

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 123 OF 2018

BETWEEN : **IN THE ESTATE OF SOM KISHORE SHARMA** aka **SOM KISHORE SHARMA** (deceased) by its Administratrix **LEELA DEVI SHARMA** of Togobula, Nadroga
PLAINTIFF

AND : **VINOD SHARMA, VIVITA NACEWA SHARMA** and **VEENA KIRAN SHARMA** Navutu, Shopkeeper, Retired School Teacher and School Teacher
1ST DEFENDANT

AND : **REGISTRAR OF TITLES** appointed under the Provisions of the Land Transfer Act with Office at Civic Tower, Suva
2ND DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. Maopa, for the Plaintiff
Mr. E. Dass, for the 1st Defendants.
Mr. S.Kant , for the 2nd Defendant

DATE OF HEARING : 21st September, 2022.

WRITTEN SUBMISSION: By the 1st Defendants on 21st September, 2022.

DATE OF RULING : 26th January, 2023

RULING

A. INTRODUCTION:

1. This Ruling pertains to the Summons filed by the 1st Defendants on 9th March, 2022, seeking to Strike Out the Plaintiff's action under Order 18 Rule 18 (1) of the High court Rules of 1988 and the inherent jurisdiction of this Court, on the following grounds that;
 - i. It is an abuse of the process of the court,
 - ii. It is scandalous, frivolous or vexatious,
 - iii. It is Res Judicata.

2. The said Summons is supported by the Affidavit of Vivita Naceva Sharma, the 2nd named 1st Defendant, sworn on 8th March, 2022 and filed along with documents marked as "VNS-1" to "VNS-6"

B. BACKGROUND FACTS.

3. The first named 1st Defendant, **Vinod Sharma (Vinod)**, and **Som Kishore Sharam (Som)** in respect of whose Estate this action has been filed, were sons of late **Ashwani Kumar Sharma (Ashwani)**, who had predeceased his said Sons and his wife **Lila Wati Sharama (Lila)**
4. The second named 1st Defendant, **Vivita Nacewa Sharma (Vivita)**, and the third named 1st Defendant, **Veena Kiran Sharma (Veena)**, are respectively wife and daughter of the first named 1st Defendant, Vinod.
5. Som's and Vinod's Father Ashwani, who had become the Lessee of the Lease No-3991 on 14th December, 1972, by his Last Will had bequeathed the Lease (subject matter land) unto his wife **Lila Wati** and to said two sons **Som** and **Vinod**.
6. Said **Vinod**, who later became the executor of Ashwani's will, executed a Mortgage over the subject matter land in Lease No. 3991 in the name of his wife Vivita, the 2nd named 1st defendant, who after sometime exercised her Mortgage right by Mortgagee sale and sold the land unto her Daughter "**Veena**" the third named 1st Defendant.
7. After becoming the registered proprietor, Veena, entered into a, purported, Tenancy Agreement with the Plaintiff **Leela Devi Sharma**, who lived at the subject matter land and premises together with her children, Aten Sharma, Ashika Sharma & Amit Sharma, as the surviving heirs (wife and children) of **Som**.
8. After sometimes, on the ground of arrears of rent, **Veena**, as the registered owner, filed eviction proceedings bearing no HBC 116 of 2013 against the Plaintiff under section 169 of the Land Transfer Act (Cap 131). The plaintiff, who had appeared therein as the Defendant disputing the ownership of the plaintiff therein (**Veena**), according to the then Master Mohamed Ajmeer (as he then was), had failed to adduce the ground to justify her occupation and eventually Master on 20th May, 2014 made the Orders, inter alia, to evict the Defendants (Plaintiff hereof) from and out of the subject matter land.
9. Being aggrieved by the above Order, the Plaintiff hereof as the Defendant therein, on 10th June, 2014, filed papers seeking reliefs, inter-alia, leave for Enlargement of time to appeal the Master's decision dated 20th May, 2014 and to adduce fresh evidence in Appeal. The judge, who heard the matter (A. Tuilevuka -J) by his ruling dated 28th June, 2016 dismissed the Application of the Defendant -intended Appellant thereof, who is the Plaintiff hereof.
10. However, during the time material (on 05th November, 2014) the plaintiff hereof, **LEELA DEVI**, had filed another action bearing No.HBC-94 of 2014 by her writ of Summons and Statement of claim against the 1st Defendants hereof Vinod, Vivita and Veena, seeking the following reliefs;

- a. *A declaration that Transfer by Mortgage sale Number 756880 of Crown Lease Number 3991 to veena Kiran Sharma was obtained by fraud.*
- b. *A declaration that Veen a Kiran Sharma, holds Crown Lease Number 3991 in Trust for Vinod Sharma, Estate of Lila Wati and Estate of Som Kishore Sharma, until cancelled for fraud by the 2nd Defendant.*
- c. *An Order that 2nd Defendant cancel the Transfer by Mortgage sale Number 756880 registered on Crown Lease Number 3991 over lot 1 on plan N.1651 Togabula part of in the Tikina of Molomalo comprising 1 rood 02 perches. in the province of Nadroga.*
- d. *An Order that subject to consent of iTaukei Land Trust Board, the first named 1st Defendant as Executor and Trustee of the Estate of Ashwani Kumar Sharma, transfer Crown Lease Number 3991 to himself, the Estate of Lila Wati Sharma, and the Estate of Som Kishore Sharma, in equal shares.*

11. The 1st Defendants in the said action HBC 94 of 2014, having filed their Statement of Defence dated 30th October, 2014, chose to file Summons to Show Cause dated 14th July, 2016, under Order 25 Rule 9 of the High court (Amended) Rules, 2005 and under the inherent jurisdiction of this Court.
12. Having heard the said Summons to show cause, the learned Master by his Ruling dated 13th June, 2018, struck out the plaintiff's Action No. 94 of 2014, together with a cost in a sum of \$500,00 payable by the Plaintiff. It was after this Striking out Order was made, the Plaintiff filed the Action in hand HBC-123 of 2018 seeking the same reliefs as in Action No-94 of 2014 as averred in paragraph 10 above.
13. After completion of the pleadings, when the matter was to be fixed for Trial, the 1st Defendants filed the Summons in hand seeking for Striking Out, supported by the Affidavit sworn by Vivita Nacewa Sharma, the second named 1st Defendant, in response to which the Plaintiff filed her Affidavit in opposition on 27th June, 2022. No Affidavit in reply has been filed by the 1st Defendants.

C. HEARING OF CURRENT SUMMONS:

14. At the hearing held before me on 21st September, 2022, counsel for the parties made oral submissions. Additionally, counsel for the 1st Defendants filed written submissions as well, along with the cited authorities.

D. SUBMISSIONS OF DEFENCE COUNSEL:

15. Counsel for the 1st Defendants, purports, to rely on the judgment of *Wigram VC in Hendersen –v- Hendersen (1843) Hare 100*, which is a leading case when it comes to striking out of pleadings more so especially under *Res Judicata*. Attention has also been drawn to, *Clark L J in Daxer Ltd –v- Vieland boddy [2003] EWCA*, wherein at para 49, the reformulated

rule in Hedersen by the House of Lords in Johnson –v- Gore Wood , is comprehensively summarized.

16. Counsel also submits on the Test applied in **Port of Melbourne Authority –v- Anshun Proprietary Limited [1981] HCA 45 147 CLR 589**. Which says *“the Question that needs to be determined is whether the causes of action in the second action are ‘so relevant to the subject matter of the first action that it was unreasonable not to rely upon it”*
17. Relying on the above authorities, counsel for the 1st Defendants submits that the cause of action in Civil Action No. HBC 94 of 2014 is similar to the cause of action in this current action no. HBC 123 of 2018 and same reliefs prayed for in the current action were prayed for in the previous action no. HBC 94 of 2014 as well.
18. It is alleged, by referring to the said action no; HBC 94 of 2014, that the Plaintiff has abused the process of this Court by bringing the current action no. HBC 123 of 2018, which had the same issues that was adjudicated by the Master, whereby the Plaintiff’s pleadings were struck out for want of prosecution.
19. Making submissions on Civil Action no; 116 of 2013, wherein the third named 1st Defendant Veena , had moved the Court under 169 of the Land Transfer Act and obtained an Order for the eviction of the Plaintiff , counsel argues that though the current Plaintiff made an Appeal against it, same was dismissed by Justice Tuilevuka. It is submitted that after the said dismissal , the current Plaintiff filed the action no: HBC-94 of 2014 and same was struck out by the Master and instead of Appealing the same or applying for reinstatement , the Plaintiff has filed this action for which they are barred from bringing it under the Henderson Rule.

E. SUBMISSIONS OF PLAINTIFF’S COUNSEL:

20. Counsel for the Plaintiff submitted that though the current action may have the same issues, the Court has not adjudicated nor has the Court heard the merits of the case. That the present case is not estopped by the doctrine of *res judicata* as the Court is yet to hear the merits of the issues sought in the Plaintiff’s actions and the action No-HBC 94 of 2014 was struck out under Order 25 Rule 9 as the previous Solicitors had failed to attend to move that case in Court.
21. That the section 169 Application by the third named 1st Defendant was for an eviction Order, which is a distinct one from the current proceedings wherein the Plaintiff seeks remedy for issues of breach of fiduciary duties, fraud and misrepresentation against the Defendants. There has not been any decision or judgment on the merits of the cases in HBC 94 of 2014 and/or in HBC 123 of 2018, and therefore this action is not an abuse of process.
22. It is also submitted that the striking out of the previous action no: HBC 94 of 2014 by the Master for want of prosecution does not mean that the competent Court has adjudicated

on the issues, and the merits of the action is yet to be gone into and determined by the Court.

F. DISCUSSION & DECISION:

23. 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”.

24. The main allegation of the Plaintiff against the 1st Defendants in her earlier action No. HBC-94 of 2014 and in the present action No.HBC-123 of 2018 is the failure of the fiduciary duty by the first named 1st Defendant to ensure that he set apart the one third share of the said leased land to the said **Som Kishore Sharma**, one third share to **Lila Wati Sharma**, and one third share to himself.
25. The next complaint is the fraud, allegedly, committed by the first named 1st Defendant, being the executor, by Mortgaging the entirety of the subject matter land unto his wife, the second named 1st Defendant and thereafter the second named 1st Defendant fraudulently transferring the subject matter land by a purported Mortgagee Sale unto their Daughter, the third named 1st Defendant.
26. It is also alleged that the first named 1st Defendant failed to carry out his duties as the Executor and Trustee of the said Ashwani's Will dated 23rd December, 1978, and by refusing or failing to discharge his duties unto said **Som Kishore Sharma** and **Lila Wati**, he caused the destruction of the Plaintiff's interest in the Estate of **Som Kishore Sharma**. Further, it is alleged that instead of ensuring the Plaintiff's right for continued living on the leased Land, transferred it, with the consent of the Director of Lands, unto three of them to become as joint owners.
27. The allegation that the first named 1st Defendant set up a scheme to Mortgage the leased land to his wife, which is a part of the Estate of Ashwani Kumar Sharma, administered by him, then not to pay the mortgage and thereafter for his wife to sell the said lease land unto their own Daughter by the mortgagee sale, cannot be disregarded or lightly taken. The allegation continues further that the Daughter got the Plaintiff to enter into a rental Agreement in respect of the lease land and finally filed an eviction proceeding against the Plaintiff. The above transactions require an in-depth scrutiny as to the genuineness of them at a full-scale trial.
28. The Plaintiff alleges misrepresentation with regard to the annual rent payable to the iTaukei Land Trust Board, by causing her to sign a Tenancy Agreement forcibly and subsequently filing of the 169 Action No.116 of 2013 to have her evict from the Land and premises, which she had occupied over 30 years.
29. It is to be noted that none of the above allegations have been gone into by the Court at a Trial by taking evidence in the former action No.HBC 94 of 2014 and no decision or judgment has been pronounced, except for striking out the said action for non-prosecution under Order 25 Rule 9. Had the said matter proceeded, issues and admissions would have been framed, evidence would have been led and the Court would have arrived at a final judgment as far as the allegations and the claim of the Plaintiffs are concerned.

30. 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 trial of the mater by adducing evidence.
31. The question here is whether the Ruling made by the Master on 13th June, 2018 in the previous action no.94 of 2014 operates as Res Judicata for the current action No HBC 123 of 2018. The answer to this question, with no hesitation, I would say "NO". Surprisingly, counsel for the 1st Defendants is in an attempt to paint a different picture to show that the Master has gone into the merits of the action and finally decided the matter once and for all. The Court is yet to go in to the merits of the action by receiving evidence, particularly, about the allegation of fraud, misrepresentation and failure of duty on the part of the Executor, the first named 1st Defendant and on the role alleged to have been played by his wife and daughter, the second named and third named 1st Defendants respectively.
32. Whether a fraud was perpetrated, or misrepresentation, and failure of fiduciary duty on the part of the Executor is purely a matter of evidence. Therefore it cannot be said that the plaintiff's action is an abuse of process of the Court, it is scandalous, frivolous or vexatious. In the light of what was stated above, the purported defence of *Res- Judicata* has no room at all to fix into this matter and it should necessarily fail.
33. 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 evidence to form an opinion that the current proceeding is an abuse of the process of the court. The averments in the statement of claim clearly show that the plaintiff has a reasonable cause of action.
34. 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.
35. An order dismissing an action for want of prosecution is not a decision on the merits, and does not operate as *res judicata*, and accordingly, unless the relevant time limit has expired, the Plaintiff is at liberty to bring a second action upon the same facts against the same defendant, see *People v Evans [1969] 2 Ch 255, [1968] 2 All ER 743*.
36. In **Spencer Bower, Turner and Handley** – The Doctrine of *Res Judicata* – 3rd edition, pages 9-10, it is thus stated. "Where a final judicial decision has been pronounced on the merits by anjudicial tribunal with jurisdiction over the parties and the subject matter, any party to such litigation, as against any other party..... is estopped in any subsequent litigation from disputing such decision on the merits, whether it be used as the foundation of an action or as a bar to any claim....., provided the party entitled raises the point at the proper time".
37. It will be noted that the first action HBC-94 of 2014 was struck out by the Master pursuant to Order 25 Rule 9 of the HCR for non-prosecution of the action by or on behalf of the Plaintiff and not on consideration of merits. As observed above, it can be correctly identified that the principles of *res judicata* would not apply to the first action as it was struck out for want of prosecution and that ruling by the Master was only an administrative step and not a

pronouncement delivered after taking evidence and considering the merits of the action. Thus, the former action no. HBC 94 of 2014 and the ruling made by Master on it on 13th June, 2018 will not operate as *Res- Judicata*.

G. CONCLUSIONS:

38. On careful perusal of the pleadings, this Court is of strong view that the Plaintiff has a reasonable course of action and her exercise of filing the action in hand is not an abuse of process of the Court. Also it is not scandalous, frivolous or vexatious and it is not caught up in the defence of *Res- Judicata* advanced on behalf of the 1st Defendants. The Plaintiff should have her day in Court to unfold her side of story by way of evidence with no further hindrance. Given the circumstances, she should be awarded a reasonable sum by way of summarily assessed costs in respect of this proceeding.

H. FINAL ORDERS:

- a) The Summons filed by the 1st Defendants to strike out the Plaintiff's action fails and the same is hereby dismissed.
- b) Plaintiff's action should proceed for trial.
- c) The 1st Defendants shall pay the Plaintiff a sum of \$1,500.00, being the summarily assessed costs, which shall be paid within 28 days from today.
- d) Matter to be mentioned to fix for trial.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 26th day of January, 2023.

SOLICITORS:

For the Plaintiff: Babu Singh & Associates
For the First Defendant: M/S Pillai Naidu & Associates
For the Second Defendant: Office of the Attorney General