

IN THE HIGH COURT AT SUVA
CIVIL JURISDICTION

Civil Action No. 161 of 2018

BETWEEN

VIJAY KUMAR of 23 Kisdon Crescent, Prospect, NSW 2148, Australia,
Warehouse Manager.

FIRST PLAINTIFF

AND

HARI PRASAD of lot 1 Chanik Place, Caubati, Nasinu, Fiji,
Retired Accounts Clerk.

SECOND PLAINTIFF

AND

VINESH PRASAD of Lot 10 Tamavua, Suva, Fiji, Estimator.

FIRST DEFENDANT

AND

THE REGISTRAR OF TITLES of Civic Tower, Suva.

SECOND DEFENDANT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC OF FIJI

THIRD DEFENDANT

Counsel : Mr Nadan A. for the Plaintiffs.
Ms Saumatua S. with Ms Disiga F. for the 1st Defendant.
Ms Singh P. for the 2nd & 3rd Defendants.

Date of Hearing : 01st July 2020

Date of Ruling : 20th July 2020

RULING

(On the application for Striking out)

- [1] The plaintiffs instituted these proceedings alleging that the 2nd defendant had fraudulently transferred undivided half share of the property which is the subject matter of these proceeding onto himself.
- [2] The plaintiff in the statement of claim sought the following reliefs:

- a) That the First Defendant either through himself, his servants and/or agents be forthwith restrained from interfering with the First Plaintiff and Second Plaintiff, his servants and/or agents or restraining them from entering the property comprised in Certificate of Title No. 22868 being Lot 1 on Deposited Plan No. 5642 constituting an area of 798m² and meeting the Second Plaintiff and his wife or looking after them from day to day basis.
- b) A declaration that the transfer dealing 833972 registered on 30th September 2016 and transfer dealing 857271 registered on 24th January 2018 over the property comprised in Certificate of Title No. 22868 being Lot 1 on Deposited Plan No. 5642 be deemed null and void and of no legal effect.
- c) That the First Defendant executed a Transfer instrument and all the required documents to effect transfer of the property comprised in Certificate of Title No. 22868 being Lot 1 on Deposited Plan No. 5642 constituting an area of 798m² situated t Lot 1 Chanik Place, Caubati, Nasinu, Fiji in favour of the Second Plaintiff.
- d) That alternatively, the Second Defendant shall cancel the Transfer dealing 833972 registered on 30th September 2016 and transfer dealing 857271 registered on 24th January 2018 over the said property forthwith.
- e) That the First Defendant provide a full inventory and accounts of all the funds collected as rental income from and expenditure incurred towards Flat 2 and 3 comprised in Certificate of Title No. 22868 being Lot 1 on Deposited Plan No. 5642 since September 2016 to-date within 14 days.
- f) That the First Defendant pay the First Plaintiff a sum of \$800.00.
- g) That the First Defendant pay costs of this action on full solicitor/client indemnity basis.
- h) Such other relief that this Honourable Court may deem just and expedient.

[3] Particulars of fraud as alleged by the plaintiffs in their statement of claim are as follows:

1. Knowing that the second plaintiff was old and weak and did not have a control on his memory of things he did, caused him to execute transfer instrument in his favour.
2. Deliberately misinforming the second plaintiff that the transfer of Sashi's half share of the property was yet to be registered in favour of the second plaintiff when the said transaction was already registered on 08th October, 1998.
3. Depriving the second plaintiff of his own property without making any financial contributions towards the purchase and towards any improvement on the same and despite having knowledge that the expenses on the property were only incurred by the plaintiffs and Sashi.

[4] The plaintiffs has prayed inter alia, for a declaration that the said transfer be deemed null and void and of no legal effect.

[5] On 21st January 2020 the 1st defendant filed a summons pursuant to Order 18 rule 18 of the High Court Rules seeking to have the plaintiffs' claim against the defendants struck out.

[6] Order 18 rule 18(1) of the High Court Rules 1988 provides:

The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

- (a) it discloses no reasonable cause of action or defence, as the case may be; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

In **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)** [1970] Ch 506 it was held that the power given to strike out any pleading or any Part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.

In **Drummond-Jackson v British Medical Association** [1970] 1 W.L.R. 688; [1970] 1 All ER 1094 it was held;

Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

In the case of **Walters v Sunday Pictorial Newspapers Limited** [1961] 2 All ER 761 it was held:

It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases.

In **Narawa v Native Land Trust Board** [2003] FJHC 302; HBC0232d.1995s (11 July 2003) the court made the following observations:

In the context of this case I find the following statement of Megarry V.C. in **Gleeson v J. Wippell & Co.** [1971] 1 W.L.R. 510 at 518 apt:

“First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, **Zeiss No. 3** [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is

discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial”.

[7] Particulars of fraud alleged to have been committed by the 1st defendant as averred in the statement of claim are as follows:

- a) Knowing that the 2nd plaintiff was old and weak and did not have a control on his memory of things he did, caused him to execute transfer instrument in his favour.
- b) Deliberately misinforming the 2nd plaintiff that the transfer of Sashi’s half share of the property was yet to be registered in favour of the 2nd plaintiff when the said transaction was already registered on 08th October 1998.
- c) Depriving the 2nd plaintiff of his own property without making any financial contributions towards the purchase and towards any improvement on the same, and despite having knowledge that the expenses on the property were only incurred by the plaintiffs and Sashi.

[8] The learned counsel for the 1st defendant submits that the plaintiffs has failed to provide evidence of fraud to substantiate the allegation of fraud made against the 1st defendant.

[9] There is no requirement in law to produce evidence in court before the matter is taken up for trial. Pleading are no evidence. The burden is on the plaintiff to prove the allegations of fraud at the hearing of the mater by adducing evidence. The question here is whether the statement of claim discloses a reasonable cause of action. In an action of this nature all what the plaintiff can aver in the statement of claim is that his signature was obtained fraudulently. Whether a fraud was perpetrated on him is purely a matter of evidence. Therefore it cannot be said that the plaintiff has failed to disclose a reasonable cause of action.

[10] The learned counsel for the 1st defendant also submits that the plaintiffs’ action is an abuse of the process of the court. I do not see any reason to say the proceedings instituted by the

plaintiffs is abuse of the process of the court because from the statement of claim it is clear that the plaintiffs have a reasonable cause of action.

[11] The court is of the view that this is not a matter that should be summarily dismissed. From the decisions I have cited above it is very clear that courts are discouraged to a very great extent in striking out matters without hearing the parties.

Orders

1. That application for striking out is refused.
2. The 1st defendant s ordered to pay the plaintiffs \$1000.00 as costs of this application.



20th July 2020


Lyone Seneviratne

JUDGE