IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 172 of 2014

BETWEEN : **ELENI TABUSIGA aka ELENI NAKAVULEVU** of Yavolotu Settlement, Volivoli Sigatoka, in the Republic of Fiji as the Administratix and Trustee of the Estate of Robin Yaca late of Yavuloto Settlement, Volivoli, Sigatoka.

PLAINTIFF

AND : **JOSUA NAILESU**, (address unknown to the Plaintiff), Police Officer

1st DEFENDANT

AND : **COMMISSIONER OF POLICE** of the republic of Fiji Islands, Suva

2nd DEFENDANT

AND : **ATTORNEY GENERAL** of the Republic of Fiji Islands, Suva

3rd DEFENDANT

(Mr). Kamal Robinson for the Plaintiff
(Mr). Josefa Mainavolau for the Defendants

Date of Hearing : - 10th November 2016
Date of Ruling : - 17th February 2017

RULING

1. The Court on its own motion issued a notice to the parties on 9th February 2016 listing the matter for the parties to show cause as to why the case should not be struck out for

"want of prosecution' or as an "abuse of process of the court" since no action was taken for a period of more than six (06) months.

2. The notice was issued pursuant to Order 25, rule 9 of the High Court Rules, 1988.

3. Upon being served with "Notice" the Plaintiff filed an Affidavit to show cause as to why the matter should not be struck out for "want of prosecution" or as an "abuse of process of the court".

4. The Defendants did not file an "Affidavit in Opposition" opposing the Plaintiff's Affidavit to show cause.

5. A Writ of Summons indorsed with "particulars of claim' and a prayer for relief was issued on 21st October 2014, by the Plaintiff against the Defendants for negligence in which the Plaintiff claimed damages from the Defendants with respect to the death of her husband when a motor vehicle driven by the first Defendant collided with the deceased.

6. An "Acknowledgment of Service" was filed by the Defendants on 12th November 2014. Thereafter, the action lay in abeyance until 09th February 2016 when the Court on its own motion issued a Notice to the parties pursuant to Order 25, rule 9 of the High Court Rules, 1988.

7. This action was begun by a Writ of Summons. General provisions relating to issuing of Writ of Summons is governed by Order 6, rule 2 of the High Court Rules, 1988. Order 6, rule 2 (1) (a) requires that before a Writ is issued it must be indorsed with a Statement of Claim or if the Statement of Claim is not indorsed on the Writ, with a concise statement of the nature of the claim made or the relief or remedy requires in an action.

8. Now turning to the case before me, it is not in contention that the Plaintiff filed a Writ of Summons indorsed with "a concise statement of the nature of the claim" as opposed to a Statement of Claim. Therefore, the Plaintiff must serve a Statement of Claim to the Defendants within 14 days of the service of the acknowledgement. This is a mandatory requirement under Order 18, Rule 1. It provides;

> ***"Unless the Court gives leave to the contrary or a Statement of Claim is indorsed on the writ, the Plaintiff must serve a Statement of Claim*** *on the Defendant or, if there are two or more Defendants, on each Defendant, and must do so either when the writ is served on that Defendant or at any time after service of the writ but before the expiration of 14 days after that Defendant gives notice of intention to defend."*

As required by Order 18, Rule 1, the Plaintiff should have filed and served a Statement of Claim on the Defendants within 14 days of the receipt of Acknowledgment of Service. No such statement of claim has been filed.

I have reviewed the "***Statement of the nature of case***" indorsed on the Writ. It is not a Statement of Claim both by its form and content. There is a clear distinction between the two.

> "A statement of Claim is the first pleading in actions begun by writ and constitutes the document in which the Plaintiff formulates the factual grounds on which he bases his claim or the relief or remedy which he seeks against the Defendant, and not merely, as the general indorsement of writ is required to do, a concise statement of the nature of the claim made or the relief or remedy required in the action." [See; **Bullen & Leake and Jacobs "Precedents of Pleadings" 12th edition at page 51).**

As the first pleading in any action, a Statement of Claim is a very vital document. It plays a pivotal role in ensuring the advancement of a trial by defining and limiting the issues to their bare necessities. A Statement of Claim must state a summary of material facts of the Plaintiff's cause of action entitling him/her a relief of remedy. It is also crucial as it enables the Defendant to know the case that she/he has to encounter.

9. Returning back to the case before me, the Statement of Claim became due on 01st December 2014. No claim was intimated to the Defendants. There is a delay of 26 months in serving a Statement of Claim. The position here is that the Plaintiff is very seriously in default. She is no less than 26 months out of time in serving a Statement of Claim. **What is the Plaintiff's reason for her failure to comply with Order 18, rule 1?** The Plaintiff had sworn an affidavit seeking to explain and excuse her failure. As I understand it, she advances one reason.

I focus on paragraphs 6 to 10 of the Plaintiffs Affidavit to show cause;

> 6. *That a Writ of Summons with a Indorsement of claim was filed in this Court on 21st October 2014. A full Statement of claim could not be filed as I did not have all the details that was required and as advised by my counsel that a claim had to be lodged within 3 years from the date of accident.*
>
> 7. *That I was advised by my solicitors that my claim was dependent on whether the death of my husband was caused by the 1st Defendant who was the driver of the motor vehicle which collided with my late*

husband and that it was for the police department to investigate the accident and charge the 1st defendant.

8. *That I followed with the Sigatoka police department with repose that I would be advised in due course.*

9. *That I was later advised by the police department that the DPP's office was handling this file as the 1st Defendant was a police officer and upon following with the DPP's office I was only provided a written update of case by a letter from the DPP's office on 14th march 2016 which I promptly handed to my solicitors for further action. (Annexed marked "ET1" is a copy of the said letter)*

10. I am not impressed at all with the reason for failure to comply with Order 18, Rule 1. It is not necessary to take criminal proceedings into account in reaching a decision to file a Statement of Claim. The issue in the criminal proceedings is not identical with a claim for damages. The question of negligence in a Civil Action is whether there has been a lack of due care towards the Plaintiff. On the trial of the issue in the civil court, the opinion of the criminal court is irrelevant. The civil court should come to a decision on the facts placed before it, without regard to the result of other proceedings before another tribunal.

See; **Hollington V F. Hewthorn & Company Limited, (1943) 2 ALL. ER 35.**

In my view, the evidence comes nowhere near justifying the delay and the breach of the rules. The delay is not merely inexcusable but also inordinate such as to cause prejudice to the Defendants. It has to be remembered that we do not have in this country an 'inquisitorial' procedure for civil litigation. Our procedure is 'accusatorial'. Those who make charges must state right at the beginning what they are and what facts they are based on. The delay of 26 months in serving the Statement of Claim is unfortunate from the point of view of the Defendants since they did not know what allegations are being made against them at all. This is really enough to dispose of the case on want of prosecution. The Plaintiff's delay had been prejudicial to the Defendants and the action should be dismissed for want of prosecution.

11. I do not wish to rest the matter there. The matter goes much further.

Compliance with Order 18, Rule 1 is mandatory for the Plaintiff. Neither a Statement of Claim was filed nor was any prior dispensation sought or granted by the Court. If she found she could not deliver a Statement of Claim within 14 days that is before 01st

December 2014, she should have applied to the court for an extension of time. The Plaintiff did not seek an extension of time to serve the Writ.

The Plaintiff by instituting her action submitted herself to an explicit and mandatory regime, set out in the High Court Rules. If she wishes her action to continue not withstanding her transgression of the Rules, she has some work to do, in the sense of persuading the court that in the interest of justice the action ought to go ahead. The rules are an indispensable framework for the orderly administration of justice. In the context of long overdue Statement of Claim, which is not only a breach of the rules but may leave the defendants without any clear idea of the case which they have to meet, may call for an assessment which treats the Plaintiff severely.

The rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation must be observed.

12. The Plaintiff's failure to comply with Order 18, rule 1 is an irregularity by non-compliance with the rules.

So, I should come to **Order 2, rule 1** which I quote;

> ***EFFECT OF NON-COMPLIANCE***
>
> ***Non-Compliance with rules (O.2, r.1)***
>
> *1. –(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*
>
> *(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.*
>
> *(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules*

to be begun by an originating process other than the one employed.

As a matter of construction of that rule, it is clear that, where there had been irregularity by non-compliance with the rules, the consequence would be that by reason of the irregularity, unless the Court so directed, the power of the Court, when an irregularity was noted, was either to set the proceedings aside or to amend them or otherwise deal with them as the Court thought fit. The content of Order 2 is designed to enable the Court, whenever faced with anything done or left undone in proceedings which constitutes a failure to comply with the requirements of the rules, to exercise the powers conferred by the rules without having first to decide whether the jurisdiction conferred by the rules applies at all.

Order 2, rule 2 describe the procedure when a Defendant wishes to apply to set aside proceedings. Such an application shall not be allowed unless made within reasonable time and before the party applying takes any further steps.

Order 2, rule 2 provides;

Application to set aside for irregularity (O.2, r.2)

2.- (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken ay fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motions.

As I construe Order 2, r 1, from the moment a step in proceedings is tainted by irregularity through failure to comply with the rules the irregular step or document remains irregular inter partes until the matter has been brought before the Court and the Court has decided in which way to exercise the jurisdiction conferred by Order 2, r 1(2). Order 2, r 2 does not restrict the power of the Court in the sense of restricting its jurisdiction, and it does not have the effect of suspending the irregularity until the application under Order 2, r 2 is made. The purpose and effect of Order 2, r 2 is to prescribe the procedure if and when an opposite party decides to apply so that the Court on recognising the irregularity may exercise its powers under r 1(2) by taking the action of killing or curing the irregular proceeding.

Where, in the course of proceedings, the court finds that a failure of the nature referred to in r 1(1) has occurred, which has not been waived by the other party either expressly or by implication, the court is given by r 1(2) a choice of courses to pursue at its own discretion, whether or not an application under Order 2, r 2 is before it. In such a situation, in the exercise of its discretion under r 1(2), it may either adopt the

more draconian course of setting aside wholly or in part the proceedings in which the failure occurred, or the relevant step taken in those proceedings or the relevant document or order. Alternatively, it may make such order ... dealing with the proceedings generally as it thinks fit'. The last mentioned words are, in my opinion, manifestly wide enough to empower it to make a dispensing order waiving the relevant irregularity.

See ; Leal v Dunlop Bio-Processors Ltd [1984] 2 All ER 2007 at 211 – 212 [1984] (1) WLR 874 at 880 per Stepehnson LJ.

13. It would be absurd to say that a Plaintiff should not in the ordinary way be denied an adjudication of her claim on its merits because of procedural default, unless the default causes prejudice to her opponents for which an award of costs cannot compensate. If this argument is followed, a well-to-do Plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless and until the Defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Order2, rule 1(2) and would indeed involve a substantial rewriting of the rule.

The Plaintiff has failed to show a good reason for her procedural default. Thus, the dismissal of her action under Order2, rule 1(2) is an inevitable consequence.

ORDERS

1) The Plaintiff's action filed against the Defendants is dismissed for want of prosecution and breach of High Court Rules. **Civil Action No- HBC 172 of 2014 is hereby struck out.**

2) I make no order as to costs.

HIGH COURT OF FIJI LAUTOKA

17/2/2017

Jude Nanayakkara
Master.

At Lautoka
17th February 2017