

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 338 of 2012

BETWEEN : ZELDA ROSLYN KISSUN of Lot 5 Kinoya Road, Kinoya, Nasinu, Fiji, Self
Employed.

PLAINTIFF

AND : SAMUELA NAITAU of Lot 50, Duvula Road, Nadera, Nasinu, Fiji, Minibus Driver.

1ST DEFENDANT

AND : B W HOLDINGS LIMITED a company duly incorporated in Fiji having its
registered office at Vishnu Deo Road, Nakasi, Nasinu, Fiji.

2ND DEFENDANT

AND : ROCK TEK LIMITED a company duly incorporated in Fiji having its
registered office at 50 Kaunitani, Street, Vatuwaqa, Suva, Fiji.

3RD DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Ritesh Naidu - for the Plaintiff
No Appearance - for the 1st Defendant
Mr. Filipe - for the 2nd Defendant
Mr. Valenitabua - for the 3rd Defendant

DATE OF RULING: 08th February, 2018

RULING

*[Court's own motion for the Plaintiff to show cause why the statement of claim
should not be struck out for want of prosecution and abuse of the process
of the Court pursuant to Order 25 Rule 9 of the High Court Rules, 1988]*

(A) INTRODUCTION

1. The Court issued Notice of its own motion pursuant to *Order 25 Rule 9 of the High Court Rules, 1988* for the Plaintiff to show cause as to why the action ought not to be struck out for want of prosecution or an abuse of the process of the Court.
2. The Plaintiff filed the Affidavit opposing the striking out.
3. The 2nd Defendant filed his Affidavit in answer supporting the strike out of the Plaintiff's action.
4. The 3rd Defendant did not file any affidavit but informed court that he did not support the striking out of the Plaintiffs claim.
5. Hereafter, the Plaintiff filed his Reply to the 2nd Defendants Affidavit.
6. Written submissions were filed by the Plaintiff and the 2nd Defendant as this matter needed to be determined between the Plaintiff and the 2nd Defendant only in terms of Order 25 Rule 9 for striking out of the Plaintiff's claim.

(B) THE LAW AND PRACTICE

7. *Order 25 Rule 9 of the High Court Rules 1988, which inter-alia states as follows:*

"9. - (1) If no step has been taken in any cause or matter for six months then any party on application or the Court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.

(2) Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions.'

(C) ANALYSIS and DETERMINATION

21. The Plaintiff is required to show cause herein and the Court to determine as to why the Plaintiff's action ought not to be struck out for want of prosecution or an abuse of the process of the Court.
22. The principles to be applied the basis upon which the discretion to strike out proceedings for want of prosecution should be exercised is well established in the decision of the House of Lords in the case of *Birkett v James [1978] AC 297* and in particular the statement by Lord Diplock at 318:

"The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b)

that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

23. In the present case before this Court, the Plaintiff has submitted that she is not concerned with intentional and contumelious default in this case since the Plaintiff has not disobeyed any orders of this Court. The perusal of the Court file does confirm that the Plaintiff has not disobeyed any orders of this Court. Further, the final document filed by the Plaintiff was the Affidavit Verifying List of Documents (AVLD) and it was the 2nd Defendant who is yet to file his Affidavit Verifying List of Documents.
24. In the present case the court is concerned with the application of principle (2) within the *Birkett v James* [1978] AC 297 case only.
25. 'Inordinate' and 'inexcusable' within *Birkett v James* have their ordinary meaning. Whether delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case. *The New India Assurance Company Limited -v- Rajesh K. Singh and Anr. Civil Appeal no: ABU 0031 of 1996S (26 November 1999) C.A.*
26. Where principle (2) is relied on, both grounds of inordinate and inexcusable delay needs to be established before an action is struck out. There must be both delay of the kind described and a risk of an unfair trial or serious prejudice to the defendants.
27. Reference is therefore made to the case *Department of Transport v Smaller (Transport) Limited* [1989] 1 All ER 897.

The House of Lords did not accept a submission that the decision in *Birkett* should be reviewed by holding that where there had been inordinate and inexcusable delay, the action should be struck out, even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay.

Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ delay will either make a fair trial impossible or prejudice the defendant. He went on to affirm the principle that the burden is on the defendant to establish that serious prejudice would be caused to it by the delay. (In this case the burden is on the 2nd Defendant to establish any prejudice).

28. I have perused the court file in terms of the documents filed as required by the set down procedures and the *High Court Rules 1988* and set out hereunder the *Chronology of Events* that has taken place in this case accordingly.

CHRONOLOGY OF EVENTS

28 /12/2012	Writ of Summons filed
31/12/2012	Amended Writ of Summons filed
26/02/2013	Interlocutory Judgment entered against 2nd and 3 rd Defendant

15/03/2013 2nd Defendants Notice of appointment of Solicitors filed
22/04/2013 Setting aside interlocutory judgment filed by 2nd Defendant
05/08/2013 Application on setting aside heard by the Hon. Judge
22/02/2016 Judgment on setting aside delivered
02/03/2016 2nd Defendant filed statement of Defence
20/09/2016 Plaintiff filed Notice of intention to proceed
17/11/2016 Affidavit verifying Plaintiff's list of documents filed
19/06/2017 Order 25 Rule 9 Notice served on Plaintiff
21/06/2017 Plaintiff filed Notice of Intention to proceed
01/08/2017 Plaintiff filed Affidavit to show cause to Order 25 Rule 9 Notice
14/08/2017 03rd Defendants Notice of Appointment of Solicitors filed.

Delay

29. In considering whether **delay** of the kind required in terms of *Birkett v James* case has been established, the court is concerned only with **delay** on the part of the Plaintiff or her lawyer. It is that delay which must be shown to be **inordinate** and **inexcusable**.
30. It can be clearly ascertained from the chronology of events as set out in paragraph 28 hereinabove, as to what documents, pleadings and applications were filed and what proactive steps were taken by the parties to this proceedings to ensure that the pleadings were expeditiously completed and the file was ready to be allocated to a Hon. Judge for hearing and determination accordingly.
31. No doubt the Writ of Summons was filed on 28th December, 2012 and 3 days later the Writ was amended and filed. Subsequently, 2 months later an interlocutory judgment was entered against the 02nd and 03rd Defendants. The 02nd Defendant after filing the appointment of Solicitors then filed the setting aside of the interlocutory judgment 02 months later. Application for setting aside was heard on 05th August, 2013 but the judgment was delivered by the Court after a time frame of two (2) years and six (6) months. Therefore, the matter was delayed for a period of a period of two years six months in itself. Obviously, the Plaintiff was unable to proceed with his case any further for this period of two years and six months.
32. Apart from the above, the Plaintiff has enumerated the reasons for the delay at paragraph 5 of his written submissions quoting the paragraphs 11-28 inclusive from the Plaintiffs Affidavit filed on 01st August, 2017.
33. The 2nd Defendant submitted that he is unaware of any matters that might render the period of delay by the Plaintiff from 2nd March 2016 to the date of service of the Order 25 Rule 9 Notice excusable. The Plaintiffs conduct has been such that amount to wholesale disregard to the High Court Rules and thereby constitutes an abuse of the process of the Court which alone justifies a striking out of the Plaintiff's claim.
34. He added, the Plaintiff has no interest in pursuing this case and has not diligently prosecuted this claim. The Delay is inordinate and inexcusable in the extreme.
35. Upon a careful perusal of the court record together with the chronology of events, I also find that the 2nd Defendant contributed to the Delay from 17th November, 2016 since the 2nd Defendant failed to file and serve the Affidavit Verifying List of Documents (AVLD) which would have allowed parties to go for Discovery if required and complete the pleadings, ready for the matter to be allocated to a Hon. Judge for hearing and determination.

36. The overriding objective of the procedural rule and the requirement in *Birkett v James* is to enable the court "to deal with cases justly". Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".
37. I find for the aforesaid rational that the Plaintiff has successfully explained the Delay of the shorter period mentioned herein. Therefore, the period of inactivity is **excusable**. **Inexcusable** and **inordinate Delay** has not been established against the Plaintiff accordingly.

Prejudice and fair trial

38. Prejudice can be of two kinds. It can be either specific that is arising from particular events that may or may not have occurred during the relevant period, or general, that is prejudice that is implied from the extent of the delay.
39. The 2nd Defendant relied on specific prejudice resulting from the non-availability and/or locating of material witnesses. He further submitted that he will be severely prejudiced if this proceeding was allowed to continue to trial. He added that such prejudices rises from the fact that the proceeding concerns events that took place on 27th February, 2012 and with the passage of time, recollections of witnesses will be severely affected and there is a substantial risk that a fair trial will not be possible. The Plaintiff herself has difficulty locating witnesses.
40. The Plaintiff submitted that presumption of prejudice is not a presumption of law. It is a presumption of fact in the sense that, in most cases, it will only be the Defendant who is in a position to offer evidence as to the existence of specific prejudice. The presumption is rebuttable.
41. In order to establish prejudice, a Defendant is required to show that the Delay has prejudiced him in the conduct of his Defence. This will involve him in having to demonstrate, for example, that he has lost contact with his witnesses, his witnesses are untraceable, death of his witnesses, the witnesses recollections has been adversely affected, the destruction of documentary evidence without fault on the part of the Defendant.
42. The Plaintiff made reference to "paragraph 22" of the Plaintiff's Affidavit outlining the reasons for the Delay filed on 01st August, 2017. He confirms that he was able to locate and interview the only eye witness to the accident.
43. The Plaintiff's Affidavit confirming the availability of the only eye witness and already interviewed by the Plaintiff's Lawyer alleviates any prejudice to the 2nd Defendant.
44. I find that the 2nd Defendant has not made out a case for prejudice against him in one way or the other.

Interest of Justice

45. The demonstration of inordinate Delay, inexcusable Delay and Serious Prejudice does not lead necessarily to a dismissal of the action. Further, even if the 2nd Defendant satisfies the requirements in *Birkett v James*, the courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible. The Court of Appeal in *Chandar Dea v Ramendra Sharma and anor: Civil Appeal No. ABU 0041* of (23 March 2007) (Unrep) stated as follows:-

[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the *Birkett v. James* principles namely: 'In view of the delays which have occurred, is a fair trial now possible?' (Also case of *Department of Transport v. Chris Smaller (Transport Limited [1989] AC 1197* refers.

46. In *Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244 at 248*. Eichelbaum CJ reviewed the authorities and concluded:

'The applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since *NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58* it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.'

47. Even the courts are reluctant to strike-out any matter summarily which has certain merits in it on the grounds of abuse of process. In *Dey v. Victorian Railway Commissioners (1949) 78 CLR 62*, at 91 Dixon J said:-

'26. This principle was restated by the Court of Appeal of Fiji in *Pratap v Kristian Mission Fellowship [2006] FJCA 41*. Also refer to: *New India Assurance Co Ltd v Singh [1999] FJCA 69*.

The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include: *Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210*; *Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62*; *Birkett v James [1978] AC 297*; *Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244*; *Agar v Hyde (2000) 201 CLR 552*. Indeed the passage from *Abdul Kadeer Kuddus Hussein v Pacific Forum Line* reflects closely *Birkett v James* (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'

48. I reiterate that the Plaintiff has made reference to "paragraph 22" of the Plaintiff's Affidavit outlining the reasons for the Delay filed on 01st August, 2017. He confirms that he was able to locate and interview the only eye witness to the accident.

49. I find from the contents of the Plaintiff's Affidavit filed on 01st August, 2017, that the Plaintiff has taken steps and has a concrete intention to pursue the litigation further expeditiously when stating that he has already interviewed the witness and deciding to join the driver of the Trailer truck as a Defendant to this proceeding.
50. Taking into consideration both parties submissions, oral and written, a fair trial is still very much possible with the only eye witness at hand who would be giving evidence at the trial under oath in the within proceedings.
51. I will allow the matter to proceed and that the litigation is brought to its conclusion in terms of hearing and determination by the Court expeditiously.

Abuse of Court Process

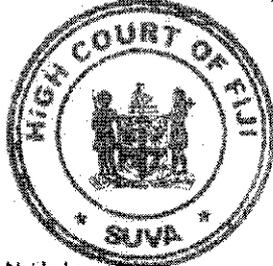
52. Inordinate and inexcusable delay alone, however great, does not amount to an abuse of the Court process. Reference is made to *Abbuthnot Latham Bank Ltd v Trafalgar Holdings [1998] 1 WLR 1426 (per Lord Woolf)*.
53. For this purpose, Delay alone, even delay of 11 years does not amount to an abuse of process. Reference made to *Barclays Bank Plc v Mailing (Unreported) 23 April 1997; CA (Civil Division) cited in Abbuthnot (supra)* at pg 1432, para G-H.
54. However, Delay which involves complete, total or wholesale disregard of the Rules of the Court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground. Case Reference *Choraria v Sethia [1998] CLC 625 9 per Nourse LJ [1998] EWCA Civ 24*.
55. In the present case, I find from the pleadings and Affidavits that the Plaintiff had the intention of pursuing this matter and bring the litigation to its conclusion. It cannot be said in one way or the other from the evidence on the Court Record that the Plaintiff has deliberately commenced this action without any intention whatsoever of bringing it to a conclusion.
56. I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and findings as follows:-

FINAL ORDERS

- (i) The delay in terms of inordinate and intentional has not been established against the Plaintiff;
- (ii) Explanation has been satisfactorily provided by the Plaintiff for any delay as such the Plaintiff has overcome the factor of inexcusable;
- (iii) The second Defendant has not suffered any real prejudice; and

- (iv) In the interest of justice, a fair trial is still possible to the current.
- (v) There is no abuse of the Court process by the Plaintiff;
- (vi) The Order 25 Rule 9 Notice is hereby struck out accordingly; and
- (vii) The substantive matter remains very much intact.
- (viii) There will not be any orders in terms of the costs made at the discretion of this Court.

Dated at Suva this 08th Day of February, 2018




VISHWA DATT SHARMA
Master of High Court, Suva

cc: Naidu Law, Suva,
Haniff Tuitoga, Suva,
Toganivalu & Valenitabua, Suva.