

In the High Court of Fiji at Labasa
Civil Jurisdiction
HBC 79 of 2006 L

Fred Wehrenberg
Plaintiff

vs

Sekaia Suluka, Crime Officer
First defendant
Tao, Police Officer, Rakiraki
Second defendant
Eparama, Police Officer, Rakiraki
Third defendant
Commissioner of Police
Fourth defendant
And
The Attorney General
Fifth defendant

COUNSEL : The plaintiff in person
Mr J. Pickering for the defendants
Date of hearing : 13th February, 2017
Date of Ruling : 27th February, 2017

Ruling

1. The plaintiff filed writ and statement of claim on 23rd March, 2006, in the High Court of Lautoka for damages. An amended statement of claim was filed on 22nd November, 2013. The defendants filed statement of defence denying the claim. The case was transferred to this Court on 3rd October, 2016.
2. I have before me four interlocutory applications, viz:
 - a) The preliminary issue raised by the defendants in their document of 12th August, 2014.
 - b) The notices of motion filed by the plaintiff for leave:
 - (i) to use at the trial, combined and supplementary affidavits of the plaintiff and Walburga Wehrenberg, which refer to United Nations Conventions, the 1997 Constitution and the law.
 - (ii) to join his wife as the second plaintiff.
 - (iii) to subpoena a former court clerk, to give evidence in regard to proceedings of the High Court.

The preliminary issue raised by the defendants

3. I will in the first instance set out the relevant Orders made in this case:
 - (a) 1st July, 2011 : Wickramasinghe J stated that the plaintiff has “*already filed affidavit*” and ordered the plaintiff to file evidence in chief of his witness by 15/11/11.
 - (b) 6th March, 2012: Nawana J recorded that the plaintiff moved for leave to file further affidavits and “*Defendants have no objection to those Affidavits being filed through the deponents of the Affidavit before 31/08/2012*”.
 - (c) 12th August, 2014: Abeyguneratne J in his interlocutory order held that there was no formal order on record by his predecessors allowing either party to submit evidence in chief by affidavits.

At the hearing, Mr Pickering, counsel for the defendants agreed that Abeyguneratne J’s observation was incorrect.

4. The defendants move that the plaintiff gives oral evidence at the trial and the affidavit evidence filed by the plaintiff be struck out, for the reasons that the affidavits should have pleaded factual events, not law and contain only facts that a deponent is able of his own knowledge to prove, as provided in Or 41, r5 .
5. Or 38, r 2 empowers the Court at or before the trial of an action to order evidence by affidavit. Or 38, r 6 enables such an order to be revoked or varied on “*sufficient cause*” being shown.
6. There is a long line of authority which have held that “*affidavits should depose only as to facts in accordance with Order 41 Rule 5 of the Rules of the High Court and not be in reality as here, a submission on the law and an expression of opinions*” as Byrne J (as he then was) stated in *Kylie-Jane Anderson v Iowane Salaitoga*,[1999] 45 FLR 241 at 243.
7. In *Ratu Jeremaia Natauniyalo v The Native Land Commission & Another*,[1998] 44 FLR 280 as cited by Mr Pickering, the FCA “*wholeheartedly*” approved the remarks of Byrne J’s (as he then was) on affidavits which breached Or 41 r 5.
8. In my view, the material question is whether any prejudice has been caused to the defendants by the disputed affidavits.

9. Byrne J (as he then was) in *State v Police Service Commission, ex parte Tikotikoca*, [1993] 39 FLR 12 as cited by the plaintiff stated that in “ *all future cases Affidavits in reply in Judicial Review proceedings should not contain submissions on the law which must be left to counsel for the parties*”, but he did not consider that any injustice has been caused and appreciated what he termed the “*chain of legality*”.

10. His Lordship Gates CJ in *Qarase v Bainimarama*, [2007] FJHC 41 as also cited by the plaintiff, stated :

Challenge is made by the defence to the contents of the plaintiff's affidavits. Indeed they have breached the rules in regard to hearsay, and appear to state that of which the deponent has no personal knowledge [Order 41 r.5 (1)]. In some place what is stated is non-factual or irrelevant or merely amounts to advocacy with opinions and conclusions proffered. Little weight can be attached to these parts of the material... (emphasis added)

11. In my view, it is for the trial judge to decide on the probative and evidential value of the contents of the affidavits ordered to be filed and whether he requires additionally, to hear oral evidence in chief of the plaintiff for clarification, before he is cross-examined. I would accordingly, direct that all witnesses be available to testify at the trial.

12. On this point, I would refer to the judgment of Lord Donaldson MR in *Mercer v Chief Constable*, [1991] 2 All ER 504 as cited by the plaintiff. His Lordship at pg 507 said that witness statements should be exchanged and ordered to stand as evidence in chief on a “*selective basis*” and stated further:

.. it will be more appropriate in the case of expert witnesses than in the case of witnesses as to fact ,...But perhaps the most important factor of all will be the extent to which the evidence of a particular witness is likely to be controversial and his credibility in issue. If so, the way in which he responds to oral examination-in-chief may be of great importance. Against this background it is wrong in principle to make a general order applying to all witness statements .. without regard to .. the extent to which the witness's evidence is likely to be controversial and go to the heart of the dispute” (emphasis added).

13. I decline the application of the defendants to strike out the affidavits filed by the plaintiff.

14. The plaintiff, in his notice of motion filed on 10th May, 2016, has sought leave to use at the trial the combined affidavit (evidence-in-chief) of the plaintiff and Walburga Wehrenberg filed on 4th November, 2011, and supplementary affidavit (evidence-in-chief) of the plaintiff and Walburga Wehrenberg filed on 2nd August, 2012, “as ordered by the Court on 1.7.2011 and 6.3.2012 which contain references to United Nations Conventions, the 1997 Constitution and the law”.

15. I find that the Orders of 1st July, 2011, and 6th March, 2012, do not provide for the filing of a combined and supplementary affidavit, contrary to the contention of the plaintiff. It follows that the affidavit of 4th November, 2011, which is challenged by the defendants does not arise for consideration.

16. The plaintiff's notice of motion filed on 10th May, 2016, is declined.

The plaintiff's application to join his wife as second plaintiff

17. The plaintiff's affidavit in support of his application for joinder of his wife states that he and his wife lived on their two jointly owned properties on Nananu-i-ra Island from May, 1989, until July, 2004, when they had to flee, due to the tortious acts of the defendants. They sold their properties to the first bidder at half price to save their lives. His wife became the target of criminal organization and she begged him to sell the property quickly. The affidavit concludes that there is “a very strong relationship between this cause of action contained in the amended statement of claim and (his) wife's sufferings as joined owner”.

18. Or 15, r 6 (5) enables the addition of a party after the expiry of the relevant period of limitation in the following two circumstances:

- (a) *the relevant period (of limitation) was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or*
- (b) *the relevant period arises under the provisions of subparagraph (i) of the proviso to paragraph 4(1)(d) of the Limitation Act and the Court directs that those provisions should not apply to the action by or against the new party. (emphasis added)*

19. Or 15, r 6(6) in so far as relevant to the present application, states that the new party shall be treated as “*necessary.. if the Court is satisfied that*”:
- (a) *the new party is a necessary party to the action in that property is vested in him at law or in equity and the plaintiffs claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined, or*
 - (b) *the relevant cause of action is vested in the new party and the plaintiff jointly but not severally, or*
(emphasis added)
20. The plaintiff makes this application under Or 15, r6 (6) (b).
21. The defendants submit that the application at this stage, will effectively deprive their right to plead limitation against the proposed plaintiff.
22. The plaintiff relied on two cases where joint owners were added as plaintiffs after the limitation period had lapsed, on an interpretation of a provision *in pari materia* to Or 15, r 6(6).
23. In the first case, *Kennedy v Small & Ors*, [2013] NIQB 81 a decision of the High Court of Northern Ireland, the plaintiff discovered discrepancies in the title of the lands he purchased. He claimed damages from the defendants who acted for him in the conveyance of the lands. The plaintiff had intended to sell his house held jointly with his wife and use the equity to buy the lands. It was held that it was necessary that his wife be joined to enable the full amount of any loss to be recovered under the original claim.
24. In *Merrett v Babb*, [2001] EWCA Civ 214 the loss was likewise, in respect of a purchase of property by a mother and daughter. The action was originally brought by the daughter against a surveyor who had negligently failed to report on settlement cracks in the building purchased.
25. In the above two cases, it is clear that the plaintiffs were added so that all matters arising out of the same claim could be dealt with once and for all. The present case is different.

26. The plaintiff pleads in his amended statement of claim that he suffered:
- i. injuries, as a result of the “*physical and mental torture and cruel, inhumane and disproportionately severe treatment by the 1st, 2nd and 3rd Defendants*” ; and
 - ii. loss and damage, as a result of his “*reputation.. severely been harmed,.. distress and mental anguish, loss of liberty for 30 hour expenses in defending himself*”, as a result of being maliciously prosecuted by the Police in Rakiraki.

The issues recorded at the PTC of 7th May, 2008, have been accordingly, raised on these two grounds.

27. In my judgment, the plaintiff’s wife is not a “*necessary*” party for the determination of his claims. His claims are personal and are not “*vested*” jointly with her, as contemplated by Or15, r6 (6) (b).

28. The plaintiff argued that in his amended statement of claim, he seeks damages for invasion and interfering with the peaceful enjoyment of his property and damages caused to his wife. It suffices to state that in order to obtain relief, a cause of action must be pleaded and relief is granted to parties before court.

29. I decline the application for joinder.

Subpoena the former court clerk

30. The issue on this summons filed on 8th January, 2015, has been decided. On 3rd July, 2015, Abeyguneratne J had disallowed this summons. The matter is res judicata.

31. I decline the plaintiff’s application to subpoena the former court clerk.

Costs

32. The plaintiff made an application before me for costs of \$ 1000 for the adjournment on 12th August, 2014. Abeyguneratne J had stated that he would consider costs, in his order on the acceptance of affidavits. That did not eventuate. Mr Pickering agreed to pay a sum of \$ 450 as costs.

33. I make order that the defendants pay the plaintiff \$ 500 costs summarily assessed.

34. **Orders**

- (a) I decline the defendants application to strike out the affidavits filed by the plaintiff.
- (b) I direct that all witnesses be available to give evidence at the trial.
- (c) The plaintiff's notice of motion filed on 10th May, 2016, is declined.
- (d) The plaintiff's application to join his wife as a plaintiff is declined.
- (e) The plaintiff's application to subpoena the former court clerk is declined.
- (f) The defendants shall pay the plaintiff costs in the sum of \$500.
- (g) I order costs in the cause in respect of the four applications I have determined.
- (h) This case will be called before the Master of the High Court of Labasa on 3rd March, 2017, at 9a.m. to fix for hearing.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

Judge

27th February, 2017

At Suva