

IN THE HIGH COURT OF FIJI

AT LABASA

ORIGINAL JURISDICTION

CASE NUMBER: HBC 17 of 2017

BETWEEN: **JAI RAJI**
PLAINTIFF

AND: **THE PERMANENT SECRETARY FOR HEALTH**
1st DEFENDANT

AND: **ATTORNEY GENERAL OF FIJI**
2nd DEFENDANT

Appearances: Mr. A. Sen for the Plaintiff.

Mr. Pickering for the Defendants.

Date/Place of Judgment: Thursday 30 April 2020 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

RULING

(Leave to Appeal from an Interlocutory Order)

A. Catchwords:

Application for leave to appeal against an interlocutory order dismissing the plaintiff's action upon an application for an adjournment – application for adjournment not adequately considered resulting in a draconian order affecting the substantive rights of the plaintiff- leave to appeal granted.

Cause

1. The plaintiff has filed an application for leave to appeal the decision of the High Court of 17 September 2018. On this date, his Lordship Justice Alfred had dismissed the plaintiff's claim with no order as to costs on the grounds that the plaintiff and his witnesses were not available to give evidence in court. The matter had been fixed for hearing for 3 days starting 17 September and ending 19 September.
2. On the first day of the trial, the court was faced with the formal application for an adjournment. The supporting affidavit outlined two reasons why an adjournment was sought.
3. The first was that the plaintiff's counsel Mr. A. Sen was to conduct a criminal trial in Suva High Court for 4 days which fell on the same dates as the trial dates for this matter. The trial fixture, as asserted in the affidavit, was allocated by the Court of Appeal, Fiji on 7 August 2018 which was after the trial dates in this matter was fixed. It was deposed in the affidavit that Mr. Sen had no choice when it came to allocation of dates by the Court of Appeal.
4. The second reason advanced by the plaintiff in the affidavit was that she was also ill and that she needed medical attention for her illness. No specifics regarding her medical condition was identified.
5. On the first day of the trial, the counsel for the plaintiff Mr. Sen moved the court on his application for an adjournment and tendered a sick sheet for the plaintiff. I note that an adjournment was conceded to.
6. When Mr. Sen produced the sick sheet, the court then asked him to call the doctor to testify on the medical condition of the plaintiff. The doctor attended the court on the same day and testified that the plaintiff was suffering from neuralgia, had hypertension and high blood pressure. She had difficulty in sleeping and therefore needed rest.

7. The court did not find the reasons forwarded by the doctor to be valid and thus ordered the case to proceed when the plaintiff and the witnesses were not available in court. The matter could not proceed and was therefore dismissed.
8. Before I deal with the application for leave, I must briefly state that the plaintiff's cause against the 1st defendant is for medical negligence.

Analysis

9. Mr. Sen indicated that leave to appeal the decision was necessary because the application for an adjournment was an interlocutory one and any decision on the same becomes an interlocutory decision.
10. In determining whether leave is to be granted I will consider whether the application for an adjournment was made on proper considerations and the harm or prejudice that will result if leave is granted or refused.
11. When it came to the question of adjournment before his Lordship, balancing the rights of the parties was necessary. It had to be examined whether the grant or refusal of an adjournment will cause irreparable injustice to one party.
12. I have examined the sick sheet produced for the adjournment based on the sickness of the plaintiff. The sick sheet stated that the plaintiff was unfit to travel to court, to participate in court and follow proceedings, to give evidence and be cross examined. The medical report was issued on 15 September 2018 which stated that the plaintiff will be unfit for 4 days.
13. I can understand why the doctor was called to give evidence on the plaintiff's condition. There was no mention of the nature of the plaintiff's sickness and the court wanted to

be satisfied whether there was any basis to consider the adjournment. In that regard, I find that calling the doctor to court was a proper procedure in considering the application for an adjournment.

14. When the doctor came to court she gave evidence of the plaintiff's sufferings. She stated that the plaintiff had neuralgia, hypertension and high blood pressure. The evidence further stated that the plaintiff was unable to sleep and also needed rest.
15. The court found that it was not satisfied that the plaintiff was medically unfit to attend court. I am concerned that neither the doctor was cross-examined on the plaintiff's sickness which disabled her from coming to court, nor was there any contrary medical evidence that the plaintiff was fit to come to court with the medical conditions she had. In absence of that, the doctor's evidence on the plaintiff's condition could not be disregarded to assess whether the adjournment should be granted. There was a proper medical ground for which an adjournment ought to have been considered.
16. If the court had any reservations that the plaintiff was unfit, it is my view that the court should have had, at the very least, allowed Mr. Sen another date to produce the plaintiff in court to see her situation. This may be a very serious action on the part of the court as it can risk the health of a party but given the courts finding that the plaintiff was fit, another time and date should have followed for the production of the plaintiff. This would have prevented an outright denial of access to justice and no prejudice to the defendants as the matter was fixed for 3 days.
17. What also concerns me is that the court was dealing with a 71 year old plaintiff who already had prior medical conditions which allegedly was not handled by the hospital properly. She had gynecological issues for which she had attended the hospital. No regard was given to the plaintiff's age and the existing medical conditions the doctor testified the plaintiff to have had for which she could not make it to court. If this aspect

was considered, a more sympathetic approach was warranted than a draconian order dismissing the cause.

18. The court stated that it reached its decision to dismiss the action taking into cognizance the deposition in the affidavit in support of the notice of motion that Mr. Sen was to be in Suva court for 4 days for hearing. The court stated that the plaintiff has not relied on that position at all during the hearing of the application for an adjournment. How the court's decision was influenced by that particular deposition is not identified in the ruling.
19. On the day of the hearing, Mr. Sen did not press on that ground as he was very much present in court to argue his application for adjournment. He did not pursue that ground at all and it should have been deemed abandoned. The only evidence before the court which needed analysis was whether the plaintiff was sick to be unfit to attend court. Any other consideration in my view was extraneous.
20. The plaintiff's claim for medical negligence also outlines that she was a hypertension patient and also anemic. Her continued hypertension could not be something that was an afterthought. I also have regard to the fact that she is an elderly citizen and for her to manage some ailments would require enough rest as per the evidence of the doctor.
21. The approach to dismiss the cause did not take into account the plaintiff's condition and appears to be laced with an unnecessary consideration that Mr. Sen was initially said to be away for a trial in Suva. I cannot help saying that the trial judge suspected that since that was the initial reason advanced for the adjournment, the plaintiff's sickness could be a cover up to substantiate the same. He does not say this in so many terms but that is what I suspect happened when his Lordship decided whether the plaintiff was genuinely sick.

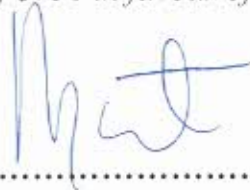
22. It appears that the assessment was clouded with an irrelevant consideration resulting in an unfair and unjustified decision to not grant an adjournment for at least a day to see the plaintiff's condition.
23. I find that an outright denial to the plaintiff to prosecute the matter was unfair and unjust and not based on the evidence before the court. At the time the application for an adjournment was made, the matter was fairly new. It was a year old matter. I can say that this was not a file which was not case managed properly.
24. I have perused the file and I do not find that the plaintiff had in any way delayed in the progress of the matter. Mr. Sen has been taking progressive steps in the cause for the matter to be ready for hearing. The conduct of the plaintiff's counsel for swift compliance of the process cannot be denounced.
25. The defendant had not identified to the court how an adjournment was going to be prejudicial for the defendant's. Even at the leave stage before me, no irreparable harm could be shown why leave should be refused.
26. It is my view that the plaintiff should be given an opportunity before the appellate court to decide the appropriateness of the court's order dismissing her case. Any denial of this right will affect her substantial rights.
27. On the question of costs of this application, I find that the plaintiff should be entitled to some costs. It is my view that the matter could have been easily resolved by consent as the defendants had not objected to any adjournment in court in the first place. There was no need to protract the matter to the hearing stage.
28. Given the nature of the application and considering that there were no substantial legal issues that needed resolving, the order for costs should be minimal to cover the disbursements of filing and appearing in court.

29. Finally, I can only hope that both parties find a more expedient way of resolving this issue with the hope of an early trial. The plaintiff is an old woman with medical issues. Nothing will be more relieving to see the matter tried during her lifetime.

Final Orders

30. In final analysis, I make the following orders:

- (a). *The plaintiff is granted leave to appeal the decision of Hon. Justice Alfred dismissing the plaintiff's action upon her application for an adjournment.*
- (b). *The plaintiff is now bound by the timeframe set by the Court of Appeal Rules to file his appeal.*
- (c). *Costs at a minimal rate of \$750 in favour of the plaintiff to be paid within 21 days.*



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Hon. Madam Justice Anjala Wati

Judge

30. 04.2020



To:

1. *Maqbool & Company for the Plaintiff.*
2. *Attorney – General's Chambers for the Defendants.*
3. *File: Labasa HBC 17 of 2017.*