

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No- HBC 247 of 2017

BETWEEN : **ANIL JATINDER SINGH** of Suite 10, Nadi Town Council Arcade, Nadi

PLAINTIFF

AND : **CHANDAR MANI** aka **SAM MANI** trading as Paradise Realtors (Fiji) Limited

FIRST DEFENDANT

AND : **PARADISE REALTORS (FIJI) LIMITED** a limited liability company having its registered office at Suite 4 Ganesh Building, New Queens Road, Nadi Town Road, Nadi.

SECOND DEFENDANT

Hearing : **Monday, 25th November, 2019**

Appearances : **Mr. Saimoni Nacolawa for the plaintiff**
: **(Ms) Sunita Devi Nand for the defendants**

Ruling : **Friday, 06th December, 2019**

RULING

[A] INTRODUCTION

(01) On 14th October, 2019 the defendants, facing a trial date of 17th October 2019, filed an application seeking (amongst other orders);

(A) *The matter listed for trial on the 17th and 18th October, 2019 be vacated.*

(B) *The said matter be assigned another date to fix a hearing date.*

(02) Counsel for the plaintiff opposed the application for adjournment of trial. In opposing the application for adjournment, counsel for the plaintiff emphasized that the trial preparation is already completed and they are ready for trial. In the alternative, and in the event the

trial is adjourned, counsel sought \$6,000.00 for costs thrown away. Counsel for the plaintiff said that the adjournment of trial is prejudicial to him and sought costs of \$6,000.00 for trial preparation. The plaintiff said that he had been put to expense preparing for trial and is ready to proceed.

- (03) The court granted an adjournment of trial and hearing was held to address issue of any costs thrown away being sought by the plaintiff.

[B] Application for adjournment of trial

- (01) On 05th March, 2019 the trial dates were fixed for 17th and 18th October, 2019. On 14th October, 2019 the defendants filed a Notice of Motion seeking an adjournment of trial on the following grounds; (reference is made to paragraphs (04) to (10) of the supporting affidavit of (Ms) Shartika Goundar, a solicitor in the Office of Neel Shivam Lawyers, solicitors for the defendants.)
- (4) *THAT our client who is the 1st Defendant and Director of the 2nd Defendant Company has left for Australia to undergo medical treatment.*
- (5) *THAT we were contacted by our client on 1st October, 2019 wherein we were advised that he is not able to travel due to his medical condition.*
- (6) *THAT prior to this we had sent numerous emails to our client and also called him however we had received no response.*
- (7) *THAT our client has forwarded us on email a copy of his medical report. Annexed and marked as "SG-1" is a copy of the Medical Report that states our client is not in a position to travel.*
- (8) *THAT we had emailed the Plaintiff being Anil J Singh Lawyers regarding our clients' status and our intention to vacate the hearing date. Annexed and marked as "SG-2" is a copy of the email.*
- (9) *THAT we also wrote to Anil J Singh Lawyers on 7th October, 2019 advising them that we will be making an application for the Hearing Date to be vacated. Annexed and marked as "SG-3" is a copy of the said letter.*
- (10) *THAT we are further advised by our client that due to his medical condition he will not be able to travel within the next 6 months.*
- (02) The notice of motion for adjournment of trial was first called on 17th October, 2019.
- (03) The orders of the Court were made on 17th October, 2019. The Court granted the application for adjournment upon consideration of the following matters;

- (A) The first defendant has left for Australia to undergo medical treatment.
 - (B) The copy of his medical report (SG-1) issued by Dr. Shafiaur Rahman, Jans Family Health Practice, NSW, states that he has significant health issues and getting on going treatment.
 - (C) About 17 days before the date fixed for trial, the defendants' solicitors had emailed the plaintiff informing the medical condition of the first defendant and their intention to vacate the trial. (Annexure SG-2).
 - (D) Again, about 10 days before the date fixed for trial, the defendants' solicitors had wrote to the plaintiff advising them that the defendants' solicitors will be making an application to vacate the trial due to the ill-health of the first defendant. (Annexure SG-3)
- (04) Having considered the above factors, the Court found that the defendants have satisfied that;
- (A) Any refusal of the application would amount to denial of a fair hearing.
 - (B) Any refusal of the application would affect the effective observance of rules of Natural justice.
- (05) Therefore, in fairness of the proceedings and the observance of the rules of natural justice the Court granted an adjournment.
- (06) The exercise of discretion either to grant or to refuse an application for adjournment of trial is a judicial act and when the orders of the Court were made on 17th October , 2019 the following matters were borne in mind by this court ;
- (a) the context in which the application is made;
 - (b) the conduct of the defendants and the plaintiff;
 - (c) whether the refusal of the application would amount to denial of a fair hearing;
 - (d) whether such refusal would affect the effective observance of rules of natural justice.
 - (e) whether the plaintiff would suffer an irremediable loss or damage by granting the application.
- See;
- (1) **Goldenwest Enterprises Ltd v Pautogo (2008) FJCA 3**
 - (2) **Davies v Pagett (1986) 10 FCR 221**

When the plaintiff's affidavit filed on 05th November, 2019 is looked at more closely, it appears that the plaintiff has not pointed to any 'irreparable loss or damage' he suffered by granting the application for adjournment of the trial. Thus, it is manifest that the order would not cause any "irreparable prejudice" to the plaintiff. Thus, there was no reason to deny the application for adjournment.

The adjournment of trial was granted (1) in the interest of justice (2) in accordance with the principles of fairness and (3) in observance of rules of natural justice and to ensure equality of arms.

The Court has every sympathy with the wish to maintain a tight rein on proceedings and to ensure expeditious hearings. Expedition is not the sole measure. Justice and fairness are essential features of the consideration for an application for an adjournment. Expeditious hearing is good. Justice is better!

(07) The plaintiff seeks costs of \$6,000.00 for adjournment of trial.

Mr Anil J. Singh, the plaintiff in this case in his Affidavit sworn on 04th November, 2019 says;

- *This matter was fixed for trial on 5th March, 2019.*
- *Prior to preparation of trial, I requested my Practice Manager to call Mr Nikheel Nambiar, Legal Practitioner and check if he is ready for trial.*
- *I was informed by my Practice Manager as follows: - "I called Mr Nambiar and he told me that he is ready for trial".*
- *I commenced preparation for trial and I caused my witnesses to be ready.*
- *On 30th September, 2019 I was informed by Mr Nikheel Nambiar that his client is not in a position to travel.*
- *THAT on or about 7th October, 2019 I received a letter from Neel Shivam Lawyers inter alia that Defendant is unfit to travel.*
- *THAT on 11th October, 2019 I informed Nambiar that I was objecting to adjournment. Annexed hereto and marked with letter "AJS1" is copy of email send to Mr Nambiar.*
- *I have carefully considered the Health Summary sheet dated 26th September, 2019 and my observation are as follows:-*
 - (a) *That this is not a proper medical certificate to be tendered in court for a Judge to act upon.*

(b) *There is no acknowledgment by the Doctor that Chandar Mani is required to attend Court in Fiji and that the trip is 4 and half hour flight only.*

(c) *The Doctor says increased risk of flying but does not say that he cannot travel as deposed, which seems to cover all forms of travel.*

(d) *Except for the first 2 lines the Health Summary Sheet is a print out of Chandar Mani's medication and his illness. The Doctor only stated increased risk of flying and there is no opinion on a boat trip.*

- *The Defendant did not seek to give electronic evidence.*
- *The honourable Court has adjourned the matter with costs reserved.*
- *I seek \$6,000.00 plus Vat as costs.*

(08) There have been no previous adjournments.

At the costs of some repetition, I state that on 30th September, 2019, facing a trial date of 17th October, 2019, the defendants' solicitors had emailed the plaintiff informing the medical condition of the first defendant and their intention to vacate the trial. (Annexure SG-2).

Again on 07th October, 2019, facing a trial date of 17th October, 2019, the defendants' Solicitors wrote to the plaintiff advising them that the defendants' Solicitors will be making an application to vacate the trial due to the medical condition of the first defendant. (Annexure SG-3).

(09) In opposing the adjournment, the plaintiff emphasized that the trial preparation is already completed and he was ready for trial. The plaintiff sought costs of trial preparation thrown away. **I have no hesitation at all in reaching the conclusion that the defendants' solicitors acted reasonably and promptly when they became aware of the medical condition of the first defendant.**

(10) Costs thrown away were request for payment of party's costs for trial preparation which had been wasted and any trial preparation that would have to be redone as a result of trial adjournment. Purpose of awarding costs thrown away was not to penalize party who sought adjournment of trial, but was meant to indemnify party for wasted time incurred for trial preparation or trial work arising from adjournment.

(11) **By 30th September, 2019 ; ie, 17 days before trial, the plaintiff knew that there will be an application by the defendants to adjourn the hearing due to the medical condition of the first defendant.**

The plaintiff says ;

- *Prior to preparation of trial, I requested my Practice Manager to call Mr Nikheel Nambiar, Legal Practitioner and check if he is ready for trial.*
- *I was informed by my Practice Manager as follows: - "I called Mr Nambiar and he told me that he is ready for trial".*
- *I commenced preparation for trial and I caused my witnesses to be ready.*

The plaintiff should have submitted an affidavit from his Practice Manager. Besides, when did the plaintiff's Practice Manager check with the defendants' Counsel?. What was the mode of communication? The plaintiff has provided no such proof. There simply is no evidence. When did the plaintiff commence trial preparation? How many hours did he spend in preparation for trial? It is not shown by affidavit evidence. There is virtually no evidence. The plaintiff has provided no proof. Nacolawa & Co, solicitors for the plaintiff were appointed on 15th October, 2019; ie, two days before trial. The question that concerns this court is how did the plaintiff commence trial preparation without a solicitor?

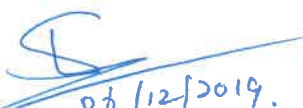
Therefore, I have no factual basis to make an Order for costs thrown away in preparation for the trial.

ORDER

I decline to order costs thrown away in favour of the plaintiff as a term of the adjournment.



At Lautoka
Friday, 06 December, 2019


06/12/2019.
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Jude Nanayakkara
[Judge]