

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 338 of 2022

BETWEEN:

MOHAMMED NEEYAZ AIMAD and MILIANA TAVUWALI TARAI
PLAINTIFF

AND:

CARPENTERS FIJI PTE LIMITED trading as CARPENTERS MOTORS
DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

A P Legal for the Plaintiff
Patel Sharma Lawyers for the Defendant

Date of Hearing:

By way of Written Submissions

Date of Ruling:

31 October 2024

RULING

01. The Plaintiff has filed this Writ of Summons and the Statement of Claim on 30/11/2022. The Defendant filed its Acknowledgment on 07/12/2022 and the Statement of Defence and Counter Claim on 16/12/2022.

02. Thereafter, the matter was left idle for over 08 months until the Plaintiff filed a Notice of Intention to Proceed pursuant to Order 3 Rule 5 on 16/08/2023.
03. Then again, the matter went into idle for 05 months, until the Plaintiff filed the current summons for an 'Enlargement of Time to File Reply to Defence and Defence to Counter Claim' on 15/01/2024. This summons was supported by an affidavit of Mohammed Neeeyaz Aimad sworn on 09/01/2024.
04. As per the Supporting Affidavit, it is submitted that the Plaintiff was in discussion with one staff of the Defendant, namely Ashwin Kumar, the National Sales Manager for the Defendant, regarding a potential settlement of the dispute which is the subject matter of this claim.
05. It is further submitted that on 11/08/2023, the Plaintiff through his solicitors wrote to the Defendant regarding the discussed settlement, however, the Plaintiff had not received any response from the Defendant. A copy of the email has been annexed to the Supporting Affidavit.
06. It is further averred, that on 11/10/2023, the solicitors for the Plaintiff had attempted to file the Reply to Statement of Defence and the Defence to Counter Claim together with the Summons for Directions and was informed by the Court Registry that a formal application for leave was needed to file the Reply to Statement of Defence and the Defence to Counter Claim.
07. As such, the Plaintiff claims that on 01/12/2023, its solicitors wrote to the Defendants solicitors for consent for enlargement of time to file the above documents. A copy of the said correspondence has been annexed with the Supporting Affidavit.
08. The Plaintiff further submits that there is an ongoing related proceedings brought in by the Fijian Competition and Consumer Commission (FCCC) pending before the Magistrates Court and that matter is to be mentioned to fix a Hearing date on 20/11/2024. Plaintiff thereby claims that it has a meritorious claim and assures that the matter will be proceeded expeditiously henceforth.
09. Moreover, the Plaintiff submits that the Defendant too had not taken any further steps to advance the matter during the period the matter was left idle and that no steps were taken by the Defendant to enter any judgement by default on their counter claim or took any other steps regarding the matter.
10. The Defendant opposed the summons of the Plaintiff and filed an Affidavit in Opposition on 01/03/2024. In this affidavit, Daniel Whippy, a Director of the Defendant company, claims that he is not aware of the discussions regarding a

settlement between the Plaintiff and Ashwin Kumar, the national Sales Manager for the Defendant company. He submits that the Plaintiff is making mere excuses for the delay. He has also claimed that he's not aware of the written correspondence regarding the settlement and in any event submits that the terms proposed by the Plaintiff are unreasonable.

11. Further, the Defendant in its affidavit has submitted that the proceedings brought up by the FCCC *"has to be fully determined before the current proceedings can progress any further as the FCCC matter is in relation to the current proceedings."*
12. The Defendant has further submitted that an undertaking by the Plaintiff to proceed expeditiously cannot be accepted as the conduct of the Plaintiff was similar in another related matter (HBC 222/2020) where that matter was struck out due to the Plaintiff's conduct.
13. The Plaintiff having filed an Affidavit in Reply, has submitted that the Defendants affidavit is an indication that there are real legal issues (or otherwise meritorious issues) relating to this matter to be determined by a Court of law and that the Plaintiff shall abide by any strict directions of the Court to move these proceedings forward expeditiously.
14. As per the directions by the Court, both parties have filed comprehensive written submissions on the said Summons and when the matter was taken up for hearing on 11/07/2024, both parties moved from Court to have the matter determined by way of affidavit evidence and the written submissions filed.
15. Order 3 Rule 4 of the High Court Rules governs the applications for leave to extend time to file pleadings, etc. This Rule reads as follows.

Extension, etc., of time (O.3, r.4)

- 4.-(1) *The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.*
- (2) *The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*
- (3) *The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose. Provided that wherever the period for filing any pleading or other document required to be filed by these rules*

or by the Court is extended whether by order of the Court or by consent a late filing fee in respect of each extension shall be paid in the amount set out in appendix II by the Party filing the pleading or other document unless for good cause the Court orders that some or all of the same be waived.

16. Pursuant to the affidavit evidence before this court it is evident that there is a real issue between the parties that needs to be duly resolved in these proceedings. The Defendant, in his Affidavit in Opposition has admitted that the same issue is the basis for the proceedings brought in by the FCCC. However, the Defendant claims that the proceedings brought in by the FCCC should be determined first before this matter could be proceeded with.
17. The proceedings brought in by the FCCC is a criminal proceeding in nature. Although the basis for the proceedings is the same issue which is in dispute in this matter, there is no rational in claiming that such proceedings should be determined first, before proceeding forward with this claim. The nature, relief and/or sanctions in the two proceedings fundamentally defer. However, it clearly demonstrates that there's a real issue that needs to be legally determined between the parties.
18. When dealing with an application for extension of time pursuant to Order 3 Rule 4, the law is well settled. Pursuant to the relevant case authorities in this regard, the criteria in considering an application for extension of time pursuant to this Rule needs evaluation of the following factors,
 - i) length of delay
 - ii) reason for delay
 - iii) whether a party has a claim or defence on merits
 - iv) whether the respondent will be prejudiced.(See *Vanualevu Hardware (Fiji) Limited v Labasa Town Council* [2016] HBC 29/12B 10 February 2016 at [3.32])
19. I have further considered at length the case authorities cited by both the counsels in this regard as per their comprehensive written submissions. And as well the Fiji Supreme Court decision in *Extreme Business Solution Fiji Limited v Formscaff Fiji Limited*; CBV 0009 of 2018 (26 April 2019).
20. In the case of *Seru Taralailai & Tevita Seniviavia Volanacagi Taralailai* [2020] Civil Action No. HBC 89 of 2017 (Judgment) 24 July 2020, it was held that:

“Extension of time in terms of Order 3 Rule 4 (1) of the High Court Rules 1988 needs careful exercise of discretionary power of the court, that can eliminate injustice, but if exercised wrongly can deny justice and or access to justice” and later on “The

discretion of the court should not be in favour of refusal of extension of time when there are merits...prolonging the matter may serve justice than quick disposal of that without consideration of merits”.

21. I have already found that this matter includes a real issue that should necessarily needs to be determined legally in these proceedings. It shall therefore not be in the interest of justice to ignore the same and dismiss this application purely on the ground of unreasonable delay.
22. However, in respect of the length and reasons for the delay, I do find that there is a considerable delay in the proceedings, which is by all standards, unconventional and unreasonable. Further, the reasons for the delay, as submitted by the Plaintiff in his Affidavit in Support, in my view, have only managed to partially explain this considerable length of delay caused by the Plaintiff.
23. Although the Plaintiff may have been engaged in discussions for a settlement, I do concede with the Defendant that this was no ground for not filing the Reply to the Statement of Defence and the Defence to Counter Claim within the prescribed time. Irrespective of the discussions for a settlement, the obligation under the Rules needs to be complied with. The Statement of Defence and the Counter Claim was filed on 16/12/2022. There is no Affidavit of Service filed to reflect when the above document was served on the Plaintiff. However, from the date of filing of the same, over 12 months has lapsed until the time the Plaintiff filed the current application for extension of time.
24. However, by the same token, it is also noted that the Plaintiff was not just completely oblivious to these proceedings as he was, in fact, engaged in a discussion with a servant of the Defendant to resolve the matter amicably. The Defendant in its Affidavit in Opposition has claimed that he is unaware of such discussions. However, in considering the fact that the Plaintiff was engaged in discussions with the ‘National Sales Manager’ of the Defendant company, I find it hard to accept this position. Furthermore, the Plaintiff had duly filed a Notice of Intention to Proceed pursuant to Order 3 Rule 5 of the High Court Rules, upon the lapse of 06 months of inaction in the matter. In the circumstances, I do not find it to be in the interest of justice that the Plaintiff should be shut off from defending the Counter Claim of the Defendant.
25. The Defendant has also argued that since the above Notice was filed after 08 months of inaction the matter should have been struck out for want of prosecution pursuant to Order 25 Rule 9 of the High Court Rules. Although literary this could have been the position, there was no Order 25 Rule 9 Notice taken out by the Defendant or been issued by the Court on its own motion. If the Defendant was of the view that such delay was prejudicial to the Defendant, then it was open to the Defendant to take out a Notice under Order 25 Rule 9 of the High Court Rules. The Defendant has failed to do so.

26. Moreover, the Defendant also had the option of filing for Default Judgment against the Plaintiff on its Counter Claim given the failure of the Plaintiff to file its Defence to Counter Claim within the stipulated time. The Defendant failed to do so as well.
27. This Court holds the firm view that it is for the party to an action that has a responsibility to prosecute their own cause diligently without undue delay. This would, vis a vis, apply to both the parties to an action. At the same time, if a party has not been diligent in taking the due steps to safeguard itself against such delay caused by the other party, then it cannot pass such responsibility on the Court. Therefore, the Court finds no basis for striking out the claim based on the delay in these proceedings as suggested by the Defendant pursuant to Order 25 Rule 9 of the High Court Rules.
28. As discussed before, the Court is clearly of the view that the delay in these proceedings is, in fact, unreasonable and that it was caused by the conduct of the Plaintiff. Yet, any prejudice caused to the Defendant by this delay, in the circumstances of this case, can be justly compensated by way of costs without the need to prevent the Plaintiff from filing its Reply to Statement of Defence and Defence to Counter Claim and this would, in Court's considered view, serve both ends of justice.
29. Thus, in the interest of justice, the Court concludes that, irrespective of the delay in these proceedings, it shall be just and expedient to exercise the discretion of the Court pursuant to Order 3 Rule 4 of the High Court Rules to extend the time for the Plaintiff to file its Reply to Statement of Defence and Defence to Counter Claim subject to costs as to be summarily assessed by the Court.
30. Accordingly, the Court makes the following orders.
 1. The Summons filed by the Plaintiff on 15/01/2024, for Extension of Time to File Reply to Statement of Defence and Defence to Counter Claim is hereby allowed subject to the following orders,
 - I. Plaintiff to pay a cost of \$ 2000.00, as summarily assessed by the Court, to the Defendant, as costs of this application within 14 days from this Ruling.
 - II. Plaintiff shall within 03 days from today (That is by 06/11/2024), file and serve its Reply to Statement of Defence and Defence to Counter Claim.

2. Further, the Court orders (in order to expedite these proceedings), the Plaintiff to file and serve the Summons for Directions within 02 days thereafter (That is by 08/11/2024).
3. In failure to comply with any of the above orders, all pleadings of the Plaintiff including the Writ, and the Statement of Claim shall be struck out subject to a cost of \$ 4000.00, as summarily assessed by the court, to be paid to the Defendant by the Plaintiff.



At Suva
31/10/2024

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