

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 217 of 2017

BETWEEN : **MOHAMMED RAFIQ** of Navakai, Nadi, Fiji, Carrier Operator.

FIRST PLAINTIFF

AND : **QAMRUL NISHA** of Navakai, Nadi, Fiji, Domestic Duties.

SECOND PLAINTIFF

AND : **ABDUL FAIAZ ALI** of Navakai, Nadi, Fiji in his capacity as sole
Executor and Trustee of the Estate of the Defendant **ABDUL KADAR**
late of Navakai, Nadi, Fiji, Cultivator.

DEFENDANT

Before : Master U.L. Mohamed Azhar

Counsels : Ms. R. Chand for the Plaintiffs
Ms. N. Chu for the Defendant

Date of Ruling: 24.06.2022

RULING

01. The defendant took out the summons pursuant to Order 18 rule 18 of the High Court Rules seeking to strike out the plaintiff's action on all four grounds mentioned in that rule. The summons is supported by an affidavit sworn by original defendant – Abdul Kadar. The plaintiffs opposed the summons and filed the affidavit sworn by both of them. The original defendant thereafter filed his affidavit in reply. Whilst this summons was pending for hearing, the original defendant passed away, and Sole Executor and Trustee of the Estate of the original defendant was substituted by consent. Both counsels made oral submission at hearing and filed the written submission.

02. The law on striking out of pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

18 (1) The Court **may** at any stage of the proceedings **order to be struck out or amend** 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.

- (2) No evidence shall be admissible on an application under paragraph (1)(a).
- (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading (emphasis added)

03. The unambiguous wording of the above rule makes its effect very clear that, the power to strike out the pleadings is permissive and not mandatory. Even though the court is satisfied on any of those grounds mentioned in the above rule, the pleadings should not necessarily be struck out as the court can, still, order for amendment. The underlying rationale is that, the access to justice should not, merely, be denied by glib use of summary procedure of pre-emptory striking out.

04. Marsack J.A. in his concurring judgment in **Attorney General v Halka** [1972] 18 FLR 210, explained how the discretionary power to strike out should be exercised by the courts and held that:

“Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 18 should be

very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised”.

05. Every person has access to justice and has fundamental right to have his or her disputes determined by an independent and impartial court or tribunal. This fundamental right, guaranteed by the supreme law of the country, should not lightly be taken away unless the case is unarguable. Salmon LJ said in Nagle v Feilden [1966] 1 All ER 689 at 697:

‘It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable’.

06. Accordingly, the general principle is that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed. The courts cannot strike out an action for the reason that, it is weak or the plaintiff or the defendant is unlikely to succeed in his or her claim or defence.

07. The first ground is that, no cause of action is disclosed in the plaintiffs’ pleadings in this matter. No evidence shall be admissible in an application filed under this ground. The court has to examine the allegations in the pleadings to come to a conclusion on reasonable cause of action. His Lordship the former Chief Justice A.H.C.T. Gates (as His Lordship then was) in Razak v. Fiji Sugar Corporation Ltd [2005] FJHC 720; HBC208.1998L (23 February 2005) held that:

“To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18 (2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498”.

08. Both plaintiffs entered into a separate Sale and Purchase Agreement on 15th June 2011 with the original defendant to buy a separate plot of land from him. The first plaintiff’s agreement was to buy the Lot 2 in Plan SO 499 containing an area of 1027 square meters of State Lease No 12824 known as Solowaru & Enamanu & Nubu in the District of Nadi, in the Province of Ba and having an area of 1.5014 hectares, for the consideration of \$ 13,500. The second plaintiff’s agreement was to buy Lot 3 of the same land and the Lot 3 contains an area of 1023 square meters for the consideration of \$ 13,500. The plaintiffs claim that, the State Lease 12824 was to expire at the time of their agreement and the first plaintiff helped the original defendant by paying a sum of \$ 5,492 being the fee for renewal of the lease. Finally, the original defendant was granted new State Lease No.19631 on or about September 2015.

09. The plaintiffs further claimed that, there was no lease for them to do the sub-division as the previous one expired and thereafter the original defendant did not give the renewed

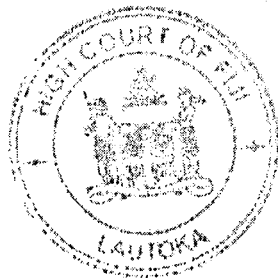
lease for them to carry out the sub-division as per the terms and conditions of the agreement they entered into with him. The solicitors for the original defendant then issued notice terminating their agreement when they were ready to perform their obligations under the agreement. Therefore, they sued the original defendant for specific performance and damages together with the interest. The original defendant in his statement of defence admitted entering into separate agreement with the plaintiff and renewal of his lease. However, he alleged that, the plaintiffs breached their agreement by failing to obtain necessary approvals and to complete the sub-division despite the numerous requests made by him. The original defendant claimed that, the failure of the plaintiffs to perform their obligations under the respective agreement led him to exercise his power under clause 6 (c) of the agreement. He further claimed that, he was ready and willing to refund the deposit, but the plaintiffs refused to accept it. His defence is that, there was no valid agreement to seek specific performance as the agreement was terminated by him and therefore moved to dismiss the action.


10. The summons filed by the defendant revolves mainly on two issues, namely, (a) the consent of the director of land is not obtained, as such the agreement is null and void, and (b) the agreement had already been terminated by the defendant and therefore there is no agreement for enforcement.
11. The subject land in this matter is a state land and the lease is a protected lease in terms of section 13 (1) of the State Lands Act. It is well known that, this section requires consent of the Director of Lands before dealing with any land which falls under purview of that section. Both parties in this matter contracted and agreed to obtain the consent from the director of land before the land is actually transferred to the plaintiffs. It was the obligation and duty of the plaintiffs to obtain the same. However, the allegation is that, the defendant did not provide necessary documents to obtain the same. Even though this allegation is totally denied by the defendant, it is the matter for the court to determine whether the plaintiffs' alleged failure to obtain the necessary approval was caused by the defendant or not. Likewise it is for the trial court to determine whether, given the circumstance of this case, the said Sale and Purchase Agreement is enforceable or not. Neither the defendant can unilaterally, nor can this court in this proceeding determine enforceability of the Sale and Purchase Agreements in concern.
12. Admittedly, the plaintiffs commenced this action for specific performance after alleged termination of the Sale and Purchase Agreement by the defendant. Not only termination of Sale and Purchase agreement, but also the reasons given by the defendant for it are disputed by the plaintiffs. Apart from the legal question of enforceability of the Sale and Purchase Agreement between the plaintiffs and the original defendant, there are several other disputed facts which make plaintiffs' case arguable. A clear cause of action is demonstrated by the plaintiffs in this matter. In these circumstances, the court cannot

summarily intervene in this matter and strike out it, exercising the power which ought to be exercised sparingly and only where a cause of action is obviously unsustainable.

13. The pleading is scandalous if it contains degrading charges which are irrelevant to the issues in hand. Conversely, if pleading or an action is intended to annoy or harass the other party, it is frivolous and vexatious. Abuse of the process of the court arises where the process of the court is used without good faith and proper purpose. On perusal of the pleadings and the evidence adduced by way of the affidavit in this matter, it does not appear that, this action is scandalous or frivolous or vexatious. This conclusion warrants dismissal of summons filed by the defendant with reasonable costs to the plaintiffs.
14. In result, I make the following orders,
 - a. The summons filed by the defendant is dismissed, and
 - b. The defendant should pay a summarily assessed cost of \$ 1,000 to each plaintiff within a month from today. The total cost is \$ 2,000.

At Lautoka
24.06.2022




U.L. Mohamed Azhar
Master of the High Court