

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 375 OF 2018

BETWEEN : ALOFA SERUVATU t/a ALOFA SERUVATU
LAWYERS
PLAINTIFF

AND : MOHAMMED TALIF AHMED NAGIFF and
MOHAMMED HANIFF NAGIFF
1st DEFENDANTS

AND : PHILOMENA SHIRLEY ANDREWS
2nd DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Ms. S. Kunatuba for the plaintiff
: Mr. S. Rattan for the second named first defendant and the
second defendant

Date of Hearing : 17 March 2021
,

Date of Decision : 31 August 2022

DECISION

PRACTICE & PROCEDURE

Summons to strike out – No reasonable cause of action –

Taxation of costs – Whether action filed in the proper administrative division – Section 79 (1) Legal Practitioners Act 2019 – Orders 4 rule 1, 18 rule 18 (1) (a) and 32 (9) (a) & (k) of the High Court Rules 1988.

The following cases are referred to in this decision:

- a. *Mishra Prakash and Associates v Lautoka General Transport Ltd* [2008] FJHC 367; HBC 136.2007 (19 December 2008)
 - b. *Patel v Kant* [2015] FJHC 52; HBC 16.2011 (26 January 2015)
 - c. *Razak v Fiji Sugar Corporation Ltd* [2005] FJHC 720; HBC208. 1998L (23 February 2005)
 - d. *AG of the Duchy of Lancaster v London and NW Railway Company* [1892] 3 Ch. 274
 - e. *Drummond – Jackson v British Medical Association and others* [1970] (1) All ER 1094
-

1. The plaintiff filed action claiming a sum of \$696,000.00 together with special and general damages from the defendants. The plaintiff pleaded that she agreed to carry out legal work for the defendants in respect of probate action HBC 36 of 2015 concerning the estate of Mohammed Nagiff. The dispute in that case concerned the refusal of the trustee in the estate of Mohammed Nagiff to admit that the defendants were beneficiaries of the estate. The plaintiff pleaded that at the time of executing instructions, the defendants agreed with the plaintiff that legal fees would be on a contingency basis. However, the plaintiff pleaded, the defendant had failed to settle her full bill of costs.
2. The first named first defendant denied the plaintiff's claim in a brief statement of defence. The second named first defendant and the second defendant filed their defence on 23 July 2019. On the same day, the second named first defendant and the second defendant filed summons under Order 18 rule 18 (1) (a) of the High Court Rules 1988 to strike out the plaintiff's statement of claim.
3. Thereafter, the plaintiff and the defendants entered terms of settlement on 6 November 2019 and an order to that effect was sealed on 18 December 2019. In terms of the order, proceedings against the first named first defendant was terminated, and the plaintiff was to pay the first named first defendant \$6,000.00

as costs. The plaintiff has not taken steps to remove the name of the first named first defendant and amend the statement of claim to the extent necessary to reflect the consent order.

4. At the hearing into the strike out application, the second named first defendant and the second defendant contended that the legal fees claimed by the plaintiff is exorbitant and grossly excessive. They denied owing legal fees, and submitted that they had overpaid the plaintiff. They submitted that there was no prior agreement as to the manner in which the charges were to be applied between the parties, and that they terminated the services of the plaintiff due to delay, negligence, overcharging and incompetence.
5. The defendants submitted that the bill was issued to Philomena Shirley Andrews, Shaira Bibi Nagiff, Sharine Nisha Nagiff, Mohammed Hanif Nagiff and Mohammed Ashraf Nagiff, but the plaintiff had sued only Philomena Shirley Andrews and Mohammed Haniff Nagiff were sued to recover the fees. They submitted that the plaintiff had failed to provide particulars of the bill, and that a client is entitled to request for particulars of charges in terms of section 80 (1) of the Legal Practitioners Act 2009. The defendants submitted that the action should be struck out as the bill of cost was deliberately exaggerated and that the action is a serious misuse of the courts procedure.
6. In reply, the plaintiff submitted that a detailed bill of costs was sent to the defendants' lawyers on 20 December 2017, detailing the work with dates and available hours. The plaintiff submitted that after the defendants paid \$63,000.00, there is an outstanding fee of \$696,250.00. The plaintiff has gone into great details in her submissions to counter the claims made by the defendants in their written submissions.
7. A reasonable cause of action means a cause of action with some chance of success¹. The phrase "no reasonable cause or defence" has been explained as no reasonable cause disclosed upon the face of the pleadings². The power to strike out is a

¹ Razak v Fiji Sugar Corporation Ltd [2005] FJHC 720; HBC208. 1998L (23 February 2005)

² AG of the Duchy of Lancaster v. London and NW Railway Company [1892] 3 Ch. 274 at 277

summary power which should be exercised only in plain and obvious cases³. The English authorities laying down these propositions have been cited with approval by the courts in Fiji.

8. The plaintiff's claim is for contingency fees. This is allowed in terms of section 78 of the Legal Practitioners Act. The plaintiff has the burden of establishing her case through evidence and according to the provisions of the Act. The main contention of the defendants is that the bill of costs is excessive and unreasonable. The plaintiff's claim and the matters raised by the defendants are matters of a factual nature that must be contested at a trial. These are matters that must be established through evidence. This is an application under Order 18 rule 18 (1) (a). The rules specifically say that evidence will not be admissible on an application under paragraph (a) of the rule. Because of this prohibition, the parties have not filed affidavits. They have, however, included matters that must be left for evidence in trial, in their written submissions. This is not the intention of the rule. The intention is to strike out causes of action that are clearly unsustainable and, therefore, disclose no reasonable cause of action. Disagreements over matters of fact must be thrashed out at the trial, where oral and documentary evidence can be admitted according to law, and counsel can test the veracity of evidence.
9. The defendants stated that the plaintiff has not taxed costs and that this was necessary before filing action in terms of section 79 (1) of the Legal Practitioners Act. In this regard they relied on the decisions of *Mishra Prakash and Associates v Lautoka General Transport Ltd*⁴ and *Patel v Kant*⁵.
10. Section 79 of the Legal Practitioners Act 2009 is reproduced below:
 - (1) "Every practitioner shall be entitled to sue for and recover the practitioner's costs pursuant to any agreement made in accordance with the provisions of this Part, or in the absence of such agreement in accordance with the schedules of fees established by regulation pursuant to this Part, together with any proper disbursements, in respect of services rendered whether as a legal practitioner.

³ Drummond – Jackson v British Medical Association and others [1970] (1) All ER 1094 at

⁴ [2008] FJHC 367; HBC 136.2007 (19 December 2008)

⁵ [2015] FJHC 52; HBC 16.2011 (26 January 2015)

- (2) It shall not be necessary for a practitioner to have such costs taxed prior to instituting proceedings for recovery of those costs. In the absence of taxation no claim may be made by the practitioner for any costs which are, pursuant to such agreement or the appropriate schedule of fees, as the case may be, left to the discretion of the taxing officer”.
11. Section 79 (2) of the Legal Practitioners Act makes it clear that it is not necessary for a practitioner to have costs taxed *prior* to instituting proceedings for recovery. In *Mishra Prakash*, the master opined that taxation prior to commencement of action was the appropriate approach to take, but added that each case must be decided on its own facts. The defendants have not satisfied court that the plaintiff’s claim should be struck out before trial on this ground
 12. The defendants say that this court has no jurisdiction to hear this action as the plaintiff has instituted action in the wrong administrative division. They submitted that the five properties which are the subject of the injunction application (the reference is to an application made by the plaintiff) are all situated in the western division, and that the defendants are residents of Lautoka. The discussions between the plaintiff and the defendants, they submitted, occurred within the territorial jurisdiction of the High Court of Lautoka.
 13. In response, the plaintiff submitted that her claim related to probate action HPP 36 of 2016, which was filed in the High Court, and the action was filed in the principal probate registry in Suva. She submitted that the case could be transferred to the Lautoka High Court in terms of the rules.
 14. The defendants did not bring to the attention of court any statutory provision or rule by which the plaintiff’s action stood to be dismissed for want of jurisdiction. Order 4 rule 1(1) of the High Court Rules says that proceedings must ordinarily be filed in the High Court registry located in the division in which the cause of action arises. Order 4 rule 1 (4) says that any action commenced in the High Court may be transferred by the court from one High Court registry to another or to a Magistrate’s Court. Section 6 (1) of the High Court Act says that all judges of the court shall have in all respects equal power, authority and jurisdiction except

where it is otherwise provided in the Act. Section 6 (2) says that any judge of the High Court may exercise all or any part of the jurisdiction vested in the court.

15. These provisions are clarified by the Chief Justice's Circular Memorandum 1 of 2000 titled, 'Commencement of Proceedings and Allocation of Business'. This practice direction, issued by Chief Justice Tuivaga on 31 August 2000, states that the purpose of the rule in Order 4 rule 1 is to facilitate the orderly and convenient dispatch of the business of the courts. It went on to state that where it appears that proceedings have been commenced in the wrong administrative division or where there is disagreement as to the appropriate division the matter should be placed before the chief registrar or a deputy registrar as soon as possible after the proceedings have been commenced. The practice direction stated that the chief registrar has power to direct where a matter is to proceed and also has power to direct that a matter which has been commenced in one division should be transferred. Order 32 rule 9 (a) and (k) of the rules of the High Court are relevant for the purpose of fixing a trial and transferring proceedings. The direction made it plain that the High Court sits in three locations and that these are three branches of a single High Court.
16. If the plaintiff or a defendant makes application to transfer this case, the court, after consideration, has the authority to transfer the case to Lautoka, if that is indeed the most appropriate location for hearing of the trial. The court notes that there has never been an application from the defendants to transfer the case to Lautoka.
17. On a reading of the pleadings before court, there appears no justification to strike out the action. It may well be that the defendants are proved right after full trial, upon a consideration of the evidence. Such a possibility alone does not justify throwing out the plaintiff's action at this stage for want of reasonable cause under Order 18 rule 18 (1) of the rules. The defendants' summons to strike out is declined.

ORDER

- A. The summons to strike out by the second named first defendant and the second defendant is struck out.

- B. The second named first defendant and the second defendant are directed to pay the plaintiff costs summarily assessed in a sum of \$750.00.

Delivered at **Suva** this **31** day of **August, 2022**



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge