

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 100 of 2023

BETWEEN

ABDUL of Lynwood, Washington, USA, Facilities Manager, **ABDUL KALIL** of Narre Warren North Victoria, Australia, Truck Driver, **ABDUL AZIM**, of Mountlake Terrace, Washington, USA, Stockroom Inventory Manager and **JAIRUL NISHA** of Rakiraki, Fiji Domestic worker as beneficiaries of the Estate of Abdul Aziz a.k.a Adul Haziz late of Dreketi, Vuda Point, Lautoka, Fiji, Cultivator, Deceased Intestate.

PLAINTFFS

AND

ABDUL SAIYUB of Vuda Point, Lautoka as the surviving Executor and Trustee of the Estate of Abdul Aziz a.k.a Adul Haziz late of Dreketi, Vuda Point, Lautoka, Fiji, Cultivator, Deceased Intestate.

FIRST DEFENDANT

Date of Ruling : 18th August 2023

RULING

(On an application for striking out)

[1] The plaintiff filed the writ of summons seeking the following reliefs:

- (a) The 1st defendant had fraudulently subdivided Crown Lease No. 27445 and Crown Lease 27444 without the consent of the plaintiff.
- (b) The 1st defendant had breached his duty as the Trustee & Executor of the Estate of Abdul Aziz a.k.a Abdul Haziz.
- (c) Abdul Sarif to be appointed to be the Trustee and Executor of the Abdul Aziz a.k.a Abdul Haziz.
- (d) To remove the 1st defendant as the Trustee and Executor of the Abdul Aziz a.k.a Abdul Haziz.
- (e) To provide account / statement of account of the Estate of Abdul Aziz a.k.a Abdul Haziz at all material times he was the Executor and Trustee.
- (f) To be restrained from disposing of any asset of the Estate.
- (g) Further to other relief(s).

[2] The 1st defendant filed the summons pursuant to Order 18 rule 18(1)(a) of the High Court Rules 1988 to have the matter struck out on the ground that it discloses no reasonable cause of action against the 1st defendant.

[3] Order 18 rule 18(1)(1)(a) –

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

[4] 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”.

- [5] From the decisions cited above it is clear that the court is discouraged to a very great extent in summarily striking out matters and the discretion conferred upon the court by Order 18 rule 18(1) of the High Court Rules 1988 must be exercised with great caution and only in exceptional cases.
- [6] The learned counsel for the 1st defendant submitted that the reliefs (a) and (b) prayed for in the prayer have not been pleaded in the statement of claim. An allegation of fraud must be pleaded in the statement of claim. On that ground the court agrees with the learned counsel for the defendant.
- [7] However, the facts relating to prayers (c) and (d) have been pleaded in the statement of claim. The plaintiff is seeking to have the 1st defendant removed as the Executor and Trustee of the Estate of Abdul Aziz a.k.a Abdul Haziz and to have him appointed as the trustee and executor.
- [8] In the statement of claim the plaintiff has averred that the 1st defendant has failed to equally distribute monies recovered from selling sugarcane equipment that he held for and on behalf of the beneficiaries and also that he claims that he owns the Estate of Abdul Aziz a.k.a Abdul Haziz and banned the plaintiffs from entering the land.

[9] These are matters that should be decided on evidence. Whether the plaintiff has sufficiently pleaded the other reliefs sought in the statement of claim can be decided with the other matters at the substantive hearing.

[10] It would cause injustice to the plaintiff if the entire action is struck out for the alleged defects in some of the reliefs prayed for.

[11] For the above reasons the court makes the following orders.

ORDERS

1. Application for striking out is refused.
2. There will be no order for costs.




Lyone Seneviratne

JUDGE

18th August 2023