

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

**Consolidated Action No. 211 of 2000
and HBC 06 OF 2007**

CIVIL ACTION NO. 211 OF 2000

BETWEEN : **GURSAMY** son of Gurappa of Wailailai, Ba, Fiji,
Cultivator and Administrator of the Estate of Gurappa son
of Gurwaiya, decease.
Plaintiff

AND : **GANAGAMMA** fathers name not known to the Plaintiff
(wife of Chindora) of Wailailai, Ba, Fiji, Domestic Duties
1st Defendant

AND : **RAJESH** son of Chindora of Wailailai, Ba, Fiji, Driver
2nd Defendant

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 06 of 2007

BETWEEN : **GURSAMY** son of Gurappa of Wailailai, Ba, Fiji,
Cultivator and Administrator of the Estate of Gurappa son
of Gurwaiya, decease.
Plaintiff

AND : **NATIVE LAND TRUST BOARD** a corporate body duly
incorporated under the Native Land Trust Cap 13 of the
Laws of Fiji
1st Defendant

AND : **GANAGAMMA** fathers name not known to the Plaintiff
(wife of Chindora) of Wailailai, Ba, Fiji, Domestic Duties
2nd Defendant

Before: Master M H Mohamed Ajmeer

Counsel:

Mr S Titoko for the plaintiff

Mr N Nand for the 1st defendant

Mr P Nayare for the 2nd defendant

Date of Hearing : 19 May 2014

Date of Ruling : 27 June 2014

R U L I N G

[1] This is an application made by Gangamma, first defendant pursuant to Order 25 Rule 9 of the High Court Rules 1988 and the Inherent Jurisdiction of the court to have the action struck out for want of prosecution. The application is supported by an affidavit of first defendant sworn on 2 December 2013 and filed on 4 December 2013.

[2] The first defendant in her supporting affidavit stated that:

1. **THAT** *the case was taken off the cause list on the 24th of February, 2012 when the Honourable Judge took the matter off the cause list for failing to provide the necessary probate documents.*
2. **THAT** *there has been an inordinate and inexcusable delay and any party representing the interest of the Plaintiff has failed to proceed with the matter with reasonable diligence and expedition.*
3. **THAT** *I as the 1st defendant cannot seat back and wait indefinitely for the Plaintiff representatives if any to proceed with the matter.*
4. **THAT** *I am also incurring unnecessary legal costs and also I face uncertainty as to the conduct of the matter by the Representatives of the Plaintiff if any.*
5. **THAT** *it has been almost 1 year and 10 months; they have not made any applications for reinstatement or deposited any probate documents. There is considerable delay by the Plaintiff and/or his representative if any in this matter.*

[3] On 28 February 2014 Saraswati Devi AKA Saras Wati, substituted plaintiff filed an affidavit sworn on 26 February 2014 in reply. In that affidavit the substituted plaintiff stated that:

1. *The said deceased commenced this action in 2000 against the above named Defendants in respect of Native Lease No. 10184.*
2. *I verily believe that this matter was set down for hearing on the 25th day of October 2010. Hearing did not proceed as Counsel for Defendants in Action No 211 of 2000 and Second Defendant in Action No. 006 of 2007 asked for adjournment.*
3. *Fresh hearing dates were given for 5th and 6th days of September 2011. Hearing did not commence on those days as my husband the late Gursamy died on the 8th June 2011.*
4. *I have instructed my Solicitors to file an application for substitution and to oppose the application to strike out. I and my family have not been creating tension and I ask that I be allowed to bring this action to a conclusion.*

The Law and analysis

[4] The application has been made under Order 25 Rule 9 of the High Court Rules 1988 to strike out the matter for want of prosecution. Ord. 25, r. 9 provides:

*“(1) 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.*

*2) 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.**(Emphasis added)” .*

[5] In this case the matter has been listed on the application of the first defendant for the plaintiff (substituted plaintiff) to show cause why it should not be struck out for want of prosecution.

- [6] On 11 January 2000 late Gursamy, the original plaintiff instituted this action claiming reliefs against the defendants jointly and/or severally. He sought, inter alia, an order that the Native Lease No.27739 in the name of the second defendant do be cancelled forthwith and the Registrar of Titles do take steps to remove the same from the register and a declaration that the plaintiff is the proper registered proprietor and owner of Native Lease No. 10184 and the same is a proper and valid lease over all of the 2 roods and 31 perches it covers. The original plaintiff died on 8 June 2011. The matter was idle to adjourn to enable the plaintiff to be substituted. No application for substitution was filed till 24 February 2012 when the matter was taken off the cause list as there was no appearance for the plaintiff and for failing to provide the necessary probate documents.
- [7] The first plaintiff filed this application to strike out on 4 December 2013. Then an application for substitution was filed on 12 February 2014. The court allowed that application and Saraspati Devi was substituted in place of the deceased plaintiff. It is worthy of note that the application for substitution was made only after the first defendant filed her application to strike out.
- [8] The matter was taken off the cause list on 24 February 2012. The first defendant filed her application to strike out on 4 December 2013. There has been little over a year and 9 month delay. Apparently, the plaintiff had failed to take steps in this matter within 6 months allowed by Ord. 25, r. 9. In the circumstances the first defendant was entitled to list the matter for show cause why the matter should not be struck out under that rule.
- [9] The substituted plaintiff states in her affidavit in reply that the matter was set down for hearing on 25 October 2010. Hearing did not proceed as counsel for the defendants asked for adjournment. Then fresh hearing dates were given for 5 and 6 September 2011. Hearing did not commence on those days as her husband died on 6 June 2011.

- [10] The original plaintiff died on 6 June 2011. The substituted plaintiff obtained probate on 28 December 2011. The matter was taken off the cause list on 24 February 2012. It will be noted that before the matter was taken off the cause list the substituted plaintiff had probate with her. Even though she had probate issued the substituted plaintiff did not mind to file reinstatement application and to progress with the matter. She only opened her eyes from hibernation after the first defendant filed the application to strike out. She should have acted diligently as the substantive matter was instituted in 2000.
- [11] A year and nine month delay must, in my view, be considered culpable delay, and that remains unexplained.
- [12] In addition to the powers to dismiss an action under Ord. 25, r. (9) of the HCR, the court has an inherent jurisdiction to dismiss an action for want of prosecution where there has been prolonged or inordinate and inexcusable delay in the prosecution of the action causing or likely to cause serious prejudice to the defendant or giving rise to the substantial risk that a fair trial would not be possible, see **Allen v Alfred McAlpine & Sons Ltd** [1968] 1 All ER 543, CA and **Birkett v James** [1977] 2 All ER 801, HL.
- [13] There has been inordinate and inexcusable delay on the part of the substituted plaintiff in the progress of the matter with reasonable diligence and expedition. That has given rise to the substantial risk that a fair trial would not be possible.
- [14] For these reasons, I proceed to dismiss and strike out the action for want of prosecution under Ord. 25, r. 9 (2) of the High Court Rules. The first defendant will be entitled to summarily assessed costs of \$300.00.

Final Orders

Plaintiff's action is dismissed and struck out for want of prosecution with summarily assessed costs of \$300.00 payable by the substituted plaintiff to the first defendant. Order accordingly.



At Lautoka

M H Mohamed Ajmeer

.....
M H Mohamed Ajmeer
Master of the High Court

Solicitors:

Messrs Mishra Prakash & Associates, Barristers & Solicitors for the plaintiff
Messrs Vijay Naidu Associates, Barristers & Solicitors for the first defendant
Messrs iTLTB Legal Department Solicitors for the second defendant