IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
EXERCISING CIVIL JURISDICTION.

CIVIL ACTION NO. HBC 208 OF 2011.

BETWEEN : APIMELEKI KUNAVULA, SAVENACA WAINICAGI, ISAIA GONEWAI (Snr) all of Korotoga, Sigatoka, self-employed, and PITA KEWA NACUVA retired civil servant of Suva, Fiji being the trustees of the Mataqali Naboka

PLAINTIFFS- APPELANTS.

AND : RUKSHANA BIBI KHAN of Korotoga, Sigatoka, Businesswoman

DEFENDANT- RESPONDENT

BEFORE : Hon. Mr. Justice Mohamed Mackie.

APPEARANCES : Ms. Ben. S. for the Plaintiff- Appellant (O/I).

: Ms. Sandhya. S. for the Defendant- Respondent (O/I)

WRITTEN SUBMISSIONS : By the Plaintiff – Appellant filed on 8th April 2024.

: Not filed by the Defendant-Respondent.

HEARING : On 8th April 2024 disposed by way of written Submissions.

DATE OF JUDGMENT : 3rd December 2024.

JUDGMENT.

A. **INTRODUCTION**:

1. This is an Appeal arising out of the Ruling dated 5th June2020 pronounced by the learned Master of this Court ("the Master").

2. The leave to Appeal against the impugned ruling was granted by my predecessor (Hon. A.G. Stuart as he then was) on 18th November 2020, and subsequently the Extension of Time to Appeal was granted by my Ruling dated 20th February 2024.

3. By his impugned Ruling dated 5th June 2020, the Master had struck out the Plaintiffs' action, pursuant Order 25 Rule 9 of the High Court rule 1988, when the matter had in fact been referred to him for the only purpose of the assessment of damages and the indemnity costs in terms of the judgment dated 24th April 2014 that had been pronounced by Hon. Lal. S. Abeygunaratne-J (as he then was), which was finally affirmed by the Supreme Court by its Judgment dated 17th July 2017, with specific directions for the Master to do the assessment.

B. BACKGROUND HISTORY IN BRIEF:

4. For the purpose of clarity and easy comprehension, the background history of the case is narrated as follows.

   a. On 16th December 2011, the Plaintiffs- Appellants ("the Appellants") filed their Originating summons against the Defendant-Respondent ("the Respondent") seeking reliefs, inter alia, the vacant possession of the properties comprised in Certificates of Title Numbers 7358 and 7317 being lots 29 and 30 respectively on the deposit plan 1143.

   b. After hearing the matter, Hon. Lal. S. Abeygunaratne –J, by his judgment dated 24th April 2014, granted reliefs as prayed for in the Originating Summons, with a further order to refer the matter to the Master, for the assessment of general damages and the indemnity costs payable by the Respondent to the Appellants.

   c. Being dissatisfied with the High Court judgment dated 24th April 2014, the Appellant had preferred an Appeal to the Court of Appeal , which by its Judgment dated 27th May 2016 allowed the Appeal by setting aside the judgment of the High court and ordering the action to be recommenced and continued as a Writ action.

d. The Plaintiffs (then Appellants) in turn had preferred an Appeal to the Supreme Court, which finally by its judgment dated 21st July 2017, allowed the Appeal, reinstated the judgment of the High court and directed the Master to assess the damages and the Indemnity Costs.

e. In the meantime, while the Supreme Court Judgment was pending, the Plaintiffs (the appellants thereof), as directed by the Court of Appeal Judgment, had filed a Writ action by way of their Statement of claim on 17th May 2017, which was pending before the Master for the pre-trial formalities. However, since the Supreme Court by its Judgment dated 21st July 2017 had allowed the Plaintiffs' then Appeal and reinstated the High court judgment dated 24th April 2014, what was left to be done before the Master was only the assessment of damages and the indemnity Costs in terms of paragraph (f) of the reliefs granted by the said judgment of the High court.

f. However, having observed the non-appearance of the parties and/or their respective Counsel /Solicitors on 25th August 2017 and 8th September 2017, the Master took the matter out of the cause list and issued show cause notice to the Appellants under Order 25 rule 9 on his own motion.

g. Accordingly, despite the appellants' Solicitors had filed the Show Cause Affidavit and informed the Master on 28th of August 2019 that Bill of Costs for the assessment had already been filed and the Order 25 rule 9 will have no application, the Master by his impugned Ruling dated 5th June 2020 struck out the Plaintiffs' action.

h. Being dissatisfied with the Master's decision dated 5th June 2020, the appellants on 16th June 2020 moved the judge seeking leave to Appeal the Master's said decision, and my predecessor, after hearing the matter, by his decision dated 18th November 2020 made Orders, inter alia, granting leave to appeal, and to file and serve the Grounds of Appeal within 7 days from the date of granting leave (ie 18th November 2020), which the appellants' Solicitors duly complied with.

i. However, since no Summons for direction was filed and served pursuant to Order 59 Rule 17 (2), the Appeal became abandoned in terms of Rule 17 (3) thereof. Though, the appellants filed an application before me for the reinstatement of the appeal, by my Ruling dated 24th February 2023 same was dismissed, however, reserving the appellants' liberty to file an application for the extension of time to file the Appeal out of time.

j. Accordingly, the appellants' Solicitors on 17th April 2023 filed an application for the extension of time and, after hearing the parties, by my Ruling dated 24th February 2024, the time for filing the Appeal against the Master's impugned Ruling dated 5th

June 2020 was extended. (Please note that the date of Master's ruling was not **5th June 2019** as stated in the last page of the impugned ruling). Thus, the Appeal being filed out of time, the same is before me now, by overcoming all procedural barriers encountered by the appellants.

C. GROUNDS OF APPEAL:

5. The plaintiffs have adduced 5 Grounds of Appeal, which are reproduced bellow.

   a. ***The Learned Master erred in striking out the cause for want of prosecution and abuse of process of the Court.***

   b. ***The Learned Master erred by not complying with the Orders of the Judge of the High Court entered on 24th April 2014 and the Supreme Court entered on 21st July 2017, by assessing the indemnity Costs of the Plaintiffs.***

   c. ***The learned Master erred by failing to consider that Order 25 Rule 9 did not apply as final judgment had been entered in the matter on the 24th of April 2014 and affirmed by the Supreme Court on 21st July 2017.***

   d. ***The Learned Master erred in law by interpreting that Order 25 Rule 9 imposes a rebuttable onus on the Plaintiff.***

D. HEARING OF THE APPEAL:

6. There was no oral hearing of the Appeal as the Counsel for both the parties had agreed to have the Appeal disposed by way of written submissions. Only the appellants filed their written submissions as stated above and no written submissions was filed by the Respondent.

E. THE LAW:

7. Order 25 Rule 9 of the High Court Rules States;

   (1). If no step has been taken in any cause or matter for six months then any party on application or the Court on its own motion may list the cause or matter for the parties to show cause why it should not struck out for want of prosecution or as parties to show cause why it should not be struck out for want of prosecution as an abuse of the process of the Court.

(2). Upon hearing the application, the Court may either dismiss the cause or matter in such terms as may be just or deal with the application as if it were a summons for direction.

F. **ANALYSIS**:

8. By his impugned Ruling dated 5th June 2020, what the Master had done was the striking out the appellants' action pursuant to Order 25 Rule 9 of the High Court Rule 1988 by examining the principles that govern the striking out of proceedings for lack of prosecution and citing the House of Lords' decision in ***Birkett v James [1977] 2 ALL ER 801*** wherein, Lord Diplock, representing the opinion of the House, stated;
"The power should be exercised only where the court is satisfied either:

(1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or

(2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and
(b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party".

9. As per the above ruling, if the court had initiated the procedures under Order 25 Rule 9 on its own motion, there exists a presumption that all the criteria for the Court to have acted under this rule had been fulfilled. Then the party who opposes the striking must rebut the presumption by demonstrating to the Court that there is neither intentional nor contumelious delay, and that any delay, if any, is neither excessive nor unjustifiable, or that such delay has not resulted in any significant prejudice to the other party (typically the defendant in most cases).

10. In view of the above, I am inclined to agree with the counsel for the appellants when he submits that the Master had failed to state the preposition that the notice under Order 25, Rule 9 imposes a rebuttable onus on Plaintiff. Careful reading of this Rule and the analysis of the relevant authorities make it clear that main purpose of this Rule under this Order is to ensure the better case management and not to punish the party, who has the right to have their case decided on its merits, particularly when the party concerned is not at any fault causing serious prejudice to the opposing party.

11. In the matter in hand, I have found that there was no intentional and contumelious inactivity on the part of the appellant. Thus, for the decision to strike out to be appropriate, it must be substantiated based on the second aspect of the test outlined in ***Birkett v james*** (supra), i.e whether there has been excessive delay resulting in prejudice.

12. As alluded to by the Counsel for the appellant, I find that the Master has failed to address the issue due to his belief that the notice issued under Rule 9 automatically implied an assumption of excessive delay and prejudice against the Respondent, which the appellant had allegedly failed to refute. Notably, the respondent did not assert any prejudice resulting from the appellants' delay in resolving the matter of costs.

13. Understandably, the Respondent was content to leave the matter undisturbed, hoping it would remain unresolved indefinitely. Though, there was, undoubtedly, inordinate and unexplained delay on the part of the appellant , it was difficult to discern how the defendant was prejudiced by this delay, when the substantial action had already been decided by the High Court and the decision finally stood affirmed by the Supreme Court, with only remaining issue to be decided being the assessment of damages and costs. If there was any prejudice to her due to this delay, she had the opportunity to substantiate the prejudice, but she opted not to present evidence on it.

14. The Master had not been called upon to adjudicate the substantial matter as per the Writ of summons that had been filed by the appellant pursuant to the Court of Appeal judgment, which was subsequently overruled by the Supreme Court Judgment. The only duty that was to be performed by the Master was the assessment of damages and the indemnity costs. The parties were not in the process of litigation of the main matter.

15. The relief that had already been granted by the judgment of the High Court, which stood affirmed by the Supreme Court, could not have been deprived by the Master through a process that could have been employed at the early stage of the proceedings, where either of the parties was expected to diligently prosecute or defend the action. Parties hereof were not at litigation stage for the Order 25 Rule 9 was to be resorted to.

16. The Respondent had not been prejudiced in any manner due to the appellants' , admitted, delay in proceeding for the process of the assessment before the Master. Conversely, substantial prejudice has been caused to the Appellant owing to the Master's impugned Ruling, which if allowed to stand will deprive the Appellant of the relief granted by the High Court and affirmed by the Supreme Court.

17. The Master, instead of acting under Order 25 Rule 9 to striking the action, should have noticed the parties and proceeded with the assessment of damages and the indemnity costs, as per the relief (F) granted by the High Court and the direction given by the Supreme Court while affirming the High Court judgment.

18. Accordingly, I decide to allow the Appeal and award summarily assessed costs in a sum of $2,500.00 payable by the Respondent unto the Appellants.

G. FINAL ORDERS:

H. For the reasons stated above, this Court makes the following orders:

A. The Plaintiffs' Appeal is allowed.

B. The Master's Ruling dated 5th June 2020 is hereby set aside.

C. The Plaintiffs' Action is reinstated to the cause list.

D. The Defendant shall pay the Plaintiffs a sum of $ 2,500.00 (Two Thousand Five Hundred Fijian Dollars) being the summarily assessed Costs of this Appeal.

E. The matter shall be placed before the learned Master for the purpose of the assessment of damages and the indemnity costs, after notifying and hearing the parties/ their Solicitors.

On this 3rd day of December 2024 at the High Court of Lautoka.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohamed Mackie.
Judge of the High Court.
High Court.
Lautoka.

SOLICITORS:

For the Plaintiff: Messrs. Parshotam Lawyers, Barristers & Solicitors.

For the Defendant: Messrs. Fa & Company, Barristers & Solicitors.