IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 68 of 2014

BETWEEN : **MOHAMMED HANIF,** of Nadi, Retired, **MOHAMMED SADIQ** of Nadi, **MOHAMMED KAUSAR** of Nadi, **MOHAMMED DAULAT** of Vancouver, Canada, Retired, **MOHAMMED HANIF** as Administrator of the Estate of Saukat late of Nadi and **MOHAMMED KABIL** of San Francisco, California, United States of America.

PLAINTIFFS

AND : **MOHAMMED SHARIF** formerly of Nadi but now of 30 Mitchell Street, Blockhouse Bay, Auckland, New Zealand as the administrator de bonis non of Mohammed Hakim late of Nadi, deceased and also sued in his personal capacity.

DEFENDANT

AND : **THE REGISTRAR OF TITLES**

NOMINAL DEFENDANT

Mr Chen Bunn Young for the Plaintiffs
Mr Wasu Sivanesh Pillay for the Defendant
Mr John Samson Pickering for the Nominal Defendant

Date of Hearing :- **16th March 2015**
Date of Ruling :- **22nd May 2015**

EXTEMPORE RULING

(A) INTRODUCTION

(1) Before me is the Defendant's Summons pursuant to Order 18, Rule 18 (1) and Order 32 of the High Court Rules and under the inherent jurisdiction of the court for an order that the Plaintiffs Statement of Claim and the action be struck out on the ground that it is an **abuse of process** of the Court.

(2) The application is supported by the affidavit of the Defendant.

(3) Upon being served with Summons, the Plaintiffs appeared in court and opposed the Defendant's Summons but did not file an affidavit in opposition opposing the application.

(4) The Summons was set down for hearing on 16th March 2015. The Plaintiffs and the Defendant were heard on the Summons. They made oral submissions to court. In addition to oral submissions, the Defendant filed careful and comprehensive written submission for which I am most grateful. Regrettably, the Plaintiffs failed to do so.

(B) THE LAW

(01) **In Halsbury's Laws of England Vol 37 page 322** the phrase "**abuse of process**" is described as follows:

"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

(02) The phrase "**abuse of process**" is summarized in ***Walton v Gardiner (1993) 177 CLR 378*** as follows:

"Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"

(03) In **Stephenson –v- Garret [1898] 1 Q.B. 677** it was held:

"It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata."

(04) **Domer –v- Gulg Oil (Great Britain)** (1975) 119 S.J 392;

"Where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure, they may be dismissed as being an abuse of the process of the court"

(05) **Steamship Mutual Association Ltd -v- Trollope and Colls (city) Ltd (1986) 33 Build L.R 77, C.A;**

"The issue of a writ making a claim which is groundless and unfounded in the sense that the plaintiff does not know of any facts to support it is an abuse of process of the Court and will be struck out".

(C) FACTUAL BACKGROUND AND ANALYSIS

(1) Initially, the Plaintiffs filed an action against the Defendant (**sued in the capacity of administrator de bonis non of Mohammed Hakim**) by way of Writ of Summons in the Lautoka High Court, Case No:- HBC 215 of 2007 seeking the following reliefs;

(i) *A Declaration that in attempting to procure the registration of Transfer No. 660518 against the Certificate of Title No. 34147 the First Defendant has acted fraudulently in the sense of being dishonest and unlawful and in acting wrongfully in attempting to procure the registration of a one undivided fourth share in his name of the lands comprised and described in Certificate of Title No. 34147;*

(ii) *For an Order directing the Second Defendant to cancel the entry of transfer no. 34147 in the Registrar of Lands;*

(iii) *A Declaration the Defendant is not entitled to be registered as the proprietor of one fourth undivided share in the lands comprised and described in Certificate of Title No. 34147;*

(iv) *Damages;*

(v) *Costs.*

(2) The Plaintiffs case was that the 1/4th share of the estate of late Mohammed Hakim who died on 11th October 1988 had been agreed to renounced by his administratix – Jaitun Bibi, and that the Defendant has made an attempt to have the 1/4th share registered to himself fraudulently.

The Defendant also happens to be the Administrator of the estate of Jaitun Bibi. The corpus appears to be the 1/4th share (undivided) of the land described in CT No. 34147. The agreement for renunciation is alleged by a deed of compromise over 12

years ago. The Plaintiffs and late Mohammed Hakim are brothers. The Defendant is the son of Mohammed Hakim.

(3) It is noteworthy that the Plaintiffs claim in HBC No.:- 215 of 2007 was based on the Deed of compromise dated 09th November 1999.

(4) The case was heard by Justice Yohan Fernando and on 13th June 2012, His Lordship delivered the judgment and dismissed the Plaintiffs action.

(5) **Nearly 02 years after that judgment**, the Plaintiffs brought this present action by way of Writ of Summons, **against the same Defendant (sued in the capacity of administrator de bonis non of Mohammed Hakim), relying on the said Deed of compromise dated 09th November 1999**, seeking the following reliefs.

(1) Specific performance against the Defendant of the clauses 2 and 7 of the Deed of Compromise dated 09th November 1999 by the execution of the transfer of one undivided fourth registered in the name of Mohammed Hakim of the land known as Cawa, Solawaru and Enamanu and containing seven hectares three thousand four hundred and sixty seven square metres more particularly described in Certificate of Title No. 34147 to the Plaintiffs.

(2) The Defendant do within 28 days from the date of Judgment to execute the following documents

(a) Registered transfer of the said undivided fourth share presently registered in the name of Mohammed Hakim in favour of the Plaintiffs;

(b) An application for Capital Gains Tax Certificate.

(c) Obtain the consents of each of all the beneficiaries of the estate of Mohammed Hakim to enable the Registrar of Tittles to register the Transfer of one undivided fourth registered in the name of Mohammed Hakim of the land known as Cawa, Solawaru and Enamanu and containing seven hectares three thousand four hundred and sixty seven square metres more particularly described in Certificate of Title No. 34147 to the Plaintiffs.

(6) The Plaintiffs present action is vigorously opposed by the Defendant. The counsel for the Defendant submits;

(1) *In this present case, once again the Plaintiff's are relying on the said Deed of Compromise dated 9th November 1999 and are seeking specific performance of the said Deed together with other declaratory orders. It is submitted that the cause of action arises from the same Deed of Compromise which has already been dealt with by this Court in Civil Action No. 215 of 2007.*

(2) *The Plaintiffs are seeking similar reliefs, in this action, as they did in Civil Action No. 215 of 2007. In Action No. 215 of 2007, the Plaintiffs were seeking the following orders:*

(i) *A Declaration that in attempting to procure the registration of transfer No. 660518 against the Certificate of Title No.34147 the First Defendant has acted fraudulently in the sense of being dishonest and unlawful and in acting wrongfully in attempting to procure the registration of a one undivided fourth share in his name of the lands comprised and described in Certificate of Titile No. 34147*

(ii) *For an order directing the Second Defendant to cancel the entry of Transfer No. 34147 in the Registrar of Lands.*

(iii) *A Declaration the Defendant is not entitled to be registered as the proprietor of one fourth undivided share in the lands comprised and described in Certificate of Title No. 34147.*

(iv) *Damages*

(v) *Costs.*

(3) *It is submitted that in the current action the prayers sought in (i) and (ii) both relate to the same Deed of Compromise dated 09th November 1999 and the undivided forth share in Certificate of Title No. 34147, which were already prayed for in Civil Action No. 215 of 2007.*

(4) *The actions taken by the Plaintiffs and its Solicitors constitute an Abuse of Process in this case and this case should therefore be struck out with costs.*

(7) The Defendant's Summons pursuant to Order 18, Rule 18 (1) is supported by the Affidavit of the Defendant – Mohammed Sharif. Reading as best I can between the lines it seems to me that the Defendant's sole argument is that the Plaintiffs action is just an abuse of Courts process as the **Plaintiffs action has already been determined by the court on the said deed of compromise.**

(8) I am aware, of course, that an application of this type does not require evidence in support. It requires the court to make its determination based upon a perusal of the pleading itself. Be that as it may, what concerns me is that the Plaintiffs did not file an affidavit in opposition opposing the Defendants affidavit in support. I am curious as to why the Plaintiffs refused to file an affidavit in opposition. In the circumstances, I am inclined to accept the argument of deponent "Mohammed Sharif" in "*toto*".

In doing so, I am fortified in my view by the Court of Appeal judgment in "**Jay Prakash v Savita Chandra" Civil Appeal No: ABU 0037/1985.** It was held;

"Of course he did have to respond in our view the cause of events have taken and the consequences, if did not respond, rendered it as matter of prudence that he should reply if indeed he had a reply. ***And in the circumstances of the case in the absence of a reply, we hold the inference inescapable what the respondent had said to be true."***

(Emphasis added)

(9) With all of the above in my mind, I pass to consideration of the argument for the Defendant. The counsel for the Defendant forcefully submits that the Plaintiffs action is just an abuse of court process as the Plaintiffs action has already been determined by the court in the said deed of Compromise and the action is statute barred.

(10) In *adverso*, the Plaintiffs submit with breathtaking disingenuousness that in the present action the Defendant is sued in the capacity of Administrator De Bonis Non of the estate of Mohammed Hakim and in the earlier proceedings (HBC 215 of 20007) the Defendant was sued in his personal capacity.

I must confess that, I remain utterly unimpressed by the effort of the counsel for the Plaintiffs.

It is perfectly clear from the paragraph 01 of the Statement of Claim, in the earlier proceedings (HBC 215 of 2007) that the Defendant was sued in the capacity of Administrator De Bonis non of the estate of Mohammed Hakim. For the sake of completeness, paragraph 01 of the earlier proceedings (HBC 215 of 2007) is reproduced below in full;

> *(1) By virtue of Letters of Administration De Bonis Non No. 45025 the Defendant is and was at all material times the administrator of the Estate of Mohammed Hakim father's name Bakridi (hereinafter referred to as "Hakim").*

On the strength of this I conclude that the Defendant is sued in the same capacity (capacity of *administrator De Bonis Non* of the Estate of Mohammed Hakim) in the earlier proceedings and in the present action.

(11) A comparison of the Statement of Claim in the earlier proceedings (HBC 215 of 2007) and the present action shows that the factual circumstances giving rise to their claims are substantially the same. **The present statement of claim and the previous statement of claim admittedly deal with the Deed of compromise dated 09th November 1999. It is not suggested that there is any further fact that is relied on. It is the same cause of action. The same cause of action is reasserted in new proceedings. Therefore, it is perfectly clear that the issue now sought to be raised in the present action were matters which were available for litigation in the earlier proceedings (HBC 215 of 2007) and they are clearly part of the subject matter of the previous litigation.** Moreover, it is perfectly clear from the paragraph 16 of the judgment in the earlier proceedings (HBC 215 of 2007) dated 13th June 2012. For the sake of completeness, paragraph 16 of the judgment in the earlier proceedings is reproduced full in below;

> *"The land described in the Deed of Compromise marked P1 (at clause 1, 2 and in Schedule 1) may be the same land at least as per the extent, lot number and the Deposited Plan as described in CT No. 34147 being 7.3467ha being Lot 6 on DP 6731 situate in Viti Levu though CT No. 34147 is not mentioned (as it did not exist at that time) in P1. Nevertheless it is the function of the Registrar of Titles to verify such matters upon any transfer or renunciation sought to be registered on the title.*

In the Statement of Claim the Plaintiffs do not seek the relief of specific performance or a declaration that the Plaintiffs be declared as entitled to be registered as the only owners to the exclusion of Hakim. (Therefore such causes of action may survive this action)".

(emphasis added)

Therefore, I interpose the view that the issues now Plaintiffs have sought to be raised in the present action could and should have been litigated in the earlier proceedings since those issues were clearly part of the subject matter of the previous litigation.

A plea of "*res judicata*" would therefore succeed. The Plaintiffs are estopped from relying on Deed of Compromise dated 09th November, 1999. Sometimes it is referred to as Cause of Action estoppel. It is not right and proper for the Plaintiffs to institute multiplicity of proceedings against the same Defendant based on essentially the same factual circumstances and same Deed of Compromise. It is tantamount to abuse of court process and smacks of harassment. **The "*res judicata*" is not confined to the issues which the court is actually asked to decide in the earlier proceedings. It covers issues or facts which are so clearly part of the subject matter of the litigation so clearly could and should have been raised. The Plaintiffs are not permitted to begin the present action because of the new views they may entertain of the law of the case. If this is permitted litigation would have no end, except when legal ingenuity is exhausted. Moreover, it is contrary to the principle that in the public interest there should be an end to litigation.**

The views that I have expressed is in accordance with the sentiments expressed in the following judicial decisions.

Wigram, V.C. in **Henderson v Henderson (1843) 3 Hare 100, 115** said;

"... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Somervell L.J in **Greenhalgh v Mallard (1947) 2. All E.R. 255, 257** said;

"... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would

be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

Given the above, in my opinion, the Plaintiffs had had the benefit of legal advice and had the opportunity to have their issues sought to be raised in the present action made the subject of judicial determination in the previous proceedings. This court is satisfied that Plaintiffs attempt to raise a claim is actually abusive in the light of their previous failure to raise it. The Plaintiffs did not show that they had fresh evidence which entirely changed the previous case and that further evidence could not by reasonable diligence have been obtained.

Given the above, I have no hesitation in holding that the Plaintiffs present action is just an abuse of courts process. Therefore, I certainly agree with the sentiments which are expressed inferentially in the Defendant's submissions.

This court has the inherent jurisdiction to prevent frivolous and vexatious litigation which the court considers to be a mere abuse of its process.

(12) Finally, in the course of the argument, the counsel for the Defendant submitted that the Plaintiffs are now statute barred from bringing this cause of action under the said deed of compromise as it is now over 06 years since the deed was dated and executed.

I cannot accept that it would be in any way proper to entertain such a bald submission which was effectively sprung on the Plaintiffs and the court at the last minute. I get the distinct impression that the counsel for the Defendant's argument was formulated and perhaps conceived as the proceedings for striking out developed.

Be that as it may, in the Writ of Summons dated 08.05.2014, the Plaintiffs are relying on a Deed of Compromise dated 09th November 1999. It is an agreement between two parties. It is contractual in nature.

According to section 4 (1) of the limitation Act, the time limit is 6 years. For the sake of completeness, section 04 (1) of the limitation Act is reproduced full in below;

4-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –

(a) actions founded on simple contract or on tort;

(b) actions to enforce a recognizance;

(c) actions to enforce an award, where the submission is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty of forfeiture or sum by way of penalty or forfeiture:

Provided that –

(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.

Therefore it is perfectly clear that the Plaintiffs claim in the present action is statute barred.

The Supreme Court practice, 1995, states at page 332,

*Thus, where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of the process of the Court (**Riches v. Director of Public Prosecutions [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935, C.A.**, as explained in **Ronex Properties Ltd. V. John Laing Construction Ltd.**, above)*

(D) CONCLUSION

Having had the benefit of written submissions and as well as arguments from counsel, for which I am most grateful, and after having perused all the pleadings by the parties, this court concludes that, the Plaintiffs action is tantamount to an abuse of court process and smacks of harassment.

(E) FINAL ORDERS

(1) The whole action is struck off.

(2) The Plaintiffs are ordered to pay costs of $2000.00 (summarily assessed) to the Defendant which is to be paid 14 days from the date hereof.

22/05/2015

Jude Nanayakkara
Acting Master of the High Court

At Lautoka
22nd May 2015