

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 82 of 2015

BETWEEN: KAMLESHAN SAMI MUDALIAR of Lot 5 Wainabuku Subdivision, 9
Miles, Taxi Driver.

PLAINTIFF/RESPONDENT

AND: PUSHPA MUDALIAR aka PUSHPA WATI DEVI of 9216 Sierra River
Drive, Elk Grove, CA 95624, USA, Supervisor

DEFENDANT/APPLICANT

BEFORE: Hon. Mr Justice Vishwa Datt Sharma

COUNSEL: Mr. Kumar S. for the Plaintiff/Respondent
Mr Narayan E. for the Defendant/Applicant

Date of Decision: 14th July, 2023 @ 9.30am

DECISION

[Withdrawal as Counsel pursuant to Order 67 Rule 6 and Order 2
and Summons to show cause pursuant to Order 25 Rule 9 of the
High Court Rules, 1988]

On the outset, I also reference to my earlier Decision delivered on 27 October 2022.

Introduction

- 1) Before this Court is a Two-Tier application. The Counsel representing the Plaintiff/Respondent sought by Summons to withdraw as Solicitors for the Plaintiff whilst the Counsel Representing the Defendant/Applicant by Summons sought for an order that the Plaintiff/Respondent to show cause why the within cause or matter should not be struck out forthwith for want of prosecution or as an abuse of the process of the Court upon the Grounds:

1.
 - (i) That since the pleadings in the within action having closed on 5th May 2015 there has been prolonged or inordinate and inexcusable delay on the part of the Plaintiff/Respondent to prosecute the action with reasonable diligence or expedition;
 - (ii) That the said delay in the part of the Plaintiff/Respondent is both intentional and inordinate given that it is a period of about 6 years since the close of pleadings
 - (iii) That the said delay in prosecution of the action is causing or likely to cause serious prejudice to the Defendant/Applicant; and
 - (iv) And upon further grounds set out in the Affidavit in Support of the Summons filed herein
2. That the Plaintiff/Respondent do pay costs of this application on a solicitor-client indemnity basis.
3. That all monies paid into this Honorable Court on 17th day of June, 2021 by the Defendant/Applicant pursuant to this Honorable Courts Order by the then Hon. Mr. Justice Kamal Kumar of 28th June 2016 be forthwith paid out to the Defendant/Applicant and/or its authorized solicitors, Patel Sharma Lawyers following the Order for Striking out of the within action.
4. Any other orders that the Court deems just and expedient.

The Law and Practice

- 2) *Order 25 Rule 9 of the High Court Rules 1988, which inter-alia states as follows:*

"9. - (1) If no step has been taken in any cause or matter for six months then any party on application or the Court of its own motion may list the cause or

matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.

(2) Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions.

- 3) Order 25 Rule 9 was introduced on 13th September 2005. After the introduction of this rule the Court of Appeal has had the opportunity to review the law on want of prosecution in Fiji both before and after the coming in to effect of the same.
- 4) Prior to the introduction of Rule 9, the Court of Appeal in *Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime* Civil Appeal No. ABU 0024 of 2000s (30th May 2003) in readopting the principles expounded in *Birkett v. James* [1978] AC 297; [1977] 2 All ER 801 and explained that:

"The power should be exercised only where the court is satisfied either (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party."

- 5) Basically, the Court of Appeal affirmed the principle enunciated in *Birkett v. James* (1978) AC 297 (1977) 2 ALL ER where the House of Lords held as follows:-

"The power should be exercised only where the court is satisfied either:-

- (i) That the default has been intentional and contumelious e.g.: disobedience to pre-emptory order of the court or conduct amounting to an abuse of the process of the court; or
- (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers (in the present case Defendant's lawyers); (b) that such delay would give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or is such as it likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party."

- 6) After the introduction of Order 25 rule 9, *Birkett v. James* was revisited by the court of Appeal. This largely arose due to the case management system introduced by the Court to agitate those cases which were lying idle in the registry for many years some ranging over 20 years. This High Court had tended to strike-out the actions based on delay alone.
- 7) The first case which went on appeal and decided by the Court was *Bhawis Pratap v Christian Mission Fellowship* Civil Appeal No. ABU 0093 of 2005 (14 July 2006). His

Lordship Mr. Justice Coventry struck out the action on a number of grounds one of which was delay of 7 years since the action was filed. On appeal, after reviewing the law on want of prosecution the Court of Appeal affirmed that the applicable law in this country is still as was pronounced in *Birkett v. James*. At para 23 of judgment the Court unreservedly stated:-

"[23] - The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by this court on several occasions. Most recently, in Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime Civil Appeal No. ABU 0024 of 2000 - FCA B/V 03/382 the court, in readopting the principles expounded in Birkett v. James [1978] AC 297. [1977] 2 All ER 801"

(2) Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions."

- 8) Again the Court of Appeal was invited to consider the position of Order 25 rule 9 in the *Trade Air Engineering (West) Ltd v. Tago Civil Appeal No. ABU 0062 of 2006 (9 March 2007) (per Gordon P, Banker and Scott JJA*. In considering the appeal the Court categorically formulated the following question:-

"[4] - The central question raised by this appeal is whether the Court's powers under O 25 R 9 should be exercised in substantial conformity with the powers it already possessed prior to the making of the new rule or whether an additional jurisdiction, exercisable on fresh principles, has been conferred on the Court "

- 9) In observing the new feature of Order 25 Rule 9 their Lordships stated:-

"[15] - A notable feature of the new Order 25 Rule 9 is that it confers on the court the power to act on its own motion. Within our present High Court Rules such a power is only rarely conferred. One example is O 34 R 2 (6), another is O 52 R 4. In a number of overseas jurisdictions much wider case management powers have been given to the High Court and most of these powers are exercisable upon the court's own motion. Such developments have however not yet reached Fiji."

- 10) Their Lordships then conclusively and unanimously held that:-

"[16] - In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority."

- 11) The issue then is whether delay alone is sufficient for the Court to strike-out an action for want of prosecution. The Court of Appeal in *New India Assurance Company Limited*

v. *Rajesh Kumar Singh* Civil Appeal Number ABU 0031/1996 emphasized that while inordinate and inexcusable delay might be established, these factors were not, on their own, sufficient to warrant the striking out of the action.

- 12) The Court of Appeal in *Bhawis Pratap v Christian Mission Fellowship* (supra) discussed and distinguished the new rules which applied in England after the introduction of the new Civil Procedure Rules after 2000 inter-alia as follows:-

"[28] *Securum Finance Limited v. Ashton* (supra) is especially instructive since it explains why, following the introduction of the new Rules, the courts in England and Wales have been more ready to strike out actions on the ground of delay alone. At paragraphs 30 and 31 Chadwick L.J wrote that:

"30 the power to strike out a statement of claim is contained in CPR r3.4. On particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case ... if it appears to the court that the statement of case is an abuse of the court's process. ...In exercising that power the court must seek to give effect to the overriding objective set out in CPR 1.1: see rule 1.2 (a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly": see rule 1.1 (1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into accounts the need to allot resources to other cases".

"31 In the *Arbutnot Latham* case this court pointed out in a passage which I have already set out that:-

"In *Birkett v. James* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration which was in issue. From now on it is going to be a consideration of increasing significance."

[29] In Fiji there is as yet no equivalent of the English CPR r 1.1 or 3.4 and therefore the approach exemplified in *Securum* has not yet become part of our civil procedure.

- 13) Thus, the developments which have been taken in England after the introduction of the new rules do not apply in this instant to Fiji without the introduction of new rules. As such the principle in *Birkett v James* applies on all fours. This was also confirmed by the Court of Appeal again in 2008; *Avinash Singh v Rakesh Singh, Nirmala Devi & Sarojini Kumar* Civil Appeal No: ABU 44/06 (8 July 2008).

Analysis and Determination

- 14) Order 67 Rule 6 of the High Court Rules sets forth the procedure to be adopted by Counsel who has ceased to act for a party. Order 67 Rule 6(2) provides that the application must be served unless the Court otherwise directs.

- 15) It seems appropriate in the Circumstances of this case as outlined in the Affidavit in Support deposited by Bed Wati Kumar "that the Law Firm of Sunil Kumar Esquire's communication or contact with the Plaintiff was in 2018, when the Plaintiff then moved and engaged Messrs Singh and Singh Lawyers who subsequently took over the file from their Law Firm."
- 16) Sunil Kumar Esquire's Law Firm came to know thereafter that Messrs Singh and Singh Lawyers had taken over all the Matters and had appeared before the High Court and the Fiji Court of Appeal.
- 17) Thereafter, Singh and Singh Lawyers underwent receivership and Messrs Nilesh Sharma Lawyers was appointed as a receiver of the law firm."
- 18) Bearing above in mind, coupled with Bed Wati Kumar's Affidavit in Support, I find that there has not been any further contact with the Plaintiff, Kamlesh Sami Mudaliar with the Law Firm of Sunil Kumar Esquire and that the Counsel has no knowledge of the Plaintiff's whereabouts and his residency. I have no alternative but in the circumstances grant the Law Firm of Sunil Kumar Esquire Leave to dispense with Service of his summons and Affidavit in Support filed in Court on 12th April 2023 and I proceed to grant leave for counsel for the Plaintiff to withdraw as solicitors for the Plaintiff accordingly.
- 19) In terms of the Defendant/ Applicant's summons filed on 25th June 2021, the Plaintiff, Kamlesh Sami Mudaliar, is required to show cause and this Court to determine as to why the Plaintiff's action ought not to be struck out for want of Prosecution or an abuse of the process of this Court.
- 20) It is important that upon my perusal of the entire Court file that I set out hereunder the relevant chronology in relation to the within action since 05th February 2015.
- 21) On or about 05th February 2015, the Plaintiff issued Writ of summons and Affidavit in Support seeking Ex-Parte Orders which were granted on 10th February 2015.
- 22) On 9th March 2015, Affidavit in Opposition was filed. Followed by an Affidavit in Reply on 11th March 2015. On 12th March 2015 parties were directed to file submissions, Statement of Claim, Statement of Defence and Counterclaim and Reply to Defence and Counterclaim. Subsequently Statement of Claim was filed by the Plaintiff on 10th April 2015. On 20th April 2015 Statement of Defence and Counter Claim was filed. 29th April 2015 submissions filed by the Defendant and on 5th May 2015 Reply to Defence and Defence to Counterclaim Filed. On 12th May 2015 Inter-parte Hearing conducted on

extension of caveat and injunction application, 28th June 2016 Judgement delivered ordering removal of the Plaintiff's caveat no. 763056 and for the Defendant to deposit 1/3 of the net sale of proceed into court of the property is sold. On 5th September 2016, Striking Out Application for Leave to Appeal, Stay of Execution and Leave to Appeal out of time. On 6th September 2016 inter-partes summons and Affidavit in Support filed in the Fiji Court of Appeal seeking leave to appeal the decision delivered on 28th June 2016. On 22nd September 2017 the Court of Appeal delivered its ruling wherein application for leave to appeal was dismissed with no order as to costs.

- 23) That against the above set out relevant chronology the Plaintiff/Respondent has taken no further steps within the matter since 5th May 2015 when the pleadings in the within action were deemed to have closed.
- 24) That the Plaintiff/Respondent has failed and continuously failed to expedite prosecution of the within action and has for about six years failed to comply with the Rules of the High Court, including failing to issue Summons for Directions, obtaining and complying with Orders for discovery and inspection, preparation of Bundle of Documents, Pre-Trial Conference and filing of Pre-Trial Conference Minutes and issuing any Order 34 summons for entering the matter for trial.
- 25) The Plaintiff/Respondent has left the jurisdiction on or about 2017 and has permanently migrated to California, United States of America.
- 26) The subject matter related to a dwelling house property comprised in Crown Lease No. 23089 being Lot 5 Wainibuku Subdivision.
- 27) That on or about 19th April 2021, the said property was sold and transferred to RC Manubahi Holdings Pte Limited vide Transfer and Lodgement Slip No. 451924 at the office of the Registrar of Titles
- 28) That this Court was informed by Patel Sharma Lawyers that transfer of the property had taken place and is now in the name of a third party and therefore the matter is in disposition.
- 29) That the Order of this Honourable Court by the then Hon. Mr Justice Kamal Kumar and former Acting Chief Justice of 28th June 2016 was *Inter alia*, in the following terms:

"(i) That Caveat No 763056 and dated 16 April 2010, lodged against land known as Lot 5 Wainibuku Subdivision in the Tikina of Suva Province of Rewa containing

three (3) perches comprised and described in Crown Lease No. 1777 be removed forthwith.

(v) That if the Defendant/ Respondent sells the property known as Lot 5 Wainibuku Subdivision in the Tikina of Suva Province of Rewa containing three (3) perches comprised and described in Crown Lease No. 1777 then she deposit one third of the net sale proceeds into High Court Civil Registry which said sum is to be held in an interest bearing account until final determination of this action or until this action is discontinued by the parties or struck out by the Court.

(vi) That each party bear their own costs of the Application.”

- 30) That in terms of the said Order of the Honourable Court, the Defendant/Applicant has caused to be deposited into the High Court 1/3 of the net sale proceeds following the sale of the said property on 19th April 2021
- 31) Hereafter, this court would want to know and needs an explanation as to what proactive actions if any was taken by the Plaintiff to pursue the proceedings further can easily be ascertained from the Chronology of events at paragraph 22?
- 32) It can easily be ascertained and confirmed from the Court records and the chronology of events that the Plaintiff failed to take any proactive measures to diligently pursue this matter in terms of the Plaintiff's Notice of Intention to Proceed upon its expiration of 30 days. Further, there was no appearance by the Plaintiff during the hearing. Thus, no explanation could be ascertained or sought from the Plaintiff in his absence to the proceedings in this Court during the hearing of the Summons to strike out the action for want of prosecution and an abuse of the process of the Court calculated from the last activity of the Plaintiff, the case stayed dormant in the system therein until to-date.
- 33) The onus is on the Plaintiff to provide a cogent and credible explanation for not taking any steps to advance the litigation in this case after filing the Notice of Intention to Proceed on 20th June 2017
- 34) This meant that the time calculated from the last action in terms of the cause of action filed by the Plaintiff on 5th February, 2015 and up to the time of issuance of the Order 25 Rule 9 Summons on 25th June 2021, that a period of little over 6 years had lapsed. In fact the Law requires that the parties to the proceedings must ensure that the pleadings in terms of the Law must be filed and served on the parties to proceedings within a particular time frame provided for to complete the pleadings and allow the case

to be heard and determined either before the Master or a Judge of the High Court accordingly. Therefore, question of case management arises.

- 35) This Court is therefore required to deliberate on the following issues in terms of the Defendant/Applicants summons filed pursuant to Order 25 Rule 9 of the High Court Rules, 1985 to arrive at a determination whether to dismiss the cause or deal with the application otherwise accordingly:
- (i) *that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or*
 - (ii) *that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers; and*
 - (iii) *that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party."*

Default is contumelious

- 36) "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court.
- 37) The Plaintiff/ Respondent has failed to prosecute the action with diligence as is reflected by the chronology of events in the within actions and will cause and likely to cause serious prejudice to the Defendant/Applicant given the following-
- (i) The inordinate and inexcusable delay of about 6 years on part of the Plaintiff/Respondent
 - (ii) In terms of the lack of availability of witnesses at the trial on account of the passage of time of about 6 years.
 - (iii) The Defendant/Applicant's lawful entitlement from the proceeds of the said sale of \$374,106.39 being held up in Court in the Chief Registrar's Bearing Account without just cause and thereby depriving the Defendant of the benefit and the use of the said sum of \$374,106.39 to detriment Defendant/Applicant.
 - (iv) The Plaintiff/Respondent has since May 2015 shown a complete lack of interest in prosecuting the within action with a clear knowledge of injustice and substantial prejudice it has caused and will continue to cause for the Defendant/Applicant.

- (v) That in the premises, the Defendant/Applicant will suffer irreparable harm and substantial prejudice if the within action is not struck out

Delay

- 38) The test for delay is both 'intentional' and 'inordinate'

Intentional

For these two elements to be satisfied, the Defendants/Applicant must establish that the delay was intentional on the part of the Plaintiff/Respondent. In other words the Plaintiff has filed an action with having no intention to proceed with the same and bring the substantive case to its conclusion.

- 39) The Plaintiff/Respondent, Kamleshwar Sami Mudaliar has failed to show any interest in his case in order to bring his case to the final disposition. Since the filing and commencement of this case in 2015, the Plaintiff/Respondent has made no effort to ensure the expedient disposition of his own case rather left the matter pending only to be handled by his counsel and change of counsel and to be dealt with by this Court accordingly.
- 40) However, the Defendant/Applicant's submissions and contention is that since May 2015, the Plaintiff/Respondent has shown a complete lack of interest in prosecuting its own case with diligence and a clear knowledge of injustice and therefore substantial prejudice is been caused and will continue to be cause to the Defendant/Applicant.
- 41) That the Defendant/Applicant will suffer irreparable harm and substantial prejudice if the within substantive action is not struck out
- 42) Apart from the pending substantive matter, the Plaintiff made an application and also sought for an extension of the caveat, then appealed the High Court decision to the Court of Appeal and sought for an order for stay of execution. He failed to succeed at the Appellate Court with regards to his appeal.
- 43) The substantive application thereafter remained undisposed in the system since 2015 to the current time
- 44) This court finds that the Plaintiff at one stage filed the Notice of Intention to Proceed. No steps were taken in the proceedings after the last activity taken by the Plaintiff and the matter was left dormant for a period of over 6 years.
- 45) Neither the Plaintiff nor his counsel of his choice or change in counsel showed up to the Court to show cause as to why the substantive matter ought not be struck out for want of prosecution in terms of Order 25 rule 9 of the High Court Rules

- 46) This Court had to intervene and find out why the Plaintiff and/or his counsels representing the Plaintiff told court that they are not representing him any further.
- 47) What this Court finally understood and ascertained was that the property in question was indisposition and sold to a third party.
- 48) The Defendant has dealt with the property comprised in Crown Lease No. 1777 being lot 5 and the caveat placed by the Plaintiff on the said property and title has been removed by this Court.

Prejudice

- 49) It is trite law that the Defendant must establish that she is prejudiced by the Plaintiff's delay
- 50) Prejudice can be of two kinds. It can either be specific, that is arising from particular events that may or may not have occurred during the relevant period or general that is prejudice that is implied from the extent of the Delay.
- 51) Reference is made to the case of Pratap v Chand (supra) at page 5 where the Judge said:

"In order to justify the striking out of an action, in addition to prolonged delay, prejudice must be shown to have occasioned to the Defendants, in the conduct of their Defence."

- 52) The Defendant submitted that prejudice was not required to be established where the abuse of process is shown citing the case of Growit v Doctor [1997] 2 ALL ER 417 which provides that if the Plaintiff institutes legal proceedings with no intention of bringing the proceedings to an end and leaves the litigation hanging on the heads of the other party, this constitutes an abuse of the process of the Court and the Court is entitled to dismiss the proceedings.
- 53) The parties to this proceeding cannot deny the fact that this matter has been pending in the system since 2015. After carefully perusing the court record I come to one conclusion that the substantive matter in terms of completing the pleadings and its disposition has in fact moved at a Snail pace. This is evident from the chronology of events set out at paragraph 22 hereinabove. It affected the Case Management in the Judicial System. The Plaintiff should have pursued the matter expeditiously, in the best interest of his client (Plaintiff) if it had a case at hand. This was not done. Even when this Court made the substantive orders and directions, the Plaintiff without any difficulty should have pursued with the matter expeditiously and concluded all the necessary pleadings. I reiterate, this was also not done. The Defendant served the Order 25 Rule 9 Summons calculating the lapse of time frame from the commencement of this proceedings in 2015 and until the Plaintiff filed a summons of Intention to Proceed on the expiration of 30 days, it adds up to over 6 years. The witnesses may or may not be available now.

This has not been confirmed to this Court by the Plaintiff and/or by the Defendant and the court was unable to ascertain the explanation hereof

- 54) The overriding objective of the procedural rule and the requirement in *Birkett v James* is to enable the court "to deal with cases justly". Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".
- 55) The Plaintiff has now been found guilty of inordinate and intentional delay and that such delay is inexcusable
- 56) I find that the Defendant has made out a case for prejudice against him.
- 57) Above rational will certainly not alleviate any prejudice to the Defendant in the within proceedings.

Interest of Justice

- 58) Even if the Plaintiff satisfied the requirements in *Birkett v James*, the Courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible. The Court of Appeal in *Chandar Deo v Ramendra Sharma and anor: Civil Appeal No. ABU 0041* of (23 March 2007) (Unrep) stated as follows:-

(15) A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the Birkett v James principles namely: In view of the delays which have occurred, is a fair trial now possible? (Also case of Department of Transport v. Chris Smaller (Transport Limited [1989] AC 1197 refers

- 59) In *Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244 at 248*, Eichelbaum CJ reviewed the authorities and concluded

'The applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.'

- 60) Even the Courts are reluctant to strike- out any matter summarily which has certain merits in it on the grounds of abuse of process. In *Dey v. Victorian Railway Commissioners (1949) 78 CLR 62*, at 91 Dixon J said:-

26. This principle was restated by the Court of Appeal of Fiji in Phatap v Kristian Mission Fellowship [2006] FJCA 41. Also refer to: New India Assurance Co Ltd v Singh [1999] FJCA 69.

The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include: Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James (1978) AC 297; Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde (2000) 201 CLR 552. Indeed the passage from Abdul Kadeer Kuddus Hussein v Pacific Forum Line reflects closely Birkett v James (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.

- 61) I find that in the current it is still not possible to have a fair trial in this case bearing in mind the length of delay. However, I have taken into consideration the time frame from the commencement of this proceeding May 2015 to the current and even if witnesses are available whether the natural ability to recall evidence from the memory after all these years is possible? This will be left at the discretion of the Plaintiff and the Counsel.
- 62) Further, the substantive matter related to a dwelling house property comprised in Crown Lease No. 23089 being Lot 5 Wainibuku Subdivision was sold and transferred to RC Manubahi Holdings Pte Limited vide Transfer and Lodgement Slip No. 451924 at the office of the Registrar of Titles. The transfer of the property had taken place and is now in the name of a third party and therefore the matter is in disposition.
- 63) The Plaintiff and/or his counsel (if any representing) were not present during the hearing of the defendant's summons seeking for striking out pursuant to *Order 25 rule 9* of the High Court Rules 1988. As a result of the Plaintiff and/or his counsel unable to provide any genuine reasons as to why the substantive matter ought to be proceeded with and brought to its conclusion.
- 64) I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and find as follows:-
- (i) *The delay is inordinate and intentional, and in fact there has been a disobedience of a Peremptory and other orders of the Court;*
 - (ii) *Explanation has not been satisfactorily provided by the Plaintiff for the delay to overcome the factor of not inexcusable; (in any event the Plaintiff and /or counsel was absent from the proceedings dealing with Order 25 rule 9)*
 - (iii) *The default is contumelious and the Plaintiff has disobeyed the Court orders;*

- (iv) *The Defendant has suffered real prejudice; and*
- (v) *In the interest of justice, a fair trial will not befit the circumstances of this case or otherwise after lapse of 6 years from 2015 to 2023 still not possible to the current time taking into consideration the long period of time lapsed.*

65) For the abovementioned rational and finding, the Plaintiff's action in this proceedings does not remain intact and this Court accedes to the Defendant's Summons in terms of Order 25 Rule 9 for want of Prosecution against the Plaintiff.

66) Also, this Court can on its own inherent jurisdiction dismisses the Plaintiff's substantive matter for abuse of process. Case hereunder Refers-

Lord "Woolf" in "Grovi and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417, has discussed the principles for striking out for "Abuse of process" (The second ground in Order 25 Rule 9 (1)) as follows:

"The Court had power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to establish want of prosecution by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant. It followed, on the facts that the deputy judge had been fully entitled to strike out the action. The appeal would therefore be dismissed."

67) In terms of costs, the summons of the defendant proceeded to hearing with the defence counsel furnishing court with written submissions and making oral submissions at the hearing. It is only appropriate that I order a summarily assessed cost of \$500 against the Plaintiff herein accordingly.

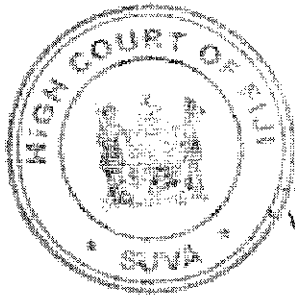
68) For the aforesaid rational, I make the following orders accordingly:-

ORDERS

- (a) The Defendant's Summons seeking the Striking Out of the Plaintiff's substantive action for want of prosecution hereby succeeds against the Plaintiff;
- (b) The Plaintiff's substantive claim herein is dismissed for want of prosecution;

- (c) There will be a Summary Assessed Costs against the Plaintiff in the sum of \$500.
- (d) The sum of \$374,106.39 being the 1/3 of the net sale proceeds deposited into the Chief Registrars Interest Bearing account to be refunded and paid back to the Trust Account of Patel Sharma Lawyers, Suva after the expiration of the appeal period provided for within the rules accordingly.

Dated at Suva this 14th day of July, 2023.



VISHWA DATT SHARMA
JUDGE

Cc: Sunil Kumar Esquire.
Patel Sharma Lawyers, Suva.

