

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 58 of 2023

BETWEEN : **SANDEEP KUMAR** of Nasau, Nadi.

PLAINTIFF

AND : **BIREND SINGH** of Mulomulo, Nadi. Driver as Trustee in the Estate of Krishna Dutt and in *propria persona*.

DEFENDANT

Before : Acting Master L. K. Wickramasekara

Counsel : Messrs. Patel & Sharma for the Plaintiff

Messrs. Ace Legal for the Defendant

Date of Ruling : 29.08.2023

RULING

01. Defendant in this action has filed Summons to Strike Out the Writ of Summons filed by the Plaintiff on the 16/03/2023. This summons has been filed on the 12/04/2023 with the supporting affidavit of the Defendant sworn on the 11/04/2023.
02. In response, the Plaintiff has filed an Affidavit in Opposition on the 19/05/2023. Defendant thereafter has filed an Affidavit in Reply on the 28/06/2023.
03. Hearing on the matter proceeded before this Court on the 27/07/2023 and both parties have filed written submissions in support of their respective case thereafter.
04. Court shall consider the affidavits in evidence for and against the application and as well as the supporting arguments and written submissions of the parties whilst deciding on this application.
05. Accordingly, I now proceed to make my Ruling on the Summons to Strike Out as follows.

06. The Plaintiff's claim is arising out of an agreement between the Plaintiff and the Defendant's deceased father to purchase a part of land owned by the Defendant's father. It is claimed that the Plaintiff had paid the Defendant's father a sum of \$ 10000.00 for this purchase and had attended to the subdivision of the land as a pre-condition to the transfer to be made. It is also claimed by the Plaintiff that the Defendant too was aware of this agreement for the purchase of the land. However, the Defendant's father had passed away before the completion of the transfer and the Plaintiff has claimed that he had thereafter been in contact with the Defendant regarding this transaction, as the Administrator/Trustee of the Estate of the Defendant's father. When finally, the subdivision was approved, the Plaintiff claimed that he had requested the Defendant to sign the transfer documents to the said piece of land where the Defendant had refused to do so. The Plaintiff is now seeking for specific performance of the said agreement.
07. Pursuant to the Summons for Strike Out and the supporting affidavit of the Defendant, the contention for the Defence is that the Defendant had obtained the Probate for the Estate of his deceased father on the 05/09/2018. He has also posted an advertisement in a local newspaper prior to getting the Probate, regarding any claims against his father's Estate. During the period in which such claims were to be referred against the Estate, no claims had had been brought forward and as such the Defendant had dealt with the property of the Estate and had subdivided and sold the land belonging to the Estate as he was the sole beneficiary of the Estate. Defendant argues that this claim of the Plaintiff is now statute barred pursuant to Section 59 (1) of the Trustees Act 1966 read with Section 2 (3) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27. Further, the Defendant argues that pursuant to Section 4 (1) (a) of the Limitations Act, the claim of the Plaintiff is time barred as well, since the Plaintiff had failed to bring in this action within six years from the date on which the cause of action has accrued, which is the (possible) date of the agreement between the Plaintiff and his deceased father. It is therefore the position of the Defendant that the Plaintiff's claim is an abuse of process and thus needs to be struck out.
08. Plaintiff on the other hand has submitted that Section 59 (1) of the Trustees Act 1966 read with Section 2 (3) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 shall not be applicable in this case as the Plaintiff was in contact with the Defendant regarding this transaction, prior to the advertisement by the Defendant for claims against the Estate and as such the Defendant was already aware of the claim. It is also submitted by the Plaintiff that Section 2 (3) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27, shall have no application in this case as that provision relates to cause of actions on *torts* and this cause of action is on a 'contract'. Plaintiff has also submitted that the claim is not time barred pursuant to Sec. 4 (1) (a) of the Limitations Act, since Sec. 4 (7) of the Limitations Act has stipulated that Sec. 4 (1) (a) of the Act does not apply to claims of 'specific performance'.

09. As per the Summons for Striking Out, the application has been made pursuant to Order 18 Rule 18 (1) (d) on the following grounds.

- a) That there is no reasonable cause of action against the Defendant
- b) That it is an abuse of process of the Court,
- c) That the Writ of Summons filed by the Plaintiff is statutory barred by Section 4 (1) (a) of the Limitations Act 1970.

10. Order 18 Rule 18 (1) of the High Court Rules 1988 reads as follows.

Striking out pleadings and indorsements (O.18, r.18)

18.- (1) *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.

- (2) No evidence shall be admissible on an application under paragraph (1)(a).*
- (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.*

11. Master Azhar, in the case of **VERONIKA MEREONI V FIJI ROADS AUTHORITY**: HBC 199/2015 [Ruling; 23/10/2017] has succinctly explained the essence of this Rule in the following words.

"At a glance, this rule gives two basic messages, and both are salutary for the interest of justice and encourage the access to justice which should not be denied by the glib use of summary procedure of pre-emptory striking out. Firstly, the power given under this rule is permissive which is indicated in the word "may" used at the beginning of this rule as opposed to mandatory. It is a "may do" provision contrary to "must do" provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not necessarily be struck out as the court can, still, order for amendment. 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. **MARSACK J.A.** giving concurring judgment of the Court of Appeal in **Attorney General v Halka [1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972)** held that:

"Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".

12. Pursuant to Order 18 Rule 18 (2), no evidence shall be admissible upon an application under Order 18 Rule 18 (1) (a), to determine if any pleading discloses no reasonable cause of action or defence. No evidence is admissible for this ground for the obvious reason that, the court can conclude absence of a reasonable cause of action or defence merely on the pleadings itself, without any extraneous evidence. His Lordship the Chief Justice A.H.C.T. GATES (as His Lordship then was) in **Razak v Fiji Sugar Corporation Ltd [2005] FJHC 720; HBC208.1998L (23 February 2005)** held that:

"To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18(2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498".

13. Citing several authorities, Halsbury's Laws of England (4th Edition) in volume 37 at para 18 and page 24, defines the reasonable cause of action as follows:

"A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered" **Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd [1899] 1 QB 86 at 90,91. CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.**

14. Given the discretionary power the court possesses to strike out under this rule, it cannot strike out an action for the reasons it is weak, or the plaintiff is unlikely to succeed, rather it should obviously be unsustainable. His Lordship the Chief Justice A.H.C.T. GATES in **Razak v Fiji Sugar Corporation Ltd** (supra) held that:

"The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."

15. It was held in **Ratumaiyale v Native Land Trust Board [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000)** that:

"It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95). The principles applicable were succinctly dealt by Justice Kirby in **London v Commonwealth** [No 2] 70 ALJR 541 at 544 - 545. These are worth repeating in full:

1. It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided (**General Street Industries Inc v Commissioner for Railways (NSW)** [1964] HCA 69; (1964) 112 CLR 125 at 128f; **Dyson v Attorney-General** [1911] 1 KB 410 at 418).

2. To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action (**Munnings v Australian Government Solicitor** (1994) 68 ALJR 169 at 171f, per Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (**Dey v Victorian Railways Commissioners** [1949] HCA 1; (1949) 78 CLR 62 at 91).

3. An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone, sufficient to warrant summary termination. (**Coe v The Commonwealth** (1979) 53 ALJR 403; (1992) 30 NSWLR 1 at 5-7). Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.

4. Summary relief of the kind provided for by O 26, r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer. (**Coe v The Commonwealth** (1979) 53 ALJR 403 at 409). If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.

5. If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleadings. (**Church of Scientology v Woodward** [1982] HCA 78; (1980) 154 CLR 25 at 79). A question has arisen as to whether O 26 r 18 applies only part of a pleading. (**Northern Land Council v The Commonwealth** (1986) 161 CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and

6. The guiding principle is, as stated in O 26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit".

16. The Defendant claims that there is no reasonable cause of action as this claim is arguably statute barred pursuant to Section 59 (1) of the Trustees Act 1966 read with Section 2 (3) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 and time barred pursuant to Section 4 (1) (a) of the Limitations Act. It is therefore the position of the Defendant that this claim is an abuse of process and as such there is no reasonable cause of action.
17. Pursuant to the affidavit evidence of the parties, it is noted by the Court that there is a purported written sales and purchase agreement between the Plaintiff and the deceased father of the Defendant over a piece of land belonging to the father of the Defendant. It is also noted that there are written receipts purportedly showing Plaintiff paying \$ 10000.00 to the father of the Defendant regarding this purchase of land. It is also averred in the Affidavit of the Plaintiff that the Defendant was aware of the sales and purchase agreement between the Plaintiff and the father of the Defendant prior to this case, and that the Defendant was aware of the claim of the Plaintiff even before the advertisement under Sec. 59 (1) of the Trustees Act was published by the Defendant.
18. I shall reproduce here Section 59 (1) of the Trustees Act 1966 read with Section 2 (3) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 for clarity.

"[TRU 59] Protection against creditors and others by means of advertisement.

59 (1) Where a trustee has given notice by advertisement published at least once in the Gazette and in a newspaper circulating in each locality in which, in the opinion of the trustee, claims are likely to arise, requiring persons having claims to which this section applies to send to the trustee, within the time fixed in the notice, particulars of their claims and warning them of the consequences of their failure to do so, then, at the expiration of that time or at any time thereafter, the trustee may administer or distribute the property or any part thereof to which the notice relates to or among the persons entitled thereto having regard only to the claims, whether formal or not, of which the trustee then has notice; and he or she shall not, as respects the property so administered or distributed, be liable to any person of whose claim he or she has not had notice at the time of the administration or distribution. "

[Emphasis added]

19. In the instant case, the affidavit evidence, as discussed in the foregoing paragraphs, is to the effect that the Defendant had prior knowledge of the claim of the Plaintiff even before the advertisement under Sec. 59 (1) was published. As such, in my considered view, the Defendant cannot now claim that as the Plaintiff did not lodge this claim pursuant to the said advertisement, he had therefore no knowledge of the same and as such had 'no notice of the claim at the time of administration or distribution', as he was already aware of the claim when publishing the advertisement under Sec. 59 (1).

Whether the Plaintiff was in actual contact with the Defendant regarding this transaction prior to the advertisement and or whether the Defendant truly had any prior knowledge of the said agreement, and the transaction are questions of fact that needs to be considered as issues in a proper trial via evidence. But, at this stage, the affidavit evidence do indicate that the Defendant had such prior knowledge of this claim.

20. I shall consider the contention of the Defendant that the claim is statute or time barred pursuant to Section 2 (3) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 and Section 4 (1) (a) of the Limitations Act. I shall reproduce these sections in this ruling for clarity.

"Effect of death on certain causes of action

- 2.-(1) *Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of, his estate:*

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section 32 of the Matrimonial Causes Act for damages on the ground of adultery. (Cap. 51)

- (2) *Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person-*

(a) shall not include any exemplary damages;

(b) in the case of a breach of promise to marry shall be limited to such damage (if any) to the estate of that person as flows from the breach of promise to marry;

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death except that a sum in respect of funeral expenses may be included.

- (3) *No proceedings shall be maintainable in respect of a **cause of action in tort** which by virtue of this section has survived against the estate of a deceased person unless either-*

(a) proceedings against him in respect of that cause of action were pending at the date of his death; or

(b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

[Emphasis Added]

21. It is clear from the plain reading of this section that Section 2 (3) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27, applies only to cause of action in tort alone. The current cause of action arises out of a written contract and as such this section shall have no application to the current claim.
22. Section 4 of the Limitations Act reads as follows,
“[LIM 4] *Limitation of actions of contract and tort, and certain other actions*
4 (1) *The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say—*
(a) actions founded on simple contract or on tort;
(b) actions to enforce a recognizance;
(c) actions to enforce an award, where the submission is not by an instrument under seal;
(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture, provided that—
(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to 6 years there were substituted a reference to 3 years; and
(ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.
(2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.
(3) An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued, provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.
(4) An action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.
(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act or Imperial enactment shall not be brought after the expiration of 2 years from the date on which the cause of action accrued, provided that for the purposes of this subsection the expression “penalty” shall not include a fine to which any person is liable on conviction of a criminal offence.
(6) Subsection (1) shall apply to an action to recover seamen’s wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the High Court which is enforceable in rem.”

(7) This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied.

[Emphasis added]

23. This claim is for specific performance of the sale and purchase agreement between the deceased father of the Defendant and the Plaintiff. As such it is clear that pursuant to Sec. 4 (7) of the Limitations Act, this claim is not time barred as well.

24. I shall now consider when a pleading shall become an abuse of process of the Court. If the action is filed without serious purpose and having no use, but intended to annoy or harass the other party, it is frivolous and vexatious. Roden J in Attorney General v Wentworth (1988) 14 NSWLR 481, said at 491 that:

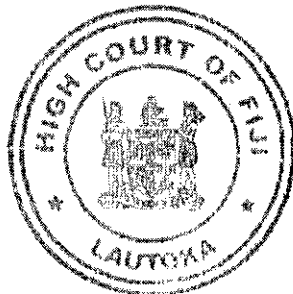
1. *Proceedings are vexatious if they instituted with the intention of annoying or embarrassing the person against whom they are brought.*
2. *They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
3. *They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.*


25. In Halsbury's Laws of England (4th Ed) Vol. 37 explains the abuse of process in para 434 which reads:

"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

26. A fair trial requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Courts are therefore vested with the power to strike out any such proceeding or claim which is detrimental to or delays the fair trial. Likewise, the rule of law and the natural justice require that, every person has access to the justice and has fundamental right to have their disputes determined by an independent and impartial court or tribunal.

27. In this regard, the Court, having considered the available affidavit evidence of the parties, do not find the Statement of Claim or any part thereof to fall within the definitions of scandalous, frivolous, or vexatious. Neither do I find that the Statement of Claim of the Plaintiff to be an abuse of process, especially on the untested affidavit evidence available before this court.
28. The sections of the law that the Defendant had relied upon to argue that this claim is an abuse of process in Court's considered view do not either apply to this claim or render this claim to be an abuse of process.
29. I do find that there are triable issues between the Plaintiff and the Defendant in these proceedings. Thus, I conclude that the Plaintiff have not been able to pass the threshold for allowing an application to strike out the Writ of Summons/Statement of Claim pursuant to Order 18 Rule 18 (1) of the High Court Rules 1988 and that this application should necessarily fail.
30. In the outcome, the following orders are made.
1. The Summons to Strike Out as filed by the Defendant on 12/04/2023 is hereby refused and struck out subject to the following orders of the court,
 2. Costs of this application to be in the cause.
 3. Defendant is granted 14 days to file and serve its Statement of Defence (That is by 12/09/2023), subject to any applicable late filing fees.
 4. Plaintiff to file and serve its Reply to the Statement of Defence 14 days after (That is by 26/09/2023).
 5. Plaintiff's Summons for Directions to be filed and served 14 days after (That is by 10/10/2023).
 6. In failure to comply with above orders, the defaulting party shall pay a cost of \$ 2000.00, as summarily assessed by the Court, to the other party.
 7. Matter to be Mentioned in Court on 24/10/2023.




L. K. Wickramasekara,
Acting Master of the High Court.

At Lautoka,
29/08/2023.