is in contempt of Court and if the defendant has not purged his or her or its contempt of court.
23. However, in my view, the court still retains the discretion to allow a defendant to participate in cross-examination, in a complicated case, or for whatever reason, provided that cross-examination is limited strictly to the purpose of assisting the court, and not to advance the defendant's own case.

IS LIABILITY A FOREGONE CONCLUSION ONCE STATEMENT OF DEFENCE IS STRUCK OUT?

24. Order 24 Rule 16 gives the Court a discretion to strike out a defence "and judgment be entered accordingly":

Failure to comply with requirement for discovery, etc. (O.24, r.16)

- 16.-(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other

purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1),-

- a) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and
- b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

25. While it is clear that the Court has a discretion to strike out a defence or not, the question is whether judgment should be entered as a matter of course after the event, or whether the Court still has a discretion to enter judgment or not.
26. I am of the view that the entering of judgment after the striking out of a defence remains a matter of discretion for the court in terms of section Order 24 Rule 16(1) (b).
27. In my view, the more complicated a case is – the more compelling it is for the discretion to be exercised against the entry of judgment.
28. As I have said, the particular circumstances of this case are not complicated. I would exercise my discretion then in favour of entering judgement. In entering judgment in this case, I have taken into account the following:
 - (i) the defendant is executor/trustee
 - (ii) the defendant has not furnished proper accounts
 - (iii) the property in question was sold to a third party whilst the defendant was executor-trustee
 - (iv) the proceeds of that sale have not properly been accounted for
29. For the sake of clarity, the judgment I entered against the defendant is for breach of his duty to account and for breach of his fiduciary duties for failing to protect the land in question or the value thereof that the estate was entitled to.

30. The only issue that remains is quantum.
31. For this, I exercise my discretion in favour of allowing the defendant's counsel to cross-examine only for the purpose of assisting the court arrive at a quantum rather than to establish their defence.

ORDERS

- (a) Judgment is entered against the defendant
- (b) Defendant is to be allowed to cross-examine the plaintiff and his witnesses only to assist the court – on the issue of quantum.
- (c) Cross examination is to be carried out strictly in terms of the guidelines of the last Ruling dated 01 November 2019.



Anare Tuilevuka
JUDGE
Lautoka