IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 214 of 2023

BETWEEN:

ISIRELI TUIFUA FA
PLAINTIFF

AND:

SELUVAIA LEPOLO PILLAY
1ST DEFENDANT

AND:

ULAMILA TUITUKU
2ND DEFENDANT

AND:

MARY MUIR
3RD DEFENDANT

AND:

ADRIENNE ALI
4TH DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:
FA & Company for the Plaintiff
Interalia Consultancy for the 1st and 4th Defendants
Law Solutions for the 2nd Defendant
Munro Leys for the 3rd Defendant

Date of Hearing:
By way of Written Submissions

Date of Ruling:
20th March 2025

RULING

01. The Court, on its own motion, has issued a notice on 26/07/2024, pursuant to Order 25 rule 9 of the High Court Rules to the parties in this matter to show cause why this matter should not be struck out for want of prosecution or as an abuse of the process of the court due to no steps been taken in this cause for over 06 months. The said notice required the relevant parties to give Notice of Intention to Proceed pursuant to Order 3 Rule 5 of the High Court Rules, **immediately** if they wish to proceed any further with the action.

02. The Plaintiff filed a Notice of Intention to Proceed on 06/08/2024, a week after the Order 25 Rule 9 Notice was issued.

03. It is to be noted that the 4th Defendant had filed a Counter Claim along with her Statement of Defence filed on 31/08/2023. The Plaintiff had filed a Reply to the Statement of Defence and Defence to the Counter Claim of the 4th Defendant on 15/09/2023. However, till the Order 25 Rule 9 Notice was issued by the Court on its own motion on 26/07/2024, the 4th Defendant had also failed to take any steps to move her Counter Claim forward.

04. Thus, the service of the Order 25 Rule 9 notice on the 4th Defendant, equally requires the 4th Defendant to file a Notice of Intention to Proceed and to file an Affidavit to Show Cause, if the Counter Claim is to be proceeded with. The 4th Defendant neither filed the Notice of Intention to Proceed nor the Affidavit to Show Cause as required by Order 25 Rule 9 Notice.

05. On 08/08/2024, when the matter was first called before this Court on the Order 25 Rule 9 Notice, only the counsel for the Plaintiff moved for further time to file an Affidavit to Show Cause. The Court then granted further 07 days for the Plaintiff to file and serve an Affidavit to Show Cause and also directed if any of the Defendants wishes to

support the Courts' motion, to file and serve Affidavits in Support and thereupon for all parties to file written submissions simultaneously.

06. The Plaintiff had filed its Affidavit to Show Cause on 16/08/2024. Written Submissions have been filed by the 3rd Defendant on 11/09/2024 and by the 1st and 4th Defendants on 23/09/2024.

07. In considering the proceedings under Order 25 Rule 9 of the High Court Rules, the Court shall first review the history of the cause. The Plaintiff's Writ of Summons along with the Statement of Claim had been filed on the 18/07/2023.

08. On the same day, 18/07/2023, the Acknowledgment of Service for the 2nd Defendant was filed by Law Solutions and on 19/07/2023 the Statement of Defence for the 2nd Defendant was filed. An Affidavit of Service of the 2nd Defendant's Statement of Defence has been filed on 21/07/2023.

09. An Acknowledgment of Service for the 3rd Defendant was filed on 27/07/2023 by Munro Leys and the Statement of Defence for the 3rd Defendant was filed on 04/08/2023.

10. An Acknowledgment of Service for the 1st and 4th Defendants was filed on 28/07/2023. On 31/08/2023, the Statement of Defence of the 1st Defendant and the Statement of Defence and the Counter Claim of the 4th Defendant were filed.

11. The Reply to the Statement of Defence of the 3rd Defendant and the Reply to the Statement of Defence and Defence to Counter Claim of the 4th Defendant were filed by the Plaintiff on 15/09/2023.

12. Thereafter, it is to be noted that no steps were taken by the Plaintiff to proceed with its Claim or by the 4th Defendant to proceed with its Counter Claim, for over 10 months until the Court, on its own motion, issued the Order 25 Rule 9 Notice on 26/07/2024.

13. This Court shall now proceed with the ruling on Order 25 Rule 9 Notice, having duly considered the available affidavit evidence and the comprehensive written submissions filed on behalf of the parties.

14. Order 25 Rule 9 of the High Court Rules 1988 provides for the jurisdiction of the court to strike out any cause or matter for want of prosecution or as an abuse of the process of the court if no step has been taken for six months. The said rule reads,

> *"If no step has been taken in any cause or matter for six months then any party on application or the court of its own motion may list the cause or matter for the*

parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the court.

Upon hearing the application, the court may either dismiss the cause or matter on such terms as may be just or deal with the application as if it were a summons for directions".

15. In the event the parties fail to take steps to proceed with a cause for over 06 months, this provision provides the jurisdiction to the Court to strike out the proceedings. The rule provides for two instances under such order for striking out could be made; that being, firstly, for want of prosecution and secondly, for abuse of process of the Court.

16. This is a rule that was introduced to the High Court Rules for case management purposes, and it was effective from 19 September 2005. The main characteristic of this rule, as this Court has observed in many previous rulings, is that the court is conferred with the power to act on its own motion in order to agitate the unduly lethargic litigation (**see; *Trade Air Engineering (West) Ltd v Taqa [2007] FJCA 9; ABU0062J.2006 (9 March 2007***).

17. I shall repeat myself in stating that well before the introduction of this rule, the courts in Fiji have been exercising this power to strike out the cause for want of prosecution following the leading English authorities such as ***Allen v. McAlpine*** [1968] 2 QB 299;[1968] 1 All ER 543 and ***Birkett v. James*** [1978] AC 297; [1977] 2 All ER 801.

18. Justice Scott, striking out the Plaintiff's action in ***Hussein v Pacific Forum Line Ltd [2000] Fiji Law Report 24; [2000] 1 FLR 46 (6 March 2000),*** stated that,

"The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are ***Allen v. McAlpine*** *[1968] 2 QB 299;[1968] 1 All ER 543 and* ***Birkett v. James*** *[1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example,* ***Merit Timber Products Ltd v. NLTB*** *(FCA Reps 94/609) and* ***Owen Potter v. Turtle Airways Ltd*** *(FCA Reps 93/205)".*

19. The Court of Appeal of Fiji in ***Trade Air Engineering (West) Ltd v Taqa*** (supra) held,

"In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority".

20. Pursuant to the above decision of the Court of Appeal, it is clear that the principles set out in ***Birkett v. James*** (supra) are still applicable to strike out any cause where no step is taken for six months, despite the introduction of the new rule (Or 25 r 9). Lord Diplock, in ***Birkett v. James*** (supra), explained the emerging trend in English courts in exercising the inherent jurisdiction for want of prosecution. His Lordship held that,

> *"Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for direction and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution except upon disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.*
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> *To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in Reggentin vs Beecholme Bakeries Ltd (Note) [1968] 2 Q.B. 276 (reported in a note to Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229) and Fitzpatrick v Batger & Co Ltd [1967] 1 W.L.R. 706*
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> *The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as Allen v McAlpine [1968] 2 Q.B. 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to R.S.C, Ord. 25, R. 1 in the current Supreme Court Practice (1976).* ***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****".*(emphasis added)

21. In view of the above celebrated authorities, the first limb in the test to be applied in considering a strike out under Order 25 Rule 9 of the High Court Rules, is ***the intentional and contumelious default***. Lord Diplock gave two examples for that first limb in the case of ***Birkett v. James*** (supra). One is ***disobedience to a peremptory order***

of the court and the other is ***conduct amounting to an abuse of the process of the court.***

22. Thus, the second limb provided in Order 25 Rule 9, which is 'abuse of the process of the court', is a good example for '***the intentional and contumelious default'*** as illustrated by Lord Diplock in ***Birkett v. James*** (supra). According to Lord Diplock, the abuse of the process of the court falls under broad category of '***the intentional and contumelious default.'***

23. House of Lords in ***"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,*** held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows,

> *"The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings are brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

24. When considering the local jurisprudence in this regard, it is pertinent to note that the Fiji Court of Appeal in ***Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006,*** followed the principles of ***"Grovit and Others v Doctor and Others"*** (supra) and held that,

> *"During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in **Grovit and Ors v Doctor** [1997] 2 ALL ER 417. That was an important decision, and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in **Birkett v James** [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court."*

25. As previously cited in many of my rulings under Order 25 Rule 9 of the High Court rules, I refer to the decision of Master Azhar (as he then was) in the case of ***Amrith Prakash v Mohammed Hassan & Director of Lands; HBC 25/15: Ruling (04 September 2017)*** where it was held,

> *"Both the **The Grovit** case and **Thomas (Fiji) Ltd** (supra) which follows the former, go on the basis that, "abuse of the process of the court" is a ground for striking out, which is independent from what had been articulated by Lord Diplock in **Birkett v James** (supra). However, it is my considered view that, this ground of "abuse of the process of the court" is part of '**the intentional and contumelious default',** the first limb expounded by Lord Diplock. The reason being that this was clearly illustrated by Lord Diplock in **Birkett v. James** (supra). For the convenience and easy reference, I reproduce the dictum of Lord Diplock which states that; "…**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…"** (Emphasis added). According to Lord Diplock, the abuse of the process of the court falls under broad category of '**the intentional and contumelious default'**. In fact, if a plaintiff commences an action and has no intention to bring it to conclusion it is an abuse of the process of the court. Thus, the default of a plaintiff intending not to bring it to conclusion would be intentional and contumelious. Accordingly, it will fall under the first limb of the principles expounded in **Birkett v. James** (supra). This view is further supported by the dictum of Lord Justice Parker who held in **Culbert v Stephen Wetwell Co. Ltd,** (1994) PIQR 5 as follows,*
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> *"There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice."*

26. It is therefore clear from the above decision**,** that the party other than the one that makes a claim against another, **is under no duty to prove the prejudice to him/her, or for that matter for the Court to consider the prejudice to the Defendant (or to the Plaintiff as the case may be), to strike out the cause or the matter under Order 25 Rule 9 of the High Court Rules 1988, if the abuse of the process of the Court is established.**

27. In the above context, it can safely be stated that it is sufficient to establish the relevant parties' inactivity coupled with the complete disregard of the Rules of the Court with

the full awareness of the consequences, for an action to be struck out pursuant to Order 25 Rule 9 of the High Court Rules.

28. The burden of proof in determining the matters under Order 25 Rule 9 of the High Court Rules may fall as a "negative burden of proof' on the Plaintiff itself. I again repeat myself of the sentiments expressed by Master Azhar (as he then was) in ***Amrith Prakash v Mohammed Hassan & Director of Lands*** (Supra), where it was further held,

> *"If the court issues a notice, it will require the party, most likely the Plaintiff, to show cause why his or her action should not be struck out under this rule. In such a situation, it is the duty of the Plaintiff to show to the Court negatively that, there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay, and no prejudice is caused to the Defendant. This is the burden of negative proof. In this case, the Defendant does not even need to participate in this proceeding. He or she can simply say that he or she is supporting the court's motion and keep quiet, allowing the plaintiff to show cause to the satisfaction of the court not to strike out plaintiff's cause. Even in the absence of the defendant, the court can require the plaintiff to show cause and if the court is satisfied that the cause should not be struck out, it can give necessary directions to the parties. Generally, when the notice is issued by the court, it will require the defendant to file an affidavit supporting the prejudice and other factors etc. However, this will not relieve the Plaintiff from discharging his or her duty to show cause why his or her action should not be struck out. In the instant case, it was the notice issued by the court on its own motion. Thus, the Plaintiff has the burden of negative proof and or to show cause why his action should not be struck out for want of prosecution or abuse of the process of the court."*

29. The second limb of the test as per the case of ***Birkett v. James*** (supra) is,

(a) that there has been inordinate and inexcusable delay on the part of the Plaintiff and/or the Defendant (as the case may be) or its lawyers, and
(b) that such a 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 other parties. In short, inordinate, and inexcusable delay and prejudice, which makes the fair trial impossible.

30. Whilst interpreting the meaning of the terms *'inordinate'* and *'inexcusable'*, the Fiji Court of Appeal in ***New India Assurance Company Ltd v Singh*** ***[1999] FJCA 69; Abu0031u.96s (26 November 1999),*** unanimously held that,

> *"We do not consider it either helpful or necessary to analyse what is meant by the words 'inordinate' and 'inexcusable'. They have their ordinary meaning.*

Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case".

31. However, in ***Deo v Fiji Times Ltd [2008] FJCA 63; AAU0054.2007S (3 November 2008)*** the Fiji Court of Appeal has cited the unreported case of ***Owen Clive Potter v Turtle Airways Limited v Anor*** *Civil Appeal No. 49 of 1992*, in construing the meaning of the terms *'inordinate' and 'inexcusable'* and held that,

"The meaning of "inordinate and inexcusable delay" was considered by the Court of Appeal in ***Owen Clive Potter v Turtle Airways Limited v Anor*** *Civil Appeal No. 49 of 1992 (unreported) where the Court held that inordinate meant "so long that proper justice may not be able to be done between the parties" and "inexcusable" meant that there was no reasonable excuse for it, so that some blame for the delay attached to the plaintiff".*

32. In considering whether a period of delay to be inordinate and contumelious pursuant to Order 25 Rule 9 of the High Court Rules, Master Azhar in ***Amrith Prakash v Mohammed Hassan & Director of Lands*** (Supra) went on to hold,

"Order 25 Rule 9 by its plain meaning empowers the Court to strike out any cause either on its own motion or an application by the defendant if no steps are taken for six months. The acceptable and/or tolerable maximum period for inaction could be six months. The threshold is six months as per the plain language of the rule. It follows that any period after six months would be inordinate and excusable so long that proper justice may not be able to be done between the parties and no reasonable excuse is shown for it. Therefore, whether a delay can be described as inordinate or inexcusable is a matter of fact which to be determined in the circumstances of each and every case."

33. Having due regard to the above legal matrix, it is to be noted in the present case, since the notice was issued by this Court on its own motion, pursuant to Order 25 Rule 9, it is for the Plaintiff to show cause why its cause should not be struck out under Order 25 Rule 9 and as well, for the 4th Defendant to show cause why its Counter Claim should not be struck out.

34. Before moving over to consider the Plaintiff's reasons as submitted in the Affidavit filed on 16/08/2024, it is pertinent to note that the 4th Defendant has failed to show cause as to why she failed to take any steps to move forward the Counter Claim for over 06 months. As illustrated in the foregoing paragraphs, Order 25 Rule 9 of the High Court Rules applies equally to a Defendant who had filed a Counter Claim as it would apply to a Plaintiff.

35. When the pleadings in a particular matter are deemed to be closed, the parties are to attend to discovery and inspection of documents pursuant to Order 24 of the High Court

Rules. Plaintiff must thereupon, within 01 month after the pleadings are deemed to be closed, file Summons for Directions pursuant to Order 25 Rule 1. Likewise, this rule applies, *mutatis mutandis*, to a Defendant who had filed a Counter Claim, pursuant to Order 25 Rule 1 (4) of the High Court Rules.

36. In this particular case at hand, neither the Plaintiff nor the 4th Defendant proceeded to file Summons for Directions for over 10 months from the date the pleadings deemed to be closed.

37. As the 4th Defendant has failed to file a Notice of Intention to Proceed and/or an Affidavit to Show Cause pursuant to Order 25 Rule 9 notice, I find no justification whatsoever for allowing the Counter Claim of the 4th Defendant to prevail.

38. In the absence of any reasons to the contrary, I find that the 4th Defendant's Counter Claim was initiated with no intention of bringing it to trial or to a conclusion within a reasonable time. Thus, I find the Counter Claim of the 4th Defendant to be an abuse of the process of the court and should necessarily be struck out pursuant to Order 25 Rule 9 of the High Court Rules.

39. I shall now consider the reasons given by the Plaintiff to show cause as per the Affidavit of the Plaintiff filed on 16/08/2024. Averments 15 to 25 in the Plaintiff's Affidavit attempt to explain the delay.

40. In summary, the Plaintiff is claiming that after the initial Domestic Violence Restraining Order (DVRO) Application No. 03 of 2023, was dismissed by the Magistrates Court, the 1st Defendant had filed a fresh DVRO application bearing application No. 181 of 2023 and the Plaintiff was *'waiting for a settlement'* and that *'considerable time was spent on trying to settle Seluvaia Lepolo Fa v Isireli Fa & Selai Fa; DVRO Case No. 181 of 2023 and for that reason this matter wasn't progressed'.*

41. It is now the opportune moment to consider the background of the Plaintiff's claim. The Plaintiff, a barrister and solicitor himself, is a beneficiary of the estate of his late father, Mr. JV Fa. The first and second Defendants are sisters of the Plaintiff who holds life interests in the property coming under the estate of late Mr. JV Fa.

42. The first Defendant had filed a DVRO Application bearing No. 03 of 2023 against the Plaintiff in the Magistrates Court on 03/01/2023. Following this application, an ex-parte DVRO had been issued in the interim whilst the application was pending before the Magistrates Court. However, after several mentions before the Court, on 12/06/2023 the application was dismissed by the Court and the interim DVRO was uplifted.

43. The Plaintiff then filed the current proceedings against the Defendants claiming that the filing of the DVRO Application No. 03 of 2023 was a malicious prosecution against him and that the Defendants had conspired to *'use the legal system and its institutions to damage and delegitimize the Plaintiff on (sic) filing Seluvaia Lepolo Fa v Isireli Fa; DVRO Case No. 03 of 2023'.* It is to be noted that the third and fourth Defendants are alleged to have been the solicitors who had instructed the first Defendant, along with the second Defendant, to file the DVRO Application No. 03 of 2023.

44. An application for a Domestic Violence Restraining Order is filed pursuant to the Domestic Violence Act 2009. A DVRO is literary made when a Respondent has or is committing and/or is likely to commit domestic violence against that person or against another person relevant to such an application. In the current case before the Court, the Plaintiff alleges that DVRO application No. 03 of 2023 was, in fact, a malicious prosecution against him and that the Defendants conspired in bringing this malicious prosecution. It appears that a primary reason for the Plaintiff to make such an allegation is the fact that DVRO application No. 03 of 2023 has been dismissed by the Magistrates Court, without arriving at an adverse finding against the Plaintiff in this cause.

45. In the above context, the first Defendant, filing a fresh DVRO application against the Plaintiff and his wife (DVRO application No. 181 of 2023), after the initial DVRO application No. 03 of 2023 been dismissed, simply has no bearing in the current proceedings. The Plaintiff's claim that it was waiting for DVRO application No. 181 of 2023 to be settled by way of a '*deed of settlement'* and therefore not taking any steps in the current proceedings for over 10 months creates a clear doubt as to the real intentions of the Plaintiff in filing the current proceedings before the Court.

46. In carefully considering the facts averred in the Affidavit of the Plaintiff in the Affidavit filed on 16/08/2024, the only reasonable conclusion this Court can arrive at is that the Plaintiff had brought this current proceeding as an influencing and/or bargaining factor in future proceedings in domestic violence related matters between the parties, (including the DVRO application No. 181 of 2023). Moreover, in considering the facts averred in the Plaintiffs' affidavit filed on 16/08/2024 as a whole, it appears to this Court that the Plaintiff may have intended to use these proceedings as a means to compel the first and second Defendants to arrive at a settlement over the estate property in the estate of late Mr. JV Fa and to prevent the third and fourth Defendants from legally representing the interests of the first and second Defendants in the above estate matter.

47. Accordingly, having carefully considered the reasons for the delay, as submitted by the Plaintiff in its Affidavit filed on 16/08/2024, this Court finds that the Plaintiff had no *bona fide* intention of bringing this matter to trial and/or to conclude these proceedings within a reasonable time. This in my considered view, is an abuse of the process of the

Court and as well a violation of the Defendant's constitutional rights guaranteed under Sec. 15 (3) of the Constitution of Fiji.

48. Further, having regard to the lengthy delay and the Plaintiff's failure to comply with the rules of the Court, I shall make reference to Lord Justice Parker in ***Culbert v Stephen Wetwell Co. Ltd, (1994) PIQR 5*** where it was held,

> *"**There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court.** Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice." (Emphasis added).*

49. The Plaintiff's inactivity in the current proceedings extends beyond 10 months from the time the pleadings are deemed to be closed. The reasons for the delay, as submitted by the Plaintiff, can hardly be considered justifiable and/or reasonable. Thus, the Court is of the firm view that the delay in these proceedings is inordinate and inexcusable.
50. As cited before, it was held in ***Amrith Prakash v Mohammed Hassan & Director of Lands*** (Supra), that the legally acceptable period for inaction in a civil cause in Fiji is 06 months as embodied in Order 25 Rule 9 of the High Court Rules 1988.

51. Thus, at this juncture, the question the Court needs to address is, whether a delay beyond the limit of 06 months be simply excusable when it is submitted that the Plaintiff was awaiting settlement in an unrelated case or in the absence of any acceptable and/or justifiable reasons to explain a delay over 06 months, that such delay be held inordinate and inexcusable?

52. In overall consideration of all the above findings, it is the conclusion of the Court that although the Plaintiff has instituted this action against the Defendants, it seems from his conduct as described above, that he appears not to have shared any genuine intention to bring it to a conclusion within a reasonable time. As already found by the Court, this amounts to an abuse of the process of the court. The House of Lords in ***"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,*** held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows,

> *"The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can*

amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in ***Birkett v James*** *[1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

53. As already highlighted in the foregoing paragraphs, the acceptable and/or tolerable period of inaction in any civil cause or matter is 6 months as per the plain meaning of Order 25 Rule 9. The threshold is, therefore, 6 months, and any delay thereafter would be inexcusable and inordinate so long as no reasonable excuse is provided, and justice may not be able to be done between the parties. In this case, as elaborated in the foregoing paragraphs, the Court does not find any acceptable and/or justifiable reasons for a delay of almost 10 months. The Court therefore repeats itself that the delay occasioned by the Plaintiff in the current proceedings is clearly inordinate and, given all the facts and circumstances before this Court, that it is contumelious.

54. In conclusion I wish to reiterate the following sentiments expressed in my previous rulings under Order 25 rule 9 of the High Court Rules. That in litigation, there are parties that pursue their cases sporadically or make default with the intention of keeping matters pending against the other parties without reaching a finality. The Courts shouldn't ignore such practice or parties.

55. Such practices shall be disallowed promptly for reasons that they are an abuse of the process of the Court, and a waste of the Court's time and resources which are not infinite.

> '*The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition and want their cases to be heard within a reasonable time'* (see; ***Singh v Singh***-supra).

56. As mentioned in the foregoing paragraphs such practices also violate the fundamental rights guaranteed by the sections 15 (2) and (3) of the Constitution which read,

> *(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.*

(3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time. (Emphasis added)

57. Further, such a practice may necessarily constitute serious prejudice to the other party as justice may not be done between the parties when the cause or matter is pending idle for an unacceptable length of time without any steps being taken to reach a finality in the proceedings.

58. For the reasons and findings set out above, it is the Courts overwhelming conclusion that the Plaintiff shares no interest at all in duly pursuing this cause to reach a finality and the delay caused by the Plaintiff in these proceedings is inexcusable and inordinate or otherwise amounts to an abuse of the process of the Court.

59. I therefore conclude that the Plaintiff has failed to duly show cause as to why his action should not be struck out for abuse of the process of the Court or for want of prosecution and accordingly this Court orders that the Writ of Summons and the Statement of Claim filed on 18/07/2023, along with the Counter Claim of the 4th Defendant filed on 31/08/2023, be struck out and dismissed pursuant to Order 25 Rule 9 of the High Court Rules 1988.

60. Consequently, the Court makes the following final orders,

I. Plaintiff's Writ of Summons and the Statement of Claim is hereby struck out and dismissed pursuant to Order 25 Rule 9 of the High Court Rules subject to a cost of $ 2000.00 to be paid to each of the Defendants, as summarily assessed by the Court, as costs of these proceedings,

II. 4th Defendant's Counter Claim filed on 31/08/2023 is also struck out and dismissed pursuant to Order 25 Rule 9 of the High Court Rules subject to a cost of $ 2000.00 to be paid to the Plaintiff, as summarily assessed by the Court.

III. This Cause is accordingly wholly struck out and dismissed.

HIGH COURT OF FIJI SUVA

L. K. Wickramasekara,

Acting Master of the High Court.

At Suva,
20/03/2025.