

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 143 of 2022 & HBC 298 of 2022

BETWEEN:

EMOSI BUINIMASI TAMANI
PLAINTIFF

AND:

KOKOMO RESORT LTD
1ST DEFENDANT

AND:

KOKOMO SERVICES PTE LTD
2ND DEFENDANT

PACIFIC LINE PRODUCTION PTE LTD
3RD DEFENDANT

ITAUKEI LAND TRUST BROAD
4TH DEFENDANT

FIJI AUDIO VISUAL COMMISSION
5TH DEFENDANT

THE ATTORNEY GENERAL OF FIJI
6TH DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSEL:

Mr. Fa I. (Jnr) for the plaintiff
Mr. Law T. for the 1st & 2nd defendant's
Ms. M. Rakai for the 3rd defendant
Mr. J. Cati for the 4th defendant
Mr. Y. Naidu for the 5th & 6th defendant

Date of Hearing:

17 October 2023

Date of Ruling:

2 November 2023

RULING

- [1. SUMMONS FOR DISCONTINUANCE IN HBC 143/2022**
2. SUMMONS FOR STRIKING OUT IN HBC 298/2022]
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01. The Plaintiff in the action no. HBC 143/22, filed Summons for Discontinuance of the cause against all the Defendant's in that action on the 19/05/2023. The grounds being that the Plaintiff had begun action against the same Defendants in Action No. HBC 298/22. This application is supported by an Affidavit of the Plaintiff, Emosi Buinimasi Tamani sworn on the 30/05/2023.
02. 3rd Defendant had opposed this Summons and had filed an Affidavit in Opposition on the 03/07/2023 as sworn by one Ashwini Kuar, a director of the 3rd Defendants company.
03. Plaintiff thereupon has filed an Affidavit in Reply on the 11/07/2023.
04. In action no. HBC 298/22, the 3rd Defendant has filed Summons to Strike Out the cause, on the ground that filing of HBC 298/22 whilst a similar action (HBC 143/22) is pending between the parties, is an abuse of the process of the Court. This application is supported with an Affidavit of one Ashwini Kuar, a director of the 3rd Defendants company. This Summons has been filed on the 01/11/2022.
05. The Plaintiff has opposed this Summons and has filed an Affidavit in Opposition on the 31/05/2023 as sworn by the Plaintiff himself.
06. The 3rd Defendant thereupon has filed an Affidavit in Reply on the 08/06/2023.
07. Comprehensive Written Submissions have been filed by the Plaintiff, and 3rd Defendant in both the actions and an oral Hearing of the Summons was held before this Court on the 17/10/2023 where counsels for the Plaintiff and 3rd Defendant made oral submissions as well.
08. Both parties had agreed before this Court that both these Summons to be dealt together in one Ruling as both matters are interconnected.
09. Having read the affidavits in evidence of the parties and the comprehensive written submissions tendered and having heard both the counsels in their respective arguments, I now proceed to make my Ruling on the Summons to Discontinue the Action (HBC 143/22) and Summons to Strike Out (HBC 298/22) as follows.
10. The background of these cases is as follows. The Plaintiff filed an Action Number HBC 143/22 on the 29/04/2022 against the first four Defendants as mentioned in the caption to this ruling above. On the 12/10/2022, the Plaintiff filed an Action Number HBC 298/22 against all the Defendants as per the caption above.

11. It is not disputed by the Plaintiff that both the matters are identical and are based on the same/similar cause of actions. The 3rd Defendants then filed the Summons to Strike Out the Action Number HBC 298/22 on the ground that the Plaintiff has filed multiple actions on the same cause of actions against the same Defendants and as such it is an abuse of the process of the Court. Plaintiff then filed a formal Summons For Leave to Discontinue the Action Number HBC 143/22 against all the Defendants.
12. The contention of the 3rd Defendant in filing its summons to strike out in HBC 298/22 and in opposing the subsequent Summons to Discontinue the Action in HBC 143/22 is that the Plaintiff is wrong in law and is in breach of the Rules of the Court in filing a duplicate action against the Defendants whilst one action is in foot on the same cause of action/s against the same Defendants. It is argued that the proper cause for the Plaintiff was to either file for amendment of the first action (HBC 143/22), if the need be, and or have the initial action of HBC 143/22 formally withdrawn and thereafter file the second action of HBC 298/22. In failing to follow the proper procedure the 3rd Defendant argues that the Plaintiff is in abuse of the process of the Court and as such the second action of HBC 298/22 should necessarily be struck out under Order 18 Rule 18 (1) (d) of the High Court Rules 1988.
13. Plaintiff on the other hand submits that the Plaintiffs initial action of HBC 143/22 had had been filed by its former solicitor, who had to later close his practice due to the practitioner been convicted of an offence and was sentenced to prison. It is further submitted that having appointed the current solicitors, the Plaintiff was informed that his claim does not reflect the proper context and as such would need major amendments, or it would be expedient to have a fresh action initiated in place of the previous action.
14. It is submitted for the Plaintiff that his current solicitors did write to all the solicitors of the Defendants in HBC 143/22 on the 23/09/2022, seeking their consent for a proposed amendment of the claim in HBC 143/22 or to have a fresh claim filed altogether (A copy of this letter is annexed as 'A' with the supporting affidavit of Emosi Buinamasi Tamani filed on 19/06/2023 in HBC 143/22). It is submitted further that, in response to this letter, all other Defendants in HBC 143/22, except for the 3rd Defendant, had consented to filing of a new action instead of HBC 143/22. The 3rd Defendant had failed to respond to the said letter. It is therefore submitted on behalf of the Plaintiff that as all other Defendants had consented for filing a new action and as the 3rd Defendant did not respond to the letter at all, the Plaintiffs current solicitors proceeded to file a new action, which is HBC 298/22.
15. However, the 3rd Defendant, at paragraphs 8 and 9 of his supporting affidavit, filed in HBC 298/22 on 01/11/2022, has claimed that the Plaintiff had filed the second action

of HBC 298/22 as a surprise, having failed to take any action in HBC 143/22 after filing of the Statement of Defenses by the Defendants.

16. The summons in HBC 143/22 for discontinuance have been filed under Order 21 Rule 3 (1) and (2) and Rule 4 of the High Court Rules. The said Rues reads as follows,

“Discontinuance of action, etc., with leave (O.21, r.3)

3.-(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

(2) An application for the grant of leave under this rule may be made by summons or motion or by notice under Order 25, Rule 7.

Effect of discontinuance (O.21, r.4)

4. Subject to any terms imposed by the Court in granting leave under rule 3, the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action.”

17. 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) Is otherwise an abuse of the process of the court.

18. 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.*

19. 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”.

20. In The **White Book** in Volume 1 (1987 Edition) at para 18/19/14 states that:

“Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). “The mere fact that these paragraphs state a scandalous fact does not make them scandalous” (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P. 663)”.

21. On the other hand, 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.*
22. 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."
23. The fair trial is fundamental to the rule of law and to democracy itself. The right to fair trial applies to both criminal and civil cases, and it is absolute which cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Thus, the courts are 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.
24. It is to be noted that case authorities in respect of Courts power to grant leave to discontinue a matter is sparse. However, there are several local cases that has clearly held that this power is at the discretion of the Court and thus it should be used judiciously. See **Attorney General V Tupou Takaiwai Senirewa Draunidalo [2007] HBM 53/07S (Ruling; 20 November 2007)**.
25. In the case of **Fiji Medical Council v Sachida Nand Mudaliar (2009) FLR 368** it was held,
"The requirement to obtain leave is based on the principle that a Plaintiff who has engaged the Defendant in litigation should not, after the proceedings have reached a certain stage, be

allowed to withdraw because of a realization that the chances of success had diminished. It is for the Court to determine whether the proceedings should be discontinued and on what terms. **On the other hand, it is also accepted that a Plaintiff should not be compelled to litigate or continue litigation against his will.** For this reason, leave will usually be granted provided that no injustice will be caused to the Defendant. (Supreme Court Practice 1991 Volume 1 paragraphs 212 – 5/11 to 212 – 5/12).” Emphasis added.

Later on, the Court went on to hold,

“Under Order 21 Rule 3 the Court has a discretion to allow discontinuance on such terms as to costs. In considering the question of costs the Court is entitled to consider whether the discontinuing Plaintiff had “an arguable case” against the Defendant. In other words, does the application to discontinue reflect a surrender by the Plaintiff in a hopeless case. It is also relevant to consider the conduct of both parties before the proceedings were commenced, in commencing the proceedings and in the termination of the proceedings.”

26. The case of **Valebasoga Quarries Ltd v Credit Corporation (Fiji) Ltd; HBC 200/2005 (14 June 2007)** is a case in which a similar situation to this case had arisen. The Plaintiff in that case had filed an earlier case where he was unsuccessful in obtaining an injunctive relief. Thereafter, the Plaintiff had filed a second action against the Defendants where it was successful in obtaining injunctive relief and thus moved to have the initial case discontinued. Justice Jiten Singh allowed the Plaintiff to discontinue the first action subject to costs. It should be noted that even at such an instance the Court had not found the second action to be an abuse of the process of the Court.
27. In this case, it is the contention of the Plaintiff, that the Action No. HBC 143/22 couldn't be moved forward without substantial amendments and expeditiously, the Plaintiff with consent of the other Defendants decided to bring in the new action of HBC 298/22. The 3rd Defendant had not denied the letter of the Plaintiff's current solicitors in requesting consent either to file a fresh action or to filing of the proposed amended claim in HBC 143/22 (The letter dated 23/09/2022 annexed as 'A' with the supporting affidavit of the Plaintiff in HBC 143/22). Except for the 3rd Defendant all other Defendants responded to this letter and consented to filing of a fresh action. The 3rd Defendant did not respond at all to this letter. Counsel during the Hearing submitted for the 3rd Defendant that they did not respond as the 3rd Defendant did not consent to the request by the Plaintiff. However, that was never informed to the Plaintiffs counsel.
28. In view of the above facts, this Court is not able to accept the contention of the 3rd Defendant that action HBC 298/22 was a complete surprise to them. The 3rd Defendant was legally put on notice of the intentions of the Plaintiff of either getting the claim in HBC 143/22 amended or to bring in a fresh action by 23/09/2022. HBC

298/22 was filed on 12/10/2022. However, it is evident that the Plaintiffs are in a technical breach of the Rules, in bringing the new action without duly withdrawing the first action. But given the facts and circumstances in this case, I do not find the Plaintiffs action in filing HBC 298/22 prior to withdrawing HBC 143/22 to be an abuse of the process of the Court, *per se*.

29. In the case of **Dev v Victorian Railways Commissioners; (1949) 78 CLR 62** (as cited by the 3rd Defendant in its written submissions) it was held,

"A case must be very clear indeed to justify the summary intervention of the court...once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process".

30. The 3rd Defendant do not find any issues on questions of facts or law between the parties to be determined as per the claim in HBC 298/22. The only argument against this action is that it was filed during the pendency of HBC 143/22 which is an identical matter and as such it is an abuse of the process of the Court.


31. However, as discussed in the foregoing paragraphs, I accept the reasons given by the Plaintiff in support of its application to withdraw the action, HBC 143/22. I also find that the bringing in of the new action, HBC 298/22, was not made as a surprise to the 3rd Defendant but that the 3rd Defendant was duly informed of the Plaintiffs intentions prior to bringing in the new action. Although the Plaintiff is at a technical breach of the Rules, the Plaintiff has thereafter taken appropriate steps to discontinue the first action and has duly filed for leave to discontinue that action from court. All other Defendants have agreed upon the discontinuance and have moved on with the action HBC 298/22 and the Plaintiff has already discontinued HBC 143/22 against all other Defendants other than against the 3rd Defendant.

32. Thus, I conclude that the interest of justice lies in favour of allowing the Plaintiffs summons to discontinue its action in HBC 143/22 against the 3rd Defendant and on the same footing that the 3rd Defendant has failed to pass the threshold for allowing an application to strike out the cause in HBC 298/22 pursuant to Order 18 Rule 18 (1) of the High Court Rules 1988.

33. Having considered all material before this Court and the circumstances in both matters, I further conclude that the Plaintiffs action in HBC 143/22 shall be allowed to be discontinued against the 3rd Defendant with reasonable costs awarded to the 3rd Defendant.

34. In the outcome, the following orders are made.

1. Summons filed by the Plaintiff on the 19/05/2023 in the action number HBC 143/22 to discontinue the proceedings is allowed and order granted accordingly to wholly discontinue the proceedings against the 3rd Defendant subject to a cost of \$ 1000.00, as summarily assessed by the Court, to be paid by the Plaintiff to the 3rd Defendant.
2. The Summons to Strike Out as filed by the 3rd Defendant on 01/11/2022 in action number HBC 298/22 is hereby refused and struck out subject to a cost of \$ 500.00, as summarily assessed by the Court, to be paid by the 3rd Defendant to the Plaintiff.
3. Action number, HBC 143/22, now stands discontinued against all the Defendants and as such is wholly struck out and dismissed.
4. 3rd Defendant to file and serve its Statement of Defence within 14 days from today in HBC 298/22 (by 16/11/2023).
5. Plaintiff may file and serve its Reply to the Statement of Defense of the 3rd Defendant (if wishes to do so) 14 days after (By 30/11/2023).
6. Plaintiff to file and serve its Summons for Directions in HBC 298/22 14 days after (By 14/12/2023).
7. In failure to comply with the above orders of the Court for filing of pleadings, the defaulting party shall pay a cost of \$ 2000.00, as summarily assessed by the Court, to the other party.
8. Action number, HBC 298/22 shall thereafter be mentioned in this Court on the 01/02/2024.



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

**At Suva,
02/11/2023.**