

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 412 of 2009**

**BETWEEN** : **VUNIMOLI SAWMILL LIMITED** a limited liability company having its registered office at Labasa.

**PLAINTIFF**

**AND** : **FIJI INSTITUTE OF TECHNOLOGY** of Suva.

**DEFENDANT**

**BEFORE** : **Justice Deepthi Amaratunga**

**COUNSEL** : **Mr. Vasarogo V** for the Plaintiff  
**Ms. A. Maharaj** for the Defendant

**Date of Hearing** : 18<sup>th</sup> March, 2011

**Date of Decision** : 9<sup>th</sup> July, 2013

**DECISION**

**A. INTRODUCTION**

1. The solicitors for the Defendant filed the undated summons to strike out certain paragraphs of Reply to Statement of Defence & defence to counter claim filed on 7<sup>th</sup> September, 2010 in terms of the Order 18 rule 18(1) (b), (c), and (d) and also Order 18 rule 6 of the High Court Rules of 1988 and alternatively the summons seeks to strike out Reply to statement of Defence and Defence to counter claim under Order 5 rule 6 of the High Court Rules of 1988. Before the hearing of the said summons, the Plaintiff on 10<sup>th</sup> February, 2011 filed a summons seeking strike out of the Defendant's summons dated 12<sup>th</sup> October, 2010 (sic) (there is no such summons) as an abuse of process and alternatively, defendant be ordered to file its reply to the Plaintiff's Defence to counterclaim or to grant

leave to amend its reply to Defence and defence to counter claim. The Plaintiff also filed a summons for Directions on 28<sup>th</sup> October, 2010.

**B. ANALYSIS**

2. First, I deal with the summons filed by the Defendant. The Defendant's undated summons seeking strike out was issued from the court on 4<sup>th</sup> October, 2010 and the orders sought in the said summons are as follows

- a. Paragraphs 1, 3, 4 and 5 of the Plaintiff's reply to the Defence and Defence to Counterclaim filed on 7<sup>th</sup> September, 2010 be struck out under Order 18 rule 18(1)(b),(c), and (d) and Order 18 rule 6(1) of the High Court Rules of 1988
- b. Alternatively, the Plaintiff's reply to Defendants statement of Defence and Defence to counterclaim filed on 7<sup>th</sup> September, 2010 be struck out under Order 5 rule 6 of the High Court Rules of 1988.

3. Order 5 rule 6 of the High Court Rules of 1988 states as follows

'Right to sue in person (O.5, rule 6)

6(1) Subject to paragraph (2) and to Order 80, rule 2, any person (Whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the High Court by a barrister and solicitor or in person.

(2) **Except as expressly provided** by or under any enactment, **a body corporate may not begin or carry** on any such proceedings otherwise than by a barrister and solicitor' (emphasis added)

4. The Plaintiff had instituted this action through a solicitor but the Plaintiff's reply to the Defendant's statement of defence and defence to counter claim, which was filed on 7<sup>th</sup> September, 2010, and it was by a person named as Bashir Khan, but the Plaintiff is a limited liability Company. At the hearing of this summons the Plaintiff was represented by a solicitor, but he was unable to point out any provision in the High Court Rules of 1988, which granted a body corporate to proceed with its action in person and more specifically to file pleadings filed on 7<sup>th</sup> September, 2010 in person. The person who had filed the said pleadings had not indicated whether he was specifically authorized to do so, but this is irrelevant as that is needed when the body corporate files an acknowledgement when it is a Defendant in an action. Obviously, the said Plaintiff's reply to the Defendant's statement of defence and defence to counter claim filed on 7<sup>th</sup> September, 2010 was in contravention of the Order 5 rule 6 and needs to be struck off from the record in limine for non-compliance with the said rule.
  
5. The Supreme Court Practice (White Book) 1991 page 32 in its commentary for Order 5 rule 6 which is identical to the Fiji High Court Rules of 1988 Order 5 rule 6 under "A body corporate" at 5/6/1 state as follows

‘As an exception to the general prohibition laid down by para (2) a body corporate, including a limited liability company, is expressly empowered itself to acknowledge service of writ of summons and an originating summons and to give notice to its intention to defend by a person duly authorized to act on its behalf, instead of action by a solicitor (ibid). in view of the expression “except as expressly provided” it would seem to be doubtful whether in a writ action a body corporate is entitled to state its intention in its acknowledgement of service of applying for a stay of execution and thereby to obtain the benefit of such a stay on a default judgment entered by the Plaintiff under O13, r.8 or whether in a district registry action, it .....’

6. Subsequent to the said filing of the Plaintiff's reply to the Defendant's statement of defence and defence to counter claim on 7<sup>th</sup> September, 2010 the Plaintiff had engaged another solicitor firm and they had also filed a notice of change of solicitors on 26<sup>th</sup> February, 2011, strangely, prior to this another notice of change of solicitors was filed on 20<sup>th</sup> October, 2010, and the same solicitors appeared at the hearing of the summons on 26<sup>th</sup> February, 2011 and also participated at the hearing of the summons filed by the Defendant, but did not make an application to rectify the error committed by the Plaintiff when it decided to file pleading in person after instituting the action through a solicitor, as required under the rules. The prohibition contained in the Order 5 rule 6(2) equally applies to continuation of an action instituted by a body corporate. The plaintiff is a body corporate, hence not only the institution of the action, but also the proceeding with the said action must only be through a solicitor and barrister. This prohibition to appear in person is applicable only when the body corporate is Plaintiff of the action. When the plaintiff is filing a reply to the statement of defence it is done as the Plaintiff of the action it had instituted and this is carrying on the said proceeding it had instituted, hence the Plaintiff is prohibited to file such pleading in person.

**C. SUMMONS FILED BY THE PLAINTIFF**

7. Firstly the same solicitors who appeared at the hearing of the Defendant's summons had filed a **summons for directions** dated **28<sup>th</sup> October, 2010** on 16<sup>th</sup> November, 2010 but the pleadings have not closed by this time and the said summons for directions clearly contravenes Order 25 rule 1(1) which indicates that summons for directions needs to be filed within one month after the pleadings are deemed closed. In this action the Plaintiff had failed to comply with the Order 5 rule 6 and the Plaintiff's reply to the Defendant's statement of defence and defence to counter claim filed on the 7<sup>th</sup> September, 2010 is struck off, hence there is no closing of pleadings and the said summons of directions was premature and should be struck off.
8. Secondly, the Plaintiff's present solicitors filed a **summons dated 10<sup>th</sup> February, 2011** seeking strike out of the Defendant's undated summons or for an order compelling the Defendant to file a reply to their defence to the

counterclaim of the Defendant. In the circumstances I do not think I need to consider the said orders since I have already struck off the pleadings filed on 7<sup>th</sup> September, 2010. There is no such provision in the High Court seeking strike out of summons and when the Plaintiff is yet to file a proper defence (after striking out) to the counter claim and a reply to the statement of claim, the orders sought in the Plaintiff's summons dated 10<sup>th</sup> February, 2011 does not arise and orders (a) and (b) of the summons of the plaintiff dated 10<sup>th</sup> February, 2010 needs to be struck off. The said summons alternatively seeks to amend the Reply to the Defence and Defence to counter Claim, but this will not arise as I have already struck off the same. The plaintiff is granted 14 days to file a reply to the defence and defence to counter claim in terms of the High Court Rules of 1988. The said summons dated 10<sup>th</sup> February, 2010 is struck off. The Defendant is granted a cost of \$750 for the cost of this application. The delay is regretted.

**D. FINAL ORDERS**

- a. The Plaintiff's purported reply to the Defendant's statement of defence and defence to counter claim (filed in person), on 7<sup>th</sup> September, 2010 is struck off since it did not comply with Order 5 rule 6.
- b. The Plaintiff is granted 14 days to file and serve a reply to the statement of defence and defence to counter claim in compliance with Order 5 rule 6. (i.e. through a barrister and solicitor)
- c. The Plaintiff's summons for directions and summons dated 28<sup>th</sup> October, 2010 and summons dated 10<sup>th</sup> February, 2011 are struck off.
- d. The Defendant is granted a cost of \$750 assessed summarily for this application to be paid within 21 days.
- e. The matter to take normal cause.

Dated at **Suva** this **9<sup>th</sup> day** of **July, 2013**.

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**Justice Deepthi Amaratunga**  
**High Court, Suva**