

IN THE HIGH COURT OF FIJI
CENTRAL DIVISION
AT SUVA

[CIVIL JURISDICTION]

Civil Action No. HBC 362 of 2022

BETWEEN : **ESTATE OF RO ADI LADY LALABALAVU LITIA KALOAFUTOGA MARA** (deceased) by its Executors and Trustees **ADI KOILA MARA NAILATIKAU** of Suva, Fiji, Lawyer and **RATU TEVITA ULUILAKEBA MARA** of Nuku'alofa, Kingdom of Tonga, Consultant.

PLAINTIFF

AND : **SEKOVE NAQIOLEVU** of Suva, Fiji, Lawyer and Businessman.

FIRST DEFENDANT

AND : **NA HINA LIMITED** a limited liability company, having its registered office at the Offices of GH Whiteside & Co, 211 Ratu Sukuna Rd, Nasese, Suva.

SECOND DEFENDANT

AND : **NA HINA TRUST** a Trust established under a Deed of Settlement dated 2 April 2002.

THIRD DEFENDANT

Before : Acting Master L. K. Wickramasekara

Counsel : Suveinakama Legal for the Plaintiff
Parshotam Lawyers for the Defendant

Date of Ruling : 28th of February 2024

RULING

01. There are two applications before this Court which shall be the subject of this Ruling.
02. The **first application** is the Defendant's Summons to Strike Out the Writ of Summons and the Statement of Claim as filed by the Plaintiff and or in the alternative to extend

time to file a Statement of Defence. This summons has been filed on the 24/02/2023 with the supporting affidavit of one Ratu Aisea Waka Vosailagi sworn on the 23/02/2023.

03. In response to this application, Adi Koila Mara Nailatikau has filed an Affidavit in Opposition on the 06/04/2023. The Defendants then filed an Affidavit in Reply on the 02/05/2023 as sworn by Ratu Aisea Waka Vosailagi.
04. Plaintiff thereafter had filed written submissions regarding this summons on the 28/07/2023 and the Defendant's written submissions filed on the 22/08/2023.
05. The **second application** before this Court is the Plaintiff's Motion filed on the 25/08/2023, pursuant to Order 38 Rule 2 and 3, for adducing certain Affidavits as evidence at the Trial of this matter. This application has been supported with the affidavit of Adi Koila Mara Nailatikau sworn on the same day.
06. Defendants have opposed the said Motion and have filed an Affidavit in Response by Ratu Aisea Waka Vosailagi on the 08/09/2023 and the Plaintiff has filed an Affidavit in Reply by Adi Koila Mara Nailatikau on the 06/10/2023.
07. Plaintiff has thereafter filed its written submissions on this application on the 06/10/2023 and the Defendants have filed their written submissions on the 17/10/2023.
08. Both parties thereupon agreed to proceed to a Ruling on both the applications upon the written submissions filed in lieu of a Hearing.
09. The Court shall accordingly consider the affidavits in evidence for and against both the applications and as well as the supporting written submissions of the parties whilst deciding on these applications.
10. The Plaintiff's claim arises out of a Trust that had originally been created on the 05th of July 1930 termed as 'Yanuca Trust'. Plaintiff claims that the late Ro Adi Lady Lalabalavu Litia Kaloafutoga Mara is a beneficiary of this trust as an heir and successor to her mother, Adi Asenaca Vosailagi, who was one of the 28 original beneficiaries of the 'Yanuca Trust'. Moreover, in 1969 October, the late Ro Adi Lady Lalabalavu Litia Kaloafutoga Mara, had been appointed the sole Trustee of the 'Yanuca Trust' through a Deed of Trust.
11. Following a Court proceeding brought in the year of 1991, a change of Trustee to the 'Yanuca Trust' was made as the late Ro Adi Lady Lalabalavu Litia Kaloafutoga Mara, was removed, voluntarily, as the sole Trustee and in place of the 'Yanuca Trust', a new

Trust had been established namely, the 'Na Hina Trust', in the year 2002. Plaintiff alleges that the creation of this 'Na Hina Trust' was in breach of the objectives of the 'Yanuca Trust' and was done without approval and or consultation of the original beneficiaries of that Trust. Furthermore, the Plaintiff alleges that the voluntary removal of the sole Trustee of the 'Yanuca Trust' was done 'untimely, under duress'.

12. Accordingly, the Plaintiff is claiming,

"36.0 THAT a Declaration be made that the Defendants acted in breach of trust:

36.1 in the incorporation and management of the Second Defendant and the dissolution of the Nakuruvakarua Company Limited without consultation nor the approval of the Beneficiaries;

36.2 in the incorporation and management of the Third Defendant and the dissolution and/or neglect of the Yanuca Trust without consultation nor the approval of the Beneficiaries;

36.3 in having caused and permitted a conflict to arise between their personal interest and duties as trustee and that of the Beneficiaries in the expenditure of trust funds;

36.4 in their neglect and failure to account fully to the beneficiaries for income derived from the utilisation of trust funds;

36.5 in the acquisition of assets that did not accurately reflect the interests of the beneficiaries;

36.6 in their failure to act impartially and to act in the interests of all the beneficiaries; and in their failure to provide information and accounts to the beneficiaries concerning the trust fund.

36.7 in their failure to provide information and accounts to the beneficiaries concerning the trust fund.

37.0 THAT Orders are made in the following:

37.1 That the First and Second Defendants be discharged from their duties and responsibilities as Trustees of the Third Defendant; and

37.2 Specific Damages be paid to the Plaintiff to the value of fifty percent (50%) of the total value of the Second Defendant for her untimely discharge, under duress, as sole Trustee of the Yanuca Trust and Director of Nakuruvakarua Company Limited; and

37.3 General Damages.

38.0 Costs; and

39.0 Such further orders and or other relief as this Honorable Court may grant in the circumstances of the case."

13. Pursuant to the Summons to Strike Out and the supporting affidavit of the Defendants, the contention for the Defence is that the 'Na Hina Trust' was created following the orders of the Court in the 1991 Court proceedings regarding the original 'Yanuca

Trust'. Thereupon, by way of a Share Holder Declaration and an Agreement, the 'Na Hina Ltd' was created by the Trustees of the 'Na Haina Trust'. Thereafter upon the retirement of the Trustees in the 'Na Haina Trust', by way of a Deed of Settlement and a Deed of Acceptance, 'Na Hina Ltd' was appointed as the Trustee of the 'Na Hina Trust'.

14. It is further the contention of the Defendants that the late Ro Adi Lady Lalabalavu Litia Kaloafutoga Mara was never a 'beneficiary' of the original 'Yanuca Trust' and cannot be considered an 'heir and or successor' to an original beneficiary of the 'Yanuca Trust' according to the 'Native Customs'. Thus, the Defendants contend that the Plaintiff has no *locus standi* to bring in this action.
15. Moreover, it is the position of the Defendants that the claim for the interests of the late Ro Adi Lady Lalabalavu Litia Kaloafutoga Mara in the original trust should have been dealt in the 1991 Court proceedings and thus, this current case is therefore an attempt to re-litigate matters already dealt in the 1991 case. Whereas the Defendants claim that the issues raised in the Statement of Claim are *res judicata*. It is therefore the position of the Defendant that the Plaintiff's claim, in the above context, discloses no reasonable cause of action, is an abuse of process and is scandalous, frivolous, or vexatious and thus needs to be struck out.
16. As per the Summons for Strike Out, the Defendants have listed their grounds for strike out as follows,
"The grounds of the application are:
 - a. *That the Plaintiff's Statement of Claim discloses no reasonable cause of action against the Defendants.*
 - b. *That the action by the Plaintiff is an abuse of the Court's process as the issues raised by the Plaintiff have been dealt with in separate proceedings and are therefore res judicata.*
 - c. *That the Plaintiff's claim is scandalous, frivolous or vexatious.*
 - d. *The Plaintiff are guilty of laches as the deceased, Adi Lady Mara, had been removed as a Trustee of the Yanuca Trust in 1993.*
 - e. *The Plaintiff have no locus standi as the deceased, Adi Lady Mara, did not have any beneficial interest in the Yanuca Trust or the Na Hina Trust."*
17. I shall now consider the law relating to an application for striking out the claim and or pleadings. 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.

18. 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”.

19. 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".

20. 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.
21. 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."
22. It was held in Ratunaiyale 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".

23. The Defendant claims that there is no reasonable cause of action as this claim has already been dealt with in the 1991 case (*res judicata*) and that the Plaintiff has no *locus standi* to bring in this case. It is further alleged that the Plaintiff is guilty of *laches*. Whereas, the Defendants further claim that this claim is an abuse of process, scandalous, frivolous or vexatious.
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. Moreover, I have comprehensively considered the law relating to 'res judicata' and 'laches' as helpfully outlined by both the counsels for the Plaintiff and the Defendants in their respective written submissions. However, having considered the pleadings, the affidavit evidence before this Court and the oral and written submissions of the parties, it is my considered view that the current claim does not fall within the definitions of 'res judicata' and or 'laches'.

27. The reason for the above finding is on the basis that the main relief sort as per the current claim is for declarations that,

"36.1 in the incorporation and management of the Second Defendant and the dissolution of the Nakuruvakarua Company Limited without consultation nor the approval of the Beneficiaries;

36.2 in the incorporation and management of the Third Defendant and the dissolution and/or neglect of the Yamuca Trust without consultation nor the approval of the Beneficiaries;

36.3 in having caused and permitted a conflict to arise between their personal interest and duties as trustee and that of the Beneficiaries in the expenditure of trust funds;

36.4 in their neglect and failure to account fully to the beneficiaries for income derived from the utilization of trust funds;

36.5 in the acquisition of assets that did not accurately reflect the interests of the beneficiaries;

36.6 in their failure to act impartially and to act in the interests of all the beneficiaries; and in their failure to provide information and accounts to the beneficiaries concerning the trust fund.

36.7 in their failure to provide information and accounts to the beneficiaries concerning the trust fund.”

28. As can be plainly understood from the above pleadings, it is clear that the current claim is primarily based on an alleged breach of the objectives of the original ‘Yanuca Trust’ by the current Trustee and whether the creation and the management of the ‘Na Hina Trust’ and the ‘Na Hina Limited’ themselves are in contravention to and or without approval and consent of the beneficiaries of the original ‘Yanuca Trust’. Having carefully considered the pleadings of the parties and the affidavit evidence before this Court, I do not find that these matters have been dealt with, in the 1991 case or for that matter in any other legal proceeding.
29. The issue of late Ro Adi Lady Lalabalavu Litia Kaloafutoga Mara’s ‘voluntary resignation’ as the sole Trustee of the ‘Yanuca Trust’ being under ‘duress’, is an ancillary ‘order’ sort by the Plaintiffs, following the above declarations as prayed for in the Statement of Claim. Whether this resignation was made under duress or not is a clear question of fact and as well as whether this overall issue is *res judicata* is also a question of fact, which needs to be decided on evidence via a proper trial. Thus, I find that both issues are undoubtedly triable issues in this case and that they are not issues that can be decided on affidavit evidence in summary proceedings.
30. The issue of whether the Plaintiff has *locus standi* to bring in this action, likewise, is a question of fact that needs to be evaluated through evidence at a proper trial. As evident from the Affidavit in Support of this summons and the subsequent written submissions of the Defendants, the contention that the late Ro Adi Lady Lalabalavu Litia Kaloafutoga Mara cannot be considered an ‘heir and or successor’ to an original beneficiary of the ‘Yanuca Trust’ according to the Native customs, needs extensive evidence on the matter and is clearly a triable issue. This issue in my opinion shall be pivotal to the Plaintiffs claim. Thus, I find that this is not an issue that can be summarily decided on affidavits in these proceedings.
31. In considering the contention for the Defendants that there is no reasonable cause of actions disclosed, I find, upon the observations and findings as per the foregoing paragraphs, that the Plaintiffs have clearly disclosed a reasonable cause of action in the Statement of Claim against the Defendants.
32. 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.

33. Having considered all available material before this Court, I 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.
34. Accordingly, this Court concludes that there is reasonable cause of action disclosed as per the Statement of Claim and that there are triable issues between the Plaintiff and the Defendants in these proceedings. Thus, I further conclude that the Defendants 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.
35. Moreover, having considered all material before this Court and based on the foregoing findings and conclusions, the Court further concludes that it is in the interest of justice to allow the application by the Defendants for extension of time to file a Statement of Defence in this case.
36. In view of the Plaintiffs application pursuant to Order 38 Rule 2 and 3, it is the considered view of the Court that this application would preferably be dealt by a Judge of the High Court prior to the Trial of the matter. Order 38 as evident from the wording of Rule 2 is clearly a provision a Trial Judge should deliberate depending on the 'circumstances of the case it thinks reasonable so to order'. I do not find that this is an application that could be dealt with at this stage of the case by the Master's Court.
37. I therefore find that this application is a premature application at this stage of the case, especially where even the pleadings in the cause are not completed. Accordingly, the Court concludes that the motion filed by the Plaintiff on the 25/08/2023 cannot be allowed at this stage of the case.
38. In consequence, Court makes the following orders.
 1. The Summons to Strike Out as filed by the Defendants on 24/02/2023 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. Defendants to file and serve their Statement of Defence within 14 days (That is by 14/03/2024), 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 28/03/2024).

5. Plaintiff's Summons for Directions to be filed and served 14 days after (That is by 11/04/2024).
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. Plaintiff's Motion filed on the 25/08/2023 is hereby refused and struck out subject to no order for costs.
8. Matter to be Mentioned in Court on 10/05/2024.

**At Suva,
28/02/2024.**



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