

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: 271 of 2014

BETWEEN : **MALTI DEVI** of Lot 38 Namena Road, Nabua,
Administration Clerk

PLAINTIFF

AND : **AMBIKA PRASAD** of 44 Valili Street, Nakasi

1st DEFENDANT

AND : **SHARON SYLVIA PRATAP** of Koroqaqa, Baulevu Road,
Nausori.

2nd DEFENDANT

AND : **REGISTRAR OF TITLES**

3rd DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. A. Nand for the Plaintiff
Mr. V. Kumar for the 2nd Defendant
Ms. P. Singh for the 3rd Defendant

Written submissions: Plaintiff; 22 May 2019
2nd Defendant; 20 May 2009 & 14 June 2019

Date of Ruling : 23 December 2019

RULING

HIGH COURT RULES 1988:

substitution – joinder – amendment of writ and statement of claim – addition of a defendant - strike out of action – delay – whether delay inordinate – Order 15 Rule 6 (2) (b), Order 15 Rule 8 (1), Order 20 Rule 5, Order 25 Rule 9 and Order 34 Rule 1 (2) of the High Court Rules — Sections 4 (1)(d)(i) and 23 of the Limitation Act 1971 – costs

Cases referred to:

1. Bai v Australia and New Zealand Banking Group Ltd [2005] FJHC 725; HBC0292.1997 (5 April 2005)
 2. Mua v Attorney General of Fiji [2002] FJHC 147; HBC0563d.1991S (16 August 2002)
 3. Bishopsgate Insurance Australia Ltd v Deloitte Haskins & Sells (1999) 3 VR 863
 4. Department of Transport v Chris Smaller Ltd [1989 AC 1 1197 at 1207]
 5. Birkett v. James (1978) AC 297
 6. Alice Marlene Dorney v Sunflower Airlines Ltd Civil Action No.460 of 1989; 25 November 1994
 7. Buck v English Electric Company Ltd 1978 [1] All ER 271
-

1. The Plaintiff instituted this action, on 18 September 2014, to set aside the sale of property by the 1st Defendant to the 2nd Defendant. The property that was thus conveyed to the 2nd Defendant was the subject of a matrimonial action in the Magistrate Court of Suva (Family Court) in Action No. 05/SCOE/0377. In that case, the Plaintiff sought a half share in the matrimonial property and the Resident Magistrate made order on 13 March 2009 in favour of the Plaintiff and gave directions with respect to the sale of the property and distribution of the sale proceeds. The Plaintiff complains that the order of the Magistrate in the family action was not complied with, and that both the original Defendants in this case were aware of the directions given by the Magistrate. The 1st Defendant died on 9 March 2018. Subsequent to his death, the Plaintiff and the 2nd Defendant have made several applications to this Court.
2. Although this action was instituted in September 2014, trial is yet to commence. There were two summons for the Court's determination, when the matter was referred to me on 21 May 2019.

- (a) Summons filed on 11 November 2018 by the Plaintiff for substitution, joinder and amendment seeking the following orders:
- a. that leave be granted to the Plaintiff to substitute the 1st Defendant Ambika Prasad with Shivneil Prasad & Navneel Prasad being the executor and trustee in the estate of Ambika Prasad, who died intestate;
 - b. that leave be granted to the Plaintiff to add and/or join a new party to these proceedings, namely, Sunil Kumar trading as Sunil Kumar Esq, a law firm based in Nausori;
 - c. that leave be granted to the Plaintiff to amend her writ of summons and statement of claim;
 - d. that leave be granted to the Plaintiff to file and serve her supplementary affidavit and verifying lists of documents to all the parties;
- (b) Summons filed by the 2nd Defendant dated 16 January 2019, seeking orders from Court:
- a. for the Plaintiff's statement of claim to be dismissed as there is serious prejudice to the 2nd Defendant, given that the 1st Defendant is deceased;
 - b. that a fair trial is not possible;
 - c. that the delay in disposing of the matter has been contemptuous;
 - d. the Plaintiffs action against the 2nd Defendant be dismissed and that the 2nd Defendant be at liberty to enter judgment for her costs including the cost of the application to be summarily assessed and be paid by the Plaintiff.

This Application was made seeking relief under Order 34 Rule 1 (2) of the High Court Rules 1988.

3. At the hearing, on 12 July 2019, both counsel stated that they would not make oral submissions, and, instead, would rely on their written submissions. The Court will first determine the strike out application filed by the 2nd Defendant.

STRIKE OUT APPLICATION

4. The following affidavits were filed by the parties in regard to the strike out application.
 - (a) Affidavit of the 2nd Defendant, filed on 21 January, 2019;
 - (b) Affidavit in Opposition of the Plaintiff, filed on 23 April 2019;
 - (c) Affidavit in Reply of the 2nd Defendant, filed on 9 May 2019.

5. The summons for strike out is based on Order 34, which states:
 - “1(1) Every order made in an action which provides for trial before a judge shall wherever the trial is to take place, fix a period within which the Plaintiff is to set down the action for trial.*

 - (2) Where the Plaintiff does not, within the period fixed under paragraph (1) set the action down for trial, the Defendant may set the action down for trial or may apply to Court to dismiss the action for want of prosecution and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks just.”*

6. Striking out of an action is also provided for by Order 25 Rule 9. The parties could be asked to show cause for want of prosecution or for abusing the process of Court if no step has been taken for six months. The rule states:
 - “(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”.*

7. The 2nd Defendant in her affidavit in support averred that the Plaintiff’s action revolved around the conduct of the 1st Defendant; that she was unaware of any dealing between the Plaintiff and the 1st Defendant and of any orders by the Magistrate’s Court; she said she had purchased the property from the 1st Defendant in a sum of \$50,000 FJD; that from the beginning of the action, on 18 September 2014, she has not been able to reside and enjoy the purchased premises due to the ongoing action; that the Plaintiff and her solicitors delayed

the prosecution of the case by vacating the hearing on three occasions; that the 1st Defendant passed away on 9 March 2018 due to illness; that she is a *bona fide* purchaser and that this action has caused her severe prejudice; that as the 1st Defendant was deceased and his testimony could not be taken it would not be possible to hold a fair and just trial; and that the Plaintiff was colluding with the administrators of the estate of Ambika Prasad. She prayed for dismissal of the action on these grounds.

8. Submissions on behalf of the 2nd Defendant pointed out that the Plaintiff had regularly defaulted in taking steps to prosecute the case, and drew attention to the following authorities: Bai v Australia and New Zealand Banking Group Ltd¹; Mua v Attorney General of Fiji²; Bishopsgate Insurance Australia Ltd v Deloitte Haskins & Sells³. Reference was made to a passage in Department of Transport v Chris Smaller Ltd⁴ in which the Court stated: *"It should be noted that the focus of the power is not disciplinary or punitive, but to do justice between the parties before the Court."* It was submitted that considerable delay on the part of the Plaintiff greatly prejudiced the 2nd Defendant, that due to the death of the 1st Defendant a fair trial could not be held; that from 10 November 2016 until 2 March 2017, the Plaintiff did not take steps to reinstate the case after the Master had taken the matter off the cause list due to delays by the Plaintiff; that due to contempt proceedings initiated by the Plaintiff, the 1st Defendant was compelled to advertise and sell the property; the property was sold to the 2nd Defendant for the sum of \$50,000 as no offers in excess of this sum were received and that this action was instituted on the basis that the 1st Defendant sold the property for \$50,000, and not at the valued amount of \$60,000 as advised by Rolls Associates, the valuer, for the purpose of the family court action.
9. The Plaintiff explained the postponement of the trial in this way. Initially the case was set down for trial on 24, 25 and 26 October 2017, but was vacated by Court, and re-fixed for 13 & 14 February, 2018. Thereafter, the Plaintiff filed a notice of motion on 24 January, 2018 and sought an order for the trial to start at 2pm or be

¹ [2005] FJHC 725; HBC0292.1997 (5 April 2005)

² [2002] FJHC 147; HBC0563d.1991S (16 August 2002)

³ (1999) 3 VR 863)

⁴ [1989 AC 1 1197 at 1207)

vacated on 13 February 2018 and commence the next day; the reason for vacating the trial was the suspension of the Plaintiff's solicitor. A motion was filed once again on 6 November 2018, seeking to vacate the hearing fixed for 23 January 2019 as the Plaintiff's solicitor was engaged in a criminal trial in the High Court. Thereafter, when the matter came up for trial again, the matter was vacated as the 1st Defendant was seriously ill. Of the three occasions on which the trial was vacated, the application to vacate was twice made on behalf of the Plaintiff; the other instance was on behalf of the 1st Defendant.

10. Upon a perusal of the record, there is no doubt that this action has been beset by avoidable delays. As the 2nd Defendant points out the Plaintiff's contribution towards the delay certainly cannot be denied. The question to be answered is whether the delays occasioned in this action are sufficiently serious as to persuade the Court to dismiss the action. To use the words of Pathik, J in Bai v Australia and New Zealand Banking Group Ltd, was there an inordinate and inexcusable delay in proceeding with the action by the Plaintiff, such that it could prejudicially affect the other parties or interfere in the administration of justice.
11. An examination of the chronology of this action suggests that a number of matters have conspired to unnecessarily delay the trial since the institution of proceedings in September 2014. Summons for Direction was filed in January 2015 and orders were made in terms thereto on 23 April 2015. In response to an application on 29 September 2014, by the Plaintiff for injunctive relief, the Court pronounced judgment on 20 May 2016. In June 2016, the Plaintiff amended the statement of claim, prompting amended statements of defence from the Defendants. Pre-trial conference minutes were filed with the registry on 29 March 2017. More diligence on the part of all parties and prudent management of the proceedings may have made for a more expeditious passage to the trial and its conclusion. This was not to be, and the 1st Defendant passed away before the trial could even commence.

12. The Plaintiff drew attention to the case of Birkett v. James⁵ in regard to the exercise of the Court's power of dismissal due to delay. The Court held⁶: *"The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious eg. 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."*

13. On an examination of the chronology, notwithstanding the delay that has taken place, I am unable to agree that the default of the Plaintiff has been intentional and contumelious or that the delay on the part of the Plaintiff or her solicitor was inordinate or inexcusable. Inordinate delay would suggest a denial of justice as between the parties; to be inexcusable, the delay must be attributable to some wrongful conduct on the part of the Plaintiff. It might have been helpful had the Defendant explained what steps she took to set the action down to trial as provided for by Order 34. The application to strike out the action was made on 16 January 2019, after the summons of the Plaintiff dated 11 November 2018. The application of the 2nd Defendant appears to be based on the death of the 1st Defendant, and that a fair trial could not be held without the evidence of the 1st Defendant. This is a decision for the judge to be made after hearing evidence at the trial. It is for the Plaintiff to establish her case on a balance of probabilities, and the 2nd Defendant is entitled to make such submissions on the availability or otherwise of material evidence. Order 34 makes no provision for the dismissal of an action solely due to the death of a party; that would seem to be a matter for determination after trial. That this action is premised on certain orders made in a family court action is also not lost on this Court.

14. For these reasons, the 2nd Defendant's summons to strikeout is dismissed.

⁵ (1978) AC 297

⁶ At page 318

Application for Substitution, Joinder and Amendment

15. By this application, the Plaintiff seeks orders to substitute the 1st Defendant with Shivneil Prasad & Navneel Prasad being the executor and trustee in the estate of the 1st Defendant; to add and/or join a new party, Sunil Kumar, a lawyer appearing for the 2nd Defendant, to these proceedings; and to amend the writ of summons and statement of claim.

16. The following affidavits were filed by the parties with respect to this application.
 - a. Affidavit in support of the Plaintiff filed on 11 October 2018;
 - b. Affidavit in opposition filed on behalf of the 2nd Defendant on 12 November 2018;
 - c. Affidavit in reply filed on behalf of the Plaintiff on 20 November 2018.

Substitution

17. It was submitted on behalf of the Plaintiff that the 1st Defendant and the Plaintiff were married until dissolution of their marriage on orders made by the Resident Magistrate, following an application by the Plaintiff, and that Shivneil Prasad & Navneel Prasad are the children of the 1st Defendant and the Plaintiff. It was submitted that following an application for property distribution filed by the Plaintiff, the Resident Magistrate, on 13 March 2009, made orders for the sale and equal distribution of the sale proceeds among the parties. The statement of defence filed on behalf of the 1st Defendant does not dispute any of this. The 2nd Defendant, too, does not controvert the Plaintiff's position with respect to the dissolution of marriage and the consequential orders made by the Resident Magistrate for the sale of property and distribution of monies.

18. Following the death of the 1st Defendant, it follows that steps must be taken for substitution. The Plaintiff seeks to substitute the children of the 1st Defendant. The 2nd Defendant objects to the two children being substituted, stating that they are very close to the Plaintiff, they reside with the Plaintiff and that substituting them would cause her prejudice. Apart from being the children of the 1st Defendant, Shivneil Prasad & Navneel Prasad were granted letters of administration by Court on 4 September 2018 to administer the estate of the 1st Defendant. Therefore, they would seem to be the most suitable to be substituted

in place of the 1st Defendant. It does not seem reasonable, at this stage, to presume that prejudice would be caused to the 2nd Defendant merely as a result of such appointment. The Court would be best positioned to decide that question after going through the trial.

19. Order 15 Rule 8 (1) states that where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy. The action against the 1st Defendant has not abated, and the Plaintiff has made an application for substitution. Shivneil Prasad & Navneel Prasad – the executor and trustee in the estate of the 1st Defendant; appointed as such by Court on 4 September 2018 – have been nominated by the Plaintiff for substitution. In my view, appointment of the 1st Defendant’s children (also the executor and trustee) does not appear objectionable on the basis of the material available to Court. Apart from the 2nd Defendant’s general assertion that the appointment of Shivneil Prasad & Navneel Prasad would cause her prejudice, there appears to be no other material in the affidavit in opposition to deny the Plaintiff’s application, which has been made in the normal course to prosecute the action after the death of the 1st Defendant.

Joinder

20. The application also seeks to add the 2nd Defendant’s lawyer, Mr. Sunil Kumar, on the basis of acts or omissions related to the family law action in the Magistrate Court and the sale of the matrimonial property. Collusion in a fraudulent transaction is attributed as the cause for the joinder of the party. However, the amended statement of defence filed by summons dated 21 June 2016, makes no reference to Mr. Sunil Kumar. In the proposed amended statement of claim, at paragraph 16, the Plaintiff pleaded that the (sought to be added) 4th Defendant witnessed the transfer document dated 26 June 2014 executed by the 1st Defendant; and at paragraph 18, that the transaction was fraudulent in terms of Section 40 of the Land Transfer Act, and that the 4th Defendant prepared, witnessed and signed the document. The Plaintiff averred that the Defendant sought to be added appeared on behalf of the 1st Defendant in the family court action; but, the 2nd Defendant states that such appearance was only in respect of contempt proceedings against the 1st Defendant, and produced the instructions

sheet dated 27 June 2014 addressed to Mr. Sunil Kumar. The relief sought against the 4th Defendant, along with the 1st and 2nd Defendants (as at the date of the application prior to the 1st Defendant's death) is damages for fraudulently transferring the land comprised on CT No.25243.

21. As contended on behalf of the 2nd Defendant, this application should have been made at the outset. There is no clear explanation by the Plaintiff as to why this was not done initially. There is no indication that the decision to do so is premised on information that has recently surfaced. In these circumstances, Order 15 of the Rules needs examination to determine whether the application to add Mr. Sunil Kumar at this stage of the proceedings could be allowed.
22. Order 15 Rule 6 (2) (b) states that at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just, and either of its own motion or on application, order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon or any person between whom and any party to the cause or matter there may be exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. The rule clearly vests the Court with the discretion to add a party if such addition was considered necessary to deal with any issue or in connection with any relief in a cause or matter.
23. The delay in this application for the addition of Mr. Sunil Kumar is far from satisfactory. However, I am conscious of the issues involved, which have its genesis in the family court action in 2009. The Plaintiff's complaint is that the orders of the Resident Magistrate, especially in regard to the sale of the property, were not complied.
24. The Order by the Resident Magistrate on 13 March 2009 was for the sale of the property at 44, Valili Street, Nakasi, Suva and for the proceeds of the sale to be first applied towards the payment of the secured charge to the Fiji National

Provident Fund and then towards costs incurred in selling the property. The balance proceeds were to be paid equally to the parties. Either party was entitled to advertise the property, and to sell it at the highest offer. The conveyance was to be carried out by the Plaintiff's (Applicant in that case) solicitors. The Plaintiff has averred that she was not informed of the advertisement of the property and that the transaction was not carried out by her solicitor, and instead it was done by the 2nd Defendant's solicitor, who is now sought to be added.

25. It was submitted on behalf of the 2nd Defendant that Mr. Kumar was a mere witness of a transfer document, and that by signing the document, he was merely performing a duty vested in him by Section 144 (2) of the Legal Practitioners Act., and that he did not owe the Plaintiff a duty at the time of witnessing the transfer document. Therefore, there was no reason to add him as a party to these proceedings. It was further submitted that the Plaintiff's application for joinder would be barred by the Limitation Act. Reference was made to Order 15 Rule 6 (5) and Section 4 (1)(d)(i) of the Limitation Act 1971 which states that in the case of actions for damages for negligence, nuisance or breach of duty where the damages claimed by the plaintiff for such negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, the limitation period is to be taken as three years. However, the Plaintiff's proposed cause of action against Mr. Kumar is on the basis of collusion and fraud, and not upon the grounds mentioned in Section 4(1)(d)(i) of the Limitation Act.

26. Moreover, Order 15 Rules 5 & 6 permit the addition of a party even after the expiry of the period of limitation imposed by Section 4(1)(d)(i) of the Limitation Act. This discretion of the Court has been judicially recognised. However, I do not think that the Court needs to exercise its discretion under these rules; in my view, the Plaintiff may be able to rely on Section 4 (1) (a) of the Limitation Act, in which event the period of limitation is 6 years, and the Plaintiff would be within the allowed period to institute action. That, too, is a matter that is likely to be clearer at the trial. The authority given to Court to direct the joinder of a party is clearly amplified by Section 23 of the Limitation Act 1971 which states that, where an action has been commenced within any period of limitation prescribed by this or any other Act and, after the expiry of such period, it transpires that

there has been misjoinder or non-joinder of any party to that action, the Court may order that any other party may be joined in the action notwithstanding that the period of limitation has expired against that other party. This enactment – which was given effect by Pathik, J in Alice Marlene Dorney v Sunflower Airlines Ltd and another – permits the Court to join a party even where the limitation period has expired⁷.

27. On the question of delay the observations of Court in Buck v English Electric Company Ltd⁸ are relevant to this context as well. The Court stated in that case⁹, *“Although a sort of pattern has been evolved as a useful guideline by indicating that five or six years’ delay raises a presumption of prejudice to a defendant it is a rebuttable presumption. There are cases when the Court of Appeal has allowed an eight or nine year delay. As Harman LJ observed in Spriggs v Norwood Trawlers, you cannot have a calendar which divides the ordinary period of delay from the inordinate. Each case depends on its own facts. I therefore reject that part of the submission on behalf of the defendants which was founded simply on the extreme length of delay in this case”*.

28. The cause of action against the 4th Defendant is based on collusion with the 1st Defendant and for participating in a wrongful transaction, which the Plaintiff claims, resulted in the orders made by the Resident Magistrate not being complied with and thereby causing losses to the Plaintiff. There is no clear mention of the prejudice that could be caused to the 2nd Defendant by the addition of Mr. Kumar as a party, apart from the ensuing delay, for which costs would be a fair compensation. The matters in controversy are such that it is best for the proposed 4th Defendant to answer the Plaintiff’s statement of claim by way of a formal defence and for this Court to proceed to trial; the claims made by the Plaintiff are such that they cannot be conveniently dealt with by affidavits alone or by submissions; with the parties at variance on the material facts, a trial is the likeliest process to shed light on the matters in dispute. Mr. Kumar’s presence before Court may be necessary to ensure that all matters in dispute in this case are effectually and completely determined. For these reasons, the joinder of Mr. Sunil Kumar as the 4th Defendant is allowed.

⁷ Civil Action No.460 of 1989; 25 November 1994

⁸ 1978 [1] All ER 271

⁹ At page 275

29. Order 20 Rule 5 empowers the Court at any stage of the proceedings to allow the Plaintiff to amend his writ, or any party to amend his pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. In terms of Rule 20 (5) (2), even where the relevant period of limitation has expired, the Court may nevertheless grant leave to amend the writ in the circumstances specified in that rule. In view of the provisions contained in the rules and for the reasons set out above in allowing the applications for substitution and addition, the Plaintiff is allowed to amend the writ and statement of claim. Addition and amendment as sought by the Plaintiff are necessary to bring finality to the matters in controversy. In view of the time taken to reach this stage, the parties are expected to act with proper diligence in proceeding to trial and concluding the proceedings.

Orders

- a. The 2nd Defendant's summons dated 16 January 2019, to strike out the Plaintiff's action, is dismissed.
- b. The Plaintiff's application for substitution of the 1st Defendant in terms of the summons dated 11 November 2018 is allowed.
- c. The Plaintiff's application to join as the 4th Defendant in terms of the summons dated 11 November 2018 is allowed.
- d. The Plaintiff's application to amend the writ of summons and statement of claim in terms of the summons dated 11 November 2018 is allowed.
- e. The amended writ and statement of claim are to be served on all Defendants within 14 days of this order. Statements of defence/ amended statements of defence must be served by the Defendants on the Plaintiff within 14 days of service of the amended statement of claim. The Plaintiff, upon being served the defence or amended defence, may reply by serving the amended reply on the Defendants within 14 days of being served such defence or amended defence.

- f. The Plaintiff's application to file and serve a supplementary affidavit and a verifying list of documents to all the parties in terms of the summons dated 11 November 2018 is allowed.

- g. The Plaintiff is directed to pay the 2nd Defendant costs summarily assessed in a sum of \$400.

Delivered at Suva this 23rd day of **December, 2019.**



Justice M. Javed Mansoor
Judge of the High Court