

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

**CIVIL JURISDICTION**

**Civil Action No. 159 of 2013**

**BETWEEN** : **SETOKI TUYAWA** of Navatulevu, Narewa Road, Nadi.

**PLAINTIFF**

**AND** : **THE COMMISSIONER OF FIJI POLICE FORCE** of Ratu Sukuna House, MacArthur Street, Suva.

**1<sup>st</sup> DEFENDANT**

**AND** : **THE ATTORNEY GENERAL OF FIJI**

**2<sup>nd</sup> DEFENDANT**

**Appearance** : **Mr. Eparama Sailo for the plaintiff**  
**Mr. Josefa Mainavolau for the defendants**

**Hearing** : **Thursday, 10<sup>th</sup> December 2020 at 9.00 a.m.**

**Decision** : **Friday, 22<sup>nd</sup> January 2021 at 9.00 a.m.**

**DECISION**

(01) The matter before me stems from the plaintiff's summons filed on 01.09.2020 seeking the grant of the following orders:

(a) *That the action herein that was struck out in terms of Orders 35, Rule 1 of the High Court Rules on 20.08.2019 be restored to the cause list.*

(b) *That the paragraph (4) of the order made on 20.08.2019 be set aside.*

(c) *That the cost of this application be cost in cause.*

- (02) The application is made pursuant to Order 32, Rule 1 and Order 35, Rule 1 of the High Court Rules 1988 and under the inherent jurisdiction of the Court.
- (03) The application is supported by an affidavit of Mr Setoki Tuiyawa, the plaintiff sworn on 26.08.2020.
- (04) The application is opposed by the defendants. It should be noted that the defendants did not file an answering affidavit, a course which they were entitled to take.
- (05) The trial of this action is called on 20.08.2019. The plaintiff was not present and unrepresented on the date of hearing. The defendants were represented on the date of hearing and were ready for trial. The Court struck out the action pursuant to Order 35, rule 1 (1) of the High Court Rules, 1988.
- (06) The plaintiff is seeking to restore the matter to the cause list. The power to reinstate an action is discretionary. The principles to be applied to the exercise of the judicial discretion to reinstate an action are;
- ❖ Adequate reason must be given for non-appearance.
  - ❖ The application to reinstate must be made promptly.
  - ❖ Prejudice.
- (07) As to the reason for non-appearance, Mr. Setoki Tuiyawa, in his supporting affidavit deposed that; (Reference is made to paragraph (3) to (9) and (12) and (13) of the affidavit)
- (3) *THAT the matter was called on 28<sup>th</sup> January, 2019 at the Lautoka High Court for a mention to fix a fresh trial date.*
  - (4) *THAT my Solicitors instructed Ms. Ravai at the material time was employed by at Messrs Fazilat Shah Legal to appear for me on their behalf and obtain trial dates for two days.*
  - (5) *THAT on 28<sup>th</sup> January, 2019, at 2.00 pm Messrs Fazilat Shah legal faxed my Solicitors the outcome of the matter. (Annexed herein and marked "ST-1" is a copy of the outcome of the instructions)*
  - (6) *THAT in the outcome Messers Fazilat Shah Legal had advised that 21<sup>st</sup> and 22<sup>nd</sup> August, 2019 is fixed for trial to be continued.*
  - (7) *THAT my Solicitors have informed me of the same and requested me to attend their office three weeks prior to the trial dates for consultation and preparation for the trial.*

- (8) *THAT in the afternoon of 20<sup>th</sup> August, 2019 my Solicitor, Mr. Eparama Sailo called the Registry to find out Court Number in which the trial will be conducted and Ms. Sala from the Registry informed him that the trial was scheduled for 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> August, 2019 and it has been struck out due to non-appearance on 20<sup>th</sup> August, 2019.*
- (9) *THAT on 16<sup>th</sup> September, 2019 my Solicitors were served at the office with the Sealed Order.*
- (12) *THAT due to the incorrect date provided to my Solicitors, my solicitors were unable to represent me in the Lautoka High Court on 20<sup>th</sup> August, 2019.*
- (13) *THAT my Solicitors within 2 days from date of service of the sealed Order prepared an application to have the action restored to the Cause List which was filed on 24<sup>th</sup> September, 2019.*

- (08) The plaintiff in his affidavit says that an incorrect date was given to his solicitors by (Ms.) Ravai, counsel who appeared in court on 28-01-2019 on behalf of the plaintiff. I do not think that a party can escape the consequences of procedural lapses and failure to attend court by sheltering behind the sins of his/her counsel. A general rule like that could paralyze the process of court. Why should the defendants to the action be made to suffer for failure of someone else? It is up to the parties to pursue their cases with diligence.

On the other hand, as a routine, the cause list for each week is published at the latest, by Friday of the preceding week informing the Solicitors and clients about their cases. Mr. Eparama Sailo is a regular practitioner in Lautoka Court.

Furthermore, as per the orders I made on 25.01.2019, the plaintiff was required to pay the hearing fees 07 days before the trial. The plaintiff has not paid the hearing fees. In the circumstances, I conclude that the plaintiff was not ready to present his case on 20.08.2019.

- (09) According to paragraph (08) of the plaintiff's affidavit, the plaintiff and his Counsel was fully aware by the afternoon on 20.08.2019 that the action had been struck out in the morning on 20/08/2019 since the plaintiff was not present and unrepresented in the morning for the hearing. The plaintiff should have filed a prompt application to reinstate the action. Why did the plaintiff wait till 24.09.2019 to file an application for reinstatement? The plaintiff cannot and ought not to have waited until the sealed order was served on them on 17.09.2019. The effect of laxity on the part of Solicitors has been stated as follows by Lord Woolf M.R. in **Lownes v Bobcock Power Ltd (18.2.98 TLR 84)**:

*“The person who suffered because the action was dismissed was not the plaintiff's solicitors but the plaintiff personally therefore it could be said that the judge was*

*visiting the sins of the solicitor on the client and should not let the desire to discipline the solicitor injure the plaintiff personally.*

*His Lordship was very conscious of the force of that point but it was wrong to give way to it. The plaintiff even in a personal injuries case, had to be responsible for the conduct of his solicitor. Consideration had to be given to the position of parties to other litigation.*

In **Halsbury's Laws of England 4<sup>th</sup> Ed. Vo. 37 para 448**, Sir Jack Jacob Q.C. the author of the subject dealing with Practice and Procedure stated:

*"... A plaintiff's solicitor who does not "get on" with his case will be at risk of having the plaintiff's action dismissed for want of prosecution and himself rendered liable for negligence to the plaintiff as his former client".*

This is a case which has a bad history. The plaintiff's first application for reinstatement filed on 24.09.2019 was struck out on 08.06.2020 because the plaintiff was not present and unrepresented. Now this is another application seeking the same remedy, namely, reinstatement of the action after dismissal.

On the other hand, why did the plaintiff wait until 01.09.2020 to file the second application for reinstatement? The plaintiff appears to have done nothing, and continued to do nothing until the filing of summons that is now before the court on 01.09.2020. There is a delay between the order of striking out the action and the filing of summons to have the striking out order set aside of over one year.

- (10) The plaintiff is making a mockery of the court system. If his solicitor did not do his duty to court then there is nothing that the court can do for him. Reinstatement is a matter of discretion of the court.

Mr. Sailo submitted that the defendants would suffer no prejudice if action is reinstated. This is a claim instituted in the High Court by the plaintiff in 2013 against the Fiji Police Force for wrongful arrest and unlawful imprisonment. The plaintiff alleges that he was wrongly identified as 'Setoki Ceinaturaga' and was apprehended by police officers based at the Nadi Police Station in 2011.

In my view, apart from the failure to turn up in court, the plaintiff has not prosecuted his case with any sense of urgency and reasonable diligence allowing it to drift for seven years.

The witnesses and the court would be asked to focus on events which happened up to almost ten years previously. There is a delay of some ten years from the events and eight years from the filing of the claim. This circumstance demonstrates prejudice. It is wise to let sleeping dogs lie. It would be an affront to justice to allow these proceedings to continue any further.

## **ORDERS**

- (1) The application for reinstatement of the action is declined.
- (2) There will be no Order as to costs.

  
22/01/2021  
.....  
**Jude Nanayakkara**  
[Judge]



**High Court - Lautoka**  
**Friday, 22<sup>nd</sup> January 2021.**