

**IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION**

Civil Action No. 322 of 2015

BETWEEN : RAJENDRA CHAUDHRY of 53C Cavendish Drive, Manukau,
Auckland 2104, New Zealand

Plaintiff

A N D : THE CHIEF REGISTRAR

1st Defendant

A N D : MOHAMMED SANEEM former Acting Chief Registrar

2nd Defendant

A N D : SHALEN KRISHNA a legal practitioner operating under the name and
style of Krishna & Co at 27 Naviti Street, Lautoka

3rd Defendant

A N D : THE ATTORNEY GENERAL

4th Defendant

Counsel: **Plaintiff: Mr. J. Karunarathna**
 1st 2nd and 4th Defendants: Mr. R.Green
 3rd Defendant: Mr. Ronald Singh

Date of Hearing: 07.8.2023

Date of Judgment: 15.8.2023

JUDGMENT

INTRODUCTION

1. This is the summons filed on 11.5.2023 by Plaintiff for setting aside orders of the Master made on 21.3.2022 and reinstate the action. Master had struck off the action pursuant to noncompliance of unless order. Plaintiff had filed summons nearly fourteen months after the striking out of the action and on that ground alone should be dismissed *in limine*. Without prejudice to that Plaintiff's summons was made pursuant to Order 24 rule 17 High Court Rules 1988 (HCR), which allows the same court that made the orders to vary or set aside its orders. This is an exception, which confine only, to orders

of the court made under Order 24 of HCR. Unless order and striking out of the action for noncompliance, was not made under Order 24 of HCR, which deals with the discovery and inspection of documents. Such variation or setting aside is done by the court which ordered in terms of Order 24 of HCR and not applicable, is the unless orders were made by Master. So this summons struck off with cost summarily assessed at \$2,000. It is also an abuse of process due to nature of the flawed application made to reinstate this action, after fourteen months from striking out.

ANALYSIS

2. On 11 .5.2023, the Plaintiff filed a Summons (Reinstatement) , seeking the following orders:

"a. The orders by the Acting Master Lal, dated 21 March 2022, striking out this matter be set aside;

b. This matter be reinstated on the cause list and further directions made to expedite this matter to trial; and

c. Costs in the cause."

3. On the face of the orders sought it has the character of an appeal, which is obviously outside the time period for appeal for final and or interlocutory order of Master. So this summons filed nearly one year after the action was struck off is struck off *in limine* as an abuse of court.

4. Without prejudiced to that merits are discussed.

5. The dilatory conduct of the Plaintiff had continued even after striking out of this action by Master. Plaintiff had waited fourteen months after strike out to file this summons which is misconceived.

6. Following affidavits were filed

(a) Affidavit in support of Plaintiff sworn on 20 .4. 2023 and filed on 11 .5. 2023

(b) Affidavit in response of Third Defendant. a sworn and filed on 13 .7. 2023

7. Facts relating to events leading up to this summons are outlined in paragraphs 5-16 of the Third Defendant's Affidavit in Response. They are uncontested facts.

Unless Order

8. On 25 .10. 2021, the Suva High Court Registry wrote to Nilesh Sharma Lawyers (**NSL**) (the receivers of Singh & Singh Lawyers who were lawyers for the Plaintiff) and

informed them of the Acting Master's directives which were as follows:

- "(a) the orders of 12 April 2021 to be complied with*
- (b) matter is relisted for mention only on 16 December 2021 at 11.00am"*

9. The other parties also received a copy of this letter.
10. On 16 Dec. 2021, the parties appeared before Master. NSL appeared and informed the court that the Plaintiff's file has been allocated to another law firm. However, no Notice of Change of Solicitors was filed on behalf of the Plaintiff, by the said law firm.
11. Admittedly this law firm, had emailed the Plaintiff on 6.1.2022 confirming having the file uplifted from the receivers of previous solicitors and asked whether they could file 'Notice of Appointment of Solicitors',
12. Plaintiff had not provided reply to said email provided confirming the appointment and proceed. See Annexed D to affidavit in support). Plaintiff had attached only part of the email without the attachment referred to in the said email.
13. Said email had also attached an order of the court which Plaintiff had not submitted in this application. It can safely deduce that the said order attached in the email of the Plaintiff contained the unless order made by Master on 16.12.2021. Even if that is not so, Plaintiff's dilatory behavior with the lawyers evident from its own evidence.
14. Master on 16 .12. 2021, Master made the following orders:
 - (a) if the Plaintiff had changed solicitors, then a Notice of Change of Solicitors must be filed;
 - (b) the Plaintiff to file PTC minutes by 4pm on 21 January 2022, or else PTC would be deemed dispensed with;
 - (c) the Plaintiff to file copy pleadings and Order 34 summons by 4pm on 25 February 2022;
 - (d) **unless the Plaintiff files the copy pleadings and Order 34 summons by 4pm on 25 February 2022, the matter will be struck out;** and
 - (e) matter adjourned for mention on 21 March 2022.(emphasis added)

15. The above orders of Master were, sealed on 31 .12. 2021, and served on the parties on 6.1. 2022 according to the affidavit of third Defendant.
16. So the solicitors who uplifted the file had promptly on the same day had emailed the Plaintiff the sealed orders and sought instructions, but Plaintiff had not given prompt response despite having a unless order in the said orders of Master sealed and served.
17. Plaintiff had not provided the attached order of the court, the email mentioned. No explanation given for such failure at the hearing. If the attachment was not received by Plaintiff he should have inquired about it promptly and that shows again the conduct of Plaintiff.
18. Plaintiff had not complied with the unless orders and accordingly matter was struck off.
19. Plaintiff again waited for more than one year and filed this summons in terms of Order 24 rule 17 of HCR and inherent power of the court, and inherent power of the court.
20. Order 24 of the Rules relates to *"Discovery and Inspection of Documents"*. As the Unless Order shows, there were no orders relating to the discovery or inspection of documents.
21. The Plaintiff purports to invoke 0.24, r.17 of the Rules which states: ***"Revocation and variation of orders (O 24, R 17)***

17. Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made."
22. The Unless Order in this case was not made pursuant of Order 24 of HCR which deals with discovery and inspection of documents. No orders were made by Master in terms of Order 24 on 21.3.2021 which the Plaintiff seeks to set aside in this summons in terms of Order 24 rule 17 of HCR.
23. Without prejudice to above such variation or revocation of the orders pursuant to Order 24 rule 17 only applies to the same court which made such orders and not to this court.

Unless orders
24. Unless orders are effective and convenient case management tool at the hand of the court when a matter is not moving in the court system. The Constitution of Republic of Fiji under Bill of Rights recognize the need to dispose civil suits within a reasonable time in terms of Section 15 (3).

25. Unless orders were made in early cases in UK and still has utility over a century. A brief history is found in *Marcan Shipping (London) Ltd v Kefalas & Anor* [2007] EWCA Civ 463 (17 May 2007)

““Unless” orders

"Unless" orders have a long history, dating back well into the nineteenth century and it was recognised at an early stage that once the condition on which it depended had been satisfied, the sanction became effective without the need for any further order. In *Whistler v Hancock* (1878) 3 QBD 83 the defendant obtained an order that unless the statement of claim were delivered within a week the action should be at an end. The plaintiff failed to serve a statement of claim and applied for relief, but the time allowed under the order expired before his application could be heard. The Divisional Court held that the court had no jurisdiction to grant relief because once the condition had been satisfied the action had come to an end and no longer existed. The decision was followed the next day in *Wallis v Hepburn* (1878) 3 Q.B.D. 84n. The same conclusion was reached in *King v Davenport* (1879) 4 Q.B.D. 402 where a summons issued on the last day for compliance with a conditional order in similar terms was adjourned to the next day. The court held that once the prescribed time had expired the Master had no jurisdiction to extend time because the action had ceased to exist. The fact that in the event of default the order operated without the further intervention of the court led Greene L.J. in *Abalian v Innous* [1936] 2 All E.R. 834, 838 to draw attention to the importance of ensuring that the order was precise in its terms to ensure that the party to whom it was directed should be in no doubt about what he needed to do to avoid the action being dismissed.

The decisions in *Whistler v Hancock*, *Wallis v Hepburn* and *King v Davenport* were finally laid to rest in *Samuels v Linzi Dresses Ltd* [1981] Q.B. 115. In that case an order was made that unless further and better particulars of the defence were served by a certain date the defence and counterclaim should be struck out and the plaintiff should be at liberty to sign judgment for damages to be assessed. The particulars were served three days late, but the defendant applied for, and obtained from the judge, an extension of time, the effect of the order being to relieve it from the sanction. Having referred to the earlier authorities and the attempts to distinguish them, Roskill L.J., with whom Lawton L.J. and Sir Stanley Rees agreed, held that they should no longer be followed and that the court does have jurisdiction to extend time even after there has been a failure to comply with an "unless" order. However, he emphasised that the power was one which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored: see page 126.”

26. In *Marcan* (supra) even Court of Appeal of UK did not set aside an unless order and emphasized the importance of complying with such orders as they are an essential tool at the hands of court for disposal of civil actions, without delay.

27. Using unless orders as a tool for case management is more applicable in Fiji due to elevation of right to determine civil action within a reasonable time is enshrined in Section 15(3) of the Constitution of the Republic of Fiji under the Chapter 2 that deals with Bill of Rights. This applies to Plaintiff as well as to Defendants as the 'determination' of civil action applies to all the parties irrespective of who instituted the action.
28. In my opinion in an exceptional case there is jurisdiction for the court that made unless order to grant an extension thus varying it, but this is should be exercised rarely for cogent reasons. Again, this application is misconceived as this court cannot vary an unless order made by Master after its non compliance and also striking out of the action.
29. Even on merits this application fails as Master had given ample opportunity for the Plaintiff to prosecute his action and struck off as last resort. The court is not supposed to wait after filing action and cause inordinate delay in the determination of such actions.
30. Counsel for first second and 4th Defendants, by way of supplementary submissions referred to additional authorities and contend that immunity granted to second Defendant in the official capacity in terms of Section 157 of the Constitution of the Republic of Fiji.
31. The issue before me striking out of Plaintiff's action pursuant to non-compliance of an unless order and the summons seeking setting aside of Master's decision made on 21.3.2022. So my decision should confine to the summons of the Plaintiff and this cannot be expanded to determine whether there was reasonable cause of action against second Defendant.
32. This was an action filed in 2015 and if desired there was ample opportunity for them to seek strike out by way of summons based on immunity. So it is superfluous to deal with the issue of immunity raised by second Defendant after the action was struck off.

CONCLUSION

33. This application by way of summons filed nearly fourteen months after Master had struck off the action. Summons was filed purportedly in terms of Order 24 rule 17 of HCR and inherent power is struck off in *limine* for following reasons. Firstly, the inordinate delay and dilatory conduct on the part of Plaintiff for not complying with the unless order, and also subsequent conduct. Secondly, Order 24 rule 17 of HCR has no application to the unless orders made by Master. Thirdly, variation or revocation in terms of Order 24 rule 17 can be done by the same court. Fourthly, even under inherent power of the court unless order cannot be set aside by this court by summons filed fourteen months after strike out of the action. Without prejudice to above, all civil actions needs determination within a reasonable time in terms of Section 15(3) of the Constitution of the Republic of Fiji. Plaintiff was given ample opportunity to prosecute

his action. It is an obligation of the court to manage its cases in the light of the above provision in the Constitution of the Republic of Fiji, to determine actions without unreasonable delay. So the court cannot wait till the parties are ready for determinations in all pending actions. Once an action is filed it is the duty of the parties as well the court to conclude it within a reasonable time. Plaintiff had not acted with due diligence regarding this action. The summons filed after fourteen months is also an abuse of process. Cost is summarily assessed at \$2,000 (from which \$1000 for third Defendant) to be paid by Plaintiff within 28 days.

FINAL ORDERS

- a. Summons filed on 11.5.2023 is struck off.
- b. Cost summarily assessed at \$2,000 to be paid within 28 days.

Dated at Suva this 15th day of August, 2023.



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Justice Deepthi Amaratunga
High Court, Suva