IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 138 of 2018

BETWEEN

SASHI PRASAD aka SASHI SHARMA (f/n Ambika Prasad aka Ambika Sharma) of Chaudhary Drive Koronivia, Nausori c/ Ministry of Education, Marela House, Suva.

FIRST PLAINTIFF

AND

ESTATE OF ARUN PRASAD SHARMA aka ARUN SHARMA (deceased) through its administrator/personal representative, VINAY SHARMA of Lot 12 Amber Place, Howell Road, Samabula, Suva.

SECOND PLAINTIFF

AND

ESTATE OF JASODA DEVI SHARMA aka JASODA (deceased) through its executrix and trustees (personal representatives) RANJILA DEVI aka RANJILA DEVI KUMAR (f/n Ambika Prasad aka Ambika Sharma) and RESHMI DEVI SHARMA (f/n Ambika Prasad aka Ambika Sharma) whose designated address of service is O'Driscoll & Co, 22 Carnarvon Street, Suva.

DEFENDANTS

Counsel	:	1st Plaintiff in person 2nd Plaintiff absent and unrepresented Mr. G. O'Driscoll for the defendants
Date of Hearing	:	26th October, 2018
Date of Ruling	:	26th November, 2018

RULING

[1] For determination there are two applications before this court. Firstly, the application of the 1st plaintiff seeking the following orders:

A. That there be an abridgment of time and the matter be heard ex-parte forthwith;
B. That the orders made by this Honourable Court on 26 September 2018 in relation to my ex-parte notice of motion be set aside;
C. That the defendants and/or their servants and/or their agents refrain from selling, transferring and/or adversely dealing with any of the properties forming part of the estate of Jasoda Devi until the determination of the plaintiff's claim in this action;

   Alternatively, if any of the properties have been sold then proceeds of the sale to be kept in an interest bearing account until the determination of the plaintiff's claim n this action;

D. That the defendant and/or their servants and/or their agents be injunct and or restrain from transferring and/or completing the transfer of the property situated on Lot 3 on DP No. 5132, allotment 45 registered in Certificate of Title No. 21979 until the final determination of my claim in this matter;
E. That leave be granted to me to file written submissions in all my interlocutory matters;
F. That the hearing date fixed for the summons to strike out on the ground of no reasonable cause of action be vacated and that the parties of no reasonable cause of action and that the parties be required to submit written submissions with regard to the same; and
G. Costs in the cause.

[2] Secondly, the defendant filed summons pursuant to Order 18 rule 18 of the High Court Rules, on 16th July, 2018 seeking an order that the plaintiff's writ of summons and the statement of claim be struck out as disclosing no cause of action. Both these applications were taken up for hearing simultaneously.

[3] I will first deal with the application of the 1st plaintiff seeking orders setting aside the ruling of this court made on 26th September, 2018 and for the same injunction which the court has already refused to grant. The necessity arises to consider the other orders sought by the 1st plaintiff in the said summons only if the court decides to set aside it's earlier of order.

[4] At the hearing the 1st plaintiff informed court that he relies on the submissions filed by him and the learned counsel for the defendants made oral submissions.

[5] In his submissions the 1st plaintiff the plaintiff has referred to previous decisions from various jurisdictions which deal with inherent power of the court to vacate its own judgments. There cannot be any argument that the court does not have that power. But the question is under what circumstances the court should exercise its inherent powers.

[6] The burden is on the 1st plaintiff to satisfy the court that it has sufficient reasons to set aside its own decision. In this regard the averments contained in the 1st plaintiff's affidavit filed in support of his notice of motion are relevant. . At the hearing of the earlier application both plaintiffs were present and both of them made submission in support of the application.

[7] In his affidavit the 1st plaintiff has averred that he is not well versed with legal matters as he is a lay person and he attempted to obtain legal assistance from the Legal Aid but was unsuccessful because his annual income is above $15,000.00. He averred further that his son was recently admitted to the bar but he met with an accident and is now in a critical condition. The position of the 1st plaintiff, as the court understands, from the averments in the affidavit is that he was not given a fair hearing by the court.

[8] The other ground averred in his affidavit is that the court should have granted the orders sought in the amended notice of motion because the defendants did not file any response to the affidavit in support.

[9] The 1st plaintiff has been involved in litigation in respect of the same property for more than twenty five years. This fact is borne out by the previous decisions in various other connected matters. In none of those cases the 1st plaintiff in this action has not been represented by a lawyer and he had appeared in person. In Civil Action No 24 of 1993

the 1st plaintiff was the 1st defendant and he had appeared in person. Action No. 24 of 2000 was instituted by defendants in this matter against the 1st plaintiff to have the caveat lodged by him against the grant of probate in the estate of Jasoda Devi Sharma, removed. In that matter also the 1st plaintiff who was the 1st defendant had appeared in person.

[10] There had been another matter that went up to the Supreme Court. The judgment of the Supreme Court in appeal No. CBV0003 of 1998 is before this court. In that case too, the 1st plaintiff had appeared in person. It appears that the 1st plaintiff had been appearing in court on his own behalf without any assistance of a lawyer and in all the three matters I referred to above judgments were against the 1st plaintiff but he had never complained that he did not have proper access to court.

[11] It is also important to note that at the hearing of this matter both plaintiffs were given an opportunity to address the court. The application was made only by the 1st plaintiff, however, the 2nd plaintiff also made submissions on behalf of the 1st plaintiff.

[12] If the 1st plaintiff sought further time to seek legal assistance the court could always have accommodated him but there was no such application.

[13] If the 1st plaintiff is not satisfied with the findings of this court the proper course for him was to apply for leave to appeal to the Court of Appeal.

[14] The 1st plaintiff also submitted that since the defendants did not file any response to his application the court should have granted the orders sought in the notice of motion. The defendants did not file any response to the application of the 1st plaintiff but the learned counsel for the defendants opposed the application at the hearing. Injunction is an equitable remedy granted at the discretion of the court. In the exercise of its discretion the court is guided by the principles laid down in certain previous decisions which I have referred to in my ruling made on 26th October, 2018. The court is not entitled to grant injunctions by default. It must always consider whether there are grounds to exercise its discretionary power in favour of the applicant.

[15] In view of the reasons stated above the court holds that the 1st plaintiff's claim that he had no proper access to court is absolutely without merit and his application to set aside the orders made by this court on 26th September, 2018, must fail.

[16] The 1st plaintiff is entitled to seek an injunction in the same matter but on different grounds. If, for an example, after the refusal of the earlier application the defendant is trying to do act which is in violation of the rights of the 1st plaintiff in the subject matter

he can always come to court seeking an order to restrain the defendant from doing that act. In the present application he is seeking the same orders which the court has once refused. In paragraph 15 of his affidavit in support the 1st plaintiff states that this application is a re-application for an injunction as per his earlier amended ex-parte notice of motion. The court after considering the respective cases of each party has made it ruling and the court is now *functus officio* and it cannot revise its own orders.

[17] I will now proceed to consider the application of the defendants to have the writ of summons and the statement claim struck out for not disclosing a reasonable cause of action. Before going into the facts of the matter I will first discuss the law relating to striking out applications.

[18] Order 18 rule 18(1) of the High Court Rules 1988 provides:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[19] In **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No 3) [1970] Ch 506 it was held that the power given to strike out any pleading or any Part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.

In **Drummond-Jackson v British Medical Association** [1970] 1 W.L.R. 688; [1970] 1 All ER 1094 it was held;

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

In the case of **Walters v Sunday Pictorial Newspapers Limited** [1961] 2 All ER 761 it was held:

> It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases.

In **Narawa v Native Land Trust Board** [2003] FJHC 302; HBC0232d.1995s (11 July 2003) the court made the flowing observations:

> In the context of this case I find the following statement of Megarry V.C. in Gleeson v J. Wippell & Co. [1971] 1 W.L.R. 510 at 518 apt:
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> "First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial".

In **Singh v Attorney-General of Fiji [2003] FJHC 305; HBC0221d.1998s** the court made the following observations:

> Also, in the context of this case I find the following statement of Megarry V.C. in Gleeson v J. Wippell & Co. [1977] 1 W.L.R. 510 at 518 apt:
>
> "First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial".
>
> The applicant says that there is no reasonable cause of action but on the evidence before me I hold there are; and in coming to this conclusion I

have borne in mind the following Notes to Or.18 r.19/11 of the Supreme Court Practice (U.K.) 1979 Vol.1 where it is stated:

> ".....A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 WLR, 688; [1970] 1 All E.R 1094, C.A.). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 Q.B. 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out (Moore v Lawson) (1915) 31 T.L.R. 418, C.A.; Wenlock v Moloney [1965] 1 W.L.R. 1238 [1965] 2 All E.R 871, C.A.)..."

[20] The claim of the 1st plaintiff is that he and Arun Prasad Sharma contributed to the construction of the commercial property. The plaintiffs' claim is based on the principles enunciated in the decision of the House of Lords in **Lloyds Bank plc v Rosset** [1989] Ch 350. The facts of that case are briefly as follows:

> Mr Rosset became entitled to a substantial sum of money under a Swiss Trust fund. He wished to use the money to purchase a family home. Mrs Rosset found the property in question which was a derelict farmhouse requiring extensive modernisation and improvements. Mr Rosset liked the farmhouse and purchased it with money from the Swiss trust fund. In accordance with the terms of the trust fund, the property was conveyed into Mr Rosset's name alone on 17th Dec 1982. Mr Rosset arranged an overdraft facility with Lloyds Bank of £15,000 to cover the improvements needed for the farmhouse this overdraft was secured by a charge on the property which was registered on 7th Feb 1983. Mrs Rosset made no financial contribution to the purchase price but carried out supervision of the builders, planning of the renovation works and a substantial amount of redecoration of the farmhouse. Mrs Rosset was allowed into possession of the property prior to exchange of contracts to commence the renovation. The overdraft limit was later raised to £18,000 and this was exceeded. The bank then commenced proceedings for possession. Mrs Rosset sought to defeat the possession by claiming to be entitled to a beneficial interest under a constructive trust which became an overriding interest under s.70(1)(g) by reason of her occupation.

It was Held:

Following Abbey National Building Society v Cann [1991] AC 56, the relevant date for actual occupation to protect an interest for the purposes of s.70 (1) (g), is the date of the transfer not the date of registration. In any event Mrs Rosset did not have an interest in the house arising from a constructive trust as there was insufficient evidence that there was a common intention that she would take a share in the beneficial interest and given that Mr Rosset had provided the whole purchase price and cost of renovations her efforts in supervising the builders and redecoration were insufficient.

Lord Bridge:

"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel."

"It was common ground that Mrs. Rosset was extremely anxious that the new matrimonial home should be ready for occupation before Christmas if possible. In these circumstances it would seem the most natural thing in the world for any wife, in the absence of her husband abroad, to spend all the time she could spare and to employ any skills she might have, such as the ability to decorate a room, in doing all she could to accelerate progress of the work quite irrespective of any expectation she might have of enjoying a beneficial interest in the property."

[21] The facts of the above case are quite different from the fact of the matter before this court. However, there must be evidence before this court to decide whether the services

the plaintiffs which they are claiming to have provided are sufficient for the court to arrive at the conclusion that a constructive trust has in fact been created. It cannot be summarily decide on the averments in the pleading although there is no prima facie case of constructive trust is shown.

[22] For the above reasons the court makes the following orders.

ORDERS

1. The Notice of Motion of the 1st plaintiff filed on 28th September, 2018 is struck out.
2. The summons of the defendants filed on 16th July, 2018 is also struck out.
3. Parties will bear their own costs of these applications.

Lyone Seneviratne

JUDGE

26th November, 2018