IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 446 of 2007

BETWEEN	:	Mukurchand Ramswarup
		Appellant
AND	:	Arthur Snow the Trustee of the Estate of Edward Snow
		First Respondent
AND	:	Susan Helen Douglas
		Second Respondent
AND	:	The Registrar of Titles and the Attorney General of Fiji
		Third Respondent
BEFORE	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr A Dayal for the Appellant Mr S Chandra for the 1st Respondent Mr W Clarke for the 2nd Respondent Ms T Sharma for the 3rd Respondent
Date of Hearing	:	10 September 2015
Date of Judgment	:	7 October 2015

JUDGMENT

1. This an Appeal by the Appellant (Plaintiff) against the decision of the learned Master given on 12 September 2014, whereby he struck out the action for want of prosecution and abuse of the process of the Court, under Order 25 rule 9 of the Rules of the High Court (RHC), with costs.

2. The Appellant filed a Notice of Appeal setting out the grounds of appeal as follows:

   (i) The learned Master erred in law in striking out the Appellant's (Plaintiff's) claim against all the Respondents (Defendants) when:
   (a) There was no evidence of inordinate or inexcusable delay.
   (b) There was no evidence, arguments or findings made that a fair trial would be prejudiced by the purported delay.
   (c) He did not apply the principle in: **Birkett v James**.
   (d) There was no evidence of abuse of process.

   (ii) The learned Master erred in law:
   (a) In not exercising his powers under Order 34 of the RHC to dispense with the Pre-Trial Conference or to order that the draft minutes of the Pre-Trial Conference be adopted.
   (b) In not treating the application as a Summons for Directions.
   (c) In failing to do so, the learned Master did not allow the Plaintiff to be heard on the substantive matter.

   (iii) The learned Master erred in law in striking out the entire claim when only the 2nd Respondent (Defendant) had presented evidence.

3. At the hearing of the Appeal before me on 10 September 2015, Counsel for the Appellant provided a written submission in support of the Appeal. He also submitted orally that the matter had been struck out because the Master said the 2nd Respondent had suffered prejudice as a result of the delay by the Plaintiff. The Master's finding is in para 16 of his Ruling.

4. Counsel referred to the Appellant's affidavit sworn on 4 June 2014, wherein the Appellant had stated his old age, his ill health and the difficulties regarding the survey and the Pre-Trial Conference as reasons why the matter should not be stuck out. Counsel also said that the ongoing discussions explained the delay in having the Pre-Trial Conference.

5. At this juncture, at the invitation of the Court, Ms Sharma acting as amicus curia, advised that the practice throughout Fiji is the same, which is, if the Plaintiff encounters difficulties, it is incumbent on him to apply to court to dispense with the Pre-Trial Conference under Order 34 Rule 2 (3).

6. The Appellant's Counsel continued that the 1st and 3rd Respondents did not file any affidavit to show their response to the Application to strike out, while the 2nd Respondent in her Affidavit did not show what prejudice she would suffer in her defence if the case went on. On these grounds alone he argued the appeal should be allowed.

7. Counsel for the 1st Respondent then submitted orally that there was no merit in the claim because there was no contract to sell the land in question, and he would adopt the arguments of Counsel for the 2nd Respondent.

8. Counsel for the 2nd Respondent now submitted, referring to his written submission. He said that the Appellant breached the order of Court and further that none of the time lines imposed by the Court were complied with by him. This showed his lax attitude to these proceedings in which he took no action between 2011 and 2014. Thus the Appellant gave no choice to the Master but to strike out the matter.

9. Counsel surmised there was no survey report. The Plaintiff's list of documents and affidavit of documents reveal no trace of any sale and purchase agreement and this is fatal under section 59 of the Indemnity, Guarantee and Bailment Act which provides that no action shall be brought upon any contract or sale of

lands unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged.

10. Finally, Counsel asked for costs on an indemnity basis and said blame attaches to the solicitors and the Counsel for the Appellant as they are ultimately responsible for most of the non-compliance with court orders. Therefore the indemnity costs has to come from Counsel for the Appellant as they are officers of Court.

11. Counsel for the 3rd Respondent submitted they did not appear at the hearing before the Master and the 3rd Respondent is not mentioned in his Order. She therefore asked for the Appeal to be struck out with costs.

12. Counsel for the Appellant in his reply conceded there was no survey report in the Bundle of Documents. He objected to costs being ordered against Counsel and Solicitors.

13. At the conclusion of the hearing, I reserved my decision to a date to be announced.

14. In the course of reaching my decision I have perused the following:

    (i) The Appellant's Written Submission.
    (ii) The 2nd Respondent's Written Submission.
    (iii) **Birkett v James** [1977] 2 All E.R. 801.
    (iv) **Allen v Sir Alfred McAlpine & Sons, Ltd** [1968] 1 All E.R.543.

15. I now deliver my judgment. The record of what has transpired leading up to this Appeal is a most unedifying one.

16. To show this, I need only to turn to the Master's Ruling. From its Introduction, I note the notice was issued by the Court of its own motion pursuant to Order 25 rule 9 of the RHC, "demanding the Plaintiff and the Defendants to show

cause why this action should not be stuck out for want of prosecution or (as) an abuse of the process of the court".

17. From its Background, I observed the action was filed on 20 September 2007. Inspite of various orders made by the Master, the Pre-Trial Conference minutes were never finalized. Master Udit finally made an Order on 17 November 2008 for a speedy trial and dispensed with the Summons for Directions. But even this was not complied with, thus necessitating Master Amaratunga, as he then was, to grant an adjournment on 14 June 2011. Even after this the action remained in abeyance and inactive till the Court issued the notice of its own motion pursuant to Order 25 rule 9.

18. The Appellant in his affidavit (to show cause why the matter should not be struck out) stated he was old and not in good health, and the complex issues of the survey and the involvement of 4 sets of lawyers made it difficult to finalise the Pre-Trial Conference minutes.

19. The 2nd Respondent on the other hand in opposing the Appellant put the blame for the inexcusable delay on the unresponsiveness of the Appellant.

20. With that as the background to the Appeal I consider now the authorities cited. In **Birkett v James**, the English House of Lords' decision was to the effect that it was wrong to dismiss an action for want of prosecution when the limitation period had not expired.

21. In my view this is not the case here based on paras 2, 3 and 14 of the Amended Statement of Claim which respectively aver:

    (a) The Plaintiff had entered into a contract with Edward Snow, (who died on 9 November 2005) to purchase certain land and had made full payment on 7 February 1984.

    (b) The Plaintiff was claiming interest from 1 April 1985 to the date of judgment.

22. In **Allen v Sir Alfred MacAlpine & Sons Ltd**, the words of Salmon L J should be applied by a Master in circumstances which are similar to those of the present appeal. He said where an action is dismissed for want of prosecution and the fault is attributable to the plaintiff's solicitor, the court should take steps to ensure that the plaintiff is personally informed of the decision and briefly of the reasons for which it was made.

23. The English Court of Appeal in that case, said when delay in the conduct of an action is prolonged or inordinate and is inexcusable (as is, per Salmon, L.J., the natural inference in the absence of a credible excuse), and there is substantial risk by reason of the delay that a fair trial of the issues will no longer be possible or that grave injustice will be done to one party or the other or to both parties, the court may in its discretion dismiss the action straight away, without giving the plaintiff opportunity to remedy the default, but leaving him to his remedy against his solicitor for negligence.

24. I find that this is the position of the Respondents here. I find no error in principle in the Master's exercise of his judicial discretion and there is no justification for me to exercise my function as an appellate court to correct his decision.

25. This is because I am satisfied that there was prolonged delay which is inexcusable in this matter. There was also no credible excuse or explanation provided as to why no survey was actually carried out by the Appellant. The absence of a survey report is the absence of a very vital piece of evidence which will assist in the resolution of the dispute. I only need to refer to the Appellant's Solicitors' written submission in support of the Appeal which states in para 6 that the Plaintiff's cause of action starts against the late Edward Snow and in para 11 that the dispute arose after he sold part of the land to another party.

26. For all the above reasons I uphold the Master's Ruling and hereby dismiss the Appeal.

27. I turn finally to the questions of costs. The norm is costs follow the event. Here what has troubled me is the fact that it is patently clear that the delays were due to the fault of the solicitors for the Appellant. Would it be fair for their sins of omission to be visited on the aged Appellant? Of course as Diplock L.J said in **Allen v McAlpine,** the Plaintiff in such circumstances is not without a remedy for he has a right of action against his solicitor for negligence.

28. I would have had no hesitation in ordering the Respondents' costs of the Appeal to be borne by the Appellant's legal representatives if the Master had taken steps to personally inform the Appellant of the reasons for his decision, in which case there might not be this Appeal. But there is no indication that this was done.

29. I therefore feel the ends of justice will be met if and I so make no order as to the costs of the Appeal. I further order under the provisions of Order 62 rule 11 (a) (iii) of the RHC that the costs as between the Appellant's legal representatives (i.e his solicitors and counsel) and their client (i.e the Appellant) are hereby disallowed.

Dated this 7th day of October 2015 at Suva.

HIGH COURT OF FIJI
SUVA

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David Alfred
JUDGE
High Court of Fiji