

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 380 of 2008

BETWEEN

KAIVA TADRAU of Labasa Police Station, Police Officer, Barrister & Solicitor
and **SELAI TADRAU** of Suva Grammar School, School Teacher.

PLAINTIFFS

AND

FIJI NATIONAL PROVIDENT FUND a body established under the provisions
of the FNPF Act having its office at 33 Ellery Street, Suva, Fiji.

1ST DEFENDANT

AND

NBF ASSET MANAGEMENT BANK of Suva, Fiji.

2ND DEFENDANT

Counsel : Ms. N Raikaci for the Plaintiffs
Ms. S. Devan for the 1st Defendant

Date of Hearing : 10th May, 2017

Date of Ruling : 30th May, 2017

RULING

(On the application for reinstatement)

- [1] The plaintiffs instituted these proceedings by originating summons claiming \$8000.00 from the defendants with interest.
- [2] The court by its order dated 07th August, 2015 refused the application of the plaintiffs to add the 2nd defendant as a party under section 43(2) of the Banking Act 1995.
- [3] When the matter was mentioned on 13th April, 2016 Mr. A. Misiki appeared for the plaintiff and the trial of the action was fixed for 24th & 25th of August, 2016 with the consent of both counsel. At the time the matter was fixed for trial the solicitors on record was Vakaloloma & Associates.
- [4] When the matter came up for trial on 24th August, 2016 it was informed that the plaintiff was not ready for the trial since Mr. Vakaloloma was appearing in another court and the counsel who represented the plaintiffs, Mr. Valenitabua informed court that he had nothing to say. The counsel for the defendant moved that the matter be struck out since the plaintiffs were also absent and the court struck out the originating summons of the plaintiffs.
- [5] On 13th October, 2016 the plaintiffs acting on their own behalf filed a notice of motion seeking to have the order striking out the originating summons vacated. On 10th November, 2016 the plaintiffs filed notice of change of solicitors appointing Messrs Oceanica IP as their solicitors.
- [6] The learned counsel for the defendant submitted that the application for reinstatement has been filed by the plaintiffs themselves without first filing a notice of intention to act in person as required by Order 67 rule 4 of the High Court Rules.
- [7] Order 67 rule 4 of the High Court Rules provides that;

Where a party, after having sued or defended by a barrister and solicitor, intends and is entitled to act in person, the change may be made without an order for that purpose and rule 1 shall, with the necessary modifications, apply in relation to a notice of intention to act in person as it applies in relation to a notice of change of barrister and solicitor except that the notice of intention to act in person must contain an address for service of the party giving it.

- [8] The above provisions must be read with the provisions of Order 67 rule 1 of the High Court Rules which provides as follows;

A party to any cause or matter who sues or defends by a barrister and solicitor may change his barrister and solicitor without an order for that purpose but, unless and until notice of the change is filed and copies of the notice are served in accordance with this rule, the former barrister and solicitor shall, subject to rules 5 and 6, be considered the barrister and solicitor of the party until the final conclusion of the cause or matter, whether in the High Court or the Court of Appeal.

- [9] It is common ground that in this matter the plaintiffs have not filed the notice of intention to act in person. The learned counsel for the plaintiffs submitted that this is an irregularity which can be cured under Order 2 rule 1 of the High Court Rules.

- [10] Order 2 rule 1 of the High Court Rules provides that;

(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.

- [11] The question arises here for consideration whether the error in the application of the plaintiffs is a mere irregularity or something that goes to the root of the matter. In terms of Order 67 rule 1 unless and until the notice of intention to act in person is filed the Solicitor on record shall be considered as the Solicitor of that particular party. It is thus clear that at the time of filing the application for reinstatement the plaintiffs was not qualified to file it and therefore the application is void *ab initio*, which means there

is no proper application before the court. This was therefore, not a mere irregularity that could be rectified under Order 67 rule 1(2) which provides as follows;

(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 terms 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.

[12] The application of the plaintiffs for reinstatement must, on that ground alone, necessarily fail.

[13] The learned counsel for the defendant also submitted that the application for reinstatement has been filed out of time. Order 35 rule 2 provides:

(1) Any judgment, order or verdict obtained where one party does not appear at the trial maybe set aside by the Court, on the application of that party, on such terms as it thinks just.

(2) An application under this rule must be made within 7 days after the trial.

[14] The striking out the originating summons was made on 24th August, 2016 and the application for reinstatement was made 14th September, 2016 which was 21 days after the order was made. As submitted by the learned counsel for the defendant there is no provision for the enlargement of time to file an application for reinstatement. Even if there is such a provision the plaintiffs should first have sought leave to file the application out of time.

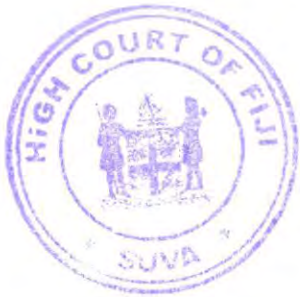
[15] It is the position of the plaintiffs that Mr. Vakaloloma did not inform about the date of hearing. It may be so but there was a duty on the plaintiffs also to inquire about the progress of the matter from their solicitors or from the court registry. The 1st plaintiff in his affidavit filed in support of the notice of motion faulted the officers of the court for not informing them the next date of hearing. I do not think that the plaintiffs have any legal or moral right to fault the officers of the court for their own negligence and the negligence of their solicitors. Whenever the plaintiffs were absent and unrepresented the court had ordered to issue notice on the plaintiffs informing them

the next date of the matter. If they are represented by a solicitor there is not duty on the court or its officers to inform the next date of the matter to the parties personally. Hence, the allegation made by the plaintiffs in the affidavit of the 1st plaintiff against the officers of the court is unreasonable and unfounded.

[16] For the reasons aforementioned I make the following orders.

Orders

1. The application of the plaintiffs to reinstate the matter is refused.
2. The plaintiffs are ordered to pay \$1000.00 to the 1st defendant (FNPF) as costs of this application.




Lyone Seneviratne

JUDGE

30th May, 2017