

In the High Court of Fiji
At Suva
Civil Jurisdiction
Civil Action No. HBC 25 of 2017

Sanjeshwar Prasad
Shanelwar Prasad Maharaj
Soniteshwar Prasad
Plaintiffs

v

Ganeshwar Prasad Maharaj
First defendant

Davindra Kumar
Second defendant

Counsel: Mr Amrit Chand for the plaintiff
Mr M. Nand for the second defendant

Date of hearing: 6th November, 2020

Date of Ruling: 22nd February, 2023

Ruling

1. The second defendant in his summons seeks:
 - 1) that the action against him be dismissed on the following preliminary issues:
 - (a) *Whether the 2nd Defendant's liability (if any) now devolves to the 1st Defendant and or has been extinguished as a result of the interlocutory judgment dated 7th August 2020 obtained by the Plaintiffs against the 1st Defendant.*
 - (b) *Whether the Plaintiffs should first proceed to enforce and satisfy the interlocutory judgment dated 7th August 2020 against the 1st Defendant by making application for assessment of damages against the 1st Defendant; and/or alternatively.*

2) An Order that the action against him be dismissed on the grounds that it does not disclose a reasonable cause of action, is frivolous or vexatious and an abuse of process of Court.

2. The affidavit in support states that on 7th August, 2020, the plaintiffs obtained interlocutory judgment against the first defendant for damages, interest and costs to be assessed. The plaintiffs have not moved for assessment of damages against the first defendant. The first defendant, as executor and trustee of the estate of Mohini Prasad sold the estate property and retained a sum of \$30,418.90 as expenses. The plaintiffs included the second defendant in this action, as the first defendant had authorized the solicitors to pay him the sum of \$30,418.90, as the first defendant had no Bank account in Fiji. The second defendant further states that he gave a sum of \$22,618.90 (which he withdrew) and \$8,000 in cash to the first defendant. The first defendant acknowledged receipt of the sum of \$30,418.90. The claim should only be made against the first defendant, as he, (the second defendant) acted on instructions from the first defendant.
3. The affidavit in opposition filed by one of the plaintiffs states that the second defendant is a party to the misappropriation of funds. He aided the first defendant by giving him his bank account for the sum of \$30,418.90 to be deposited. The second defendant has still unlawfully kept monies of the estate. There is no concrete evidence to show that he dispersed the sum of \$30,418.90. There is no evidence to confirm that the sum of \$22,618.90 was withdrawn and given with \$8,000 cash to the first defendant. The second defendant has benefitted. He is a party to the offence. The plaintiff intends to proceed against the second defendant.

The determination

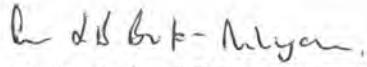
4. The plaintiffs in their statement of claim state that the first defendant paid the sum of \$30,418.90 to the second defendant without providing any explanation nor accounts. The particulars of fraud against the second defendant are set out.
5. The plaintiffs allege misappropriation of funds and fraud against the second defendant. They seek that the first and second defendant jointly and severally refund the sum of \$30,418.00 and aggravated damages from both defendants.
6. In my view, in the circumstances, the interlocutory judgment against the first defendant does not defeat the claim against the second defendant.
7. the contention that the plaintiffs should first proceed to enforce the interlocutory judgment against the first defendant does not arise for consideration.
8. The second defendant alternatively, seeks that the action against the second defendant be dismissed on the grounds that it discloses no reasonable cause of action, is frivolous or vexatious and an abuse of process of Court.
9. The law with regard to striking out pleadings is settled.
10. Lord Pearson in *Drummond -Jackson v. British Medical Association*, [1970]1 All ER 1094 at 1101 said:

..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 ..I think reasonable cause of action' means a cause of action with some chance of success, when .. only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out..(emphasis added)

11. Gates J(as he then was) in *Razak v Fiji Sugar Corporation Ltd*, [2005] FJHC 720; HBC208.1998L (23 February 2005) cited the following passage from the judgment of O'Connor J of the High Court of Australia in *Burton v President &c., of the Shire of Bairnsdale*, [1908] HCA 57; [1908] 7 CLR 76 at p.92 :

Prima facie, every litigant has a right to have matters of law as well as of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of his case to the ordinary tribunals, and the inherent jurisdiction of the Court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and vexatious in point of law will never be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed. (emphasis added)

12. In the present case, the plaintiffs allege fraud on the part of the second defendant in “gaining financial advantage” from the proceeds of the estate. The second defendant in his defence denies the allegation and puts the plaintiffs to “strict proof of all particulars of fraud”.
13. In my view, the pleadings disclose triable issues.
14. The second defendant’s summons fails.
15. **Orders**
- The second defendant’s summons is declined.
 - The second defendant shall pay the plaintiffs costs summarily assessed in a sum of \$ 1000.00.


A.L.B. Brito-Mutunayagam
JUDGE
22nd February, 2023

