

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 215 of 2005**

**BETWEEN** : **EDLIN MANI** of Lautoka Police Compound, Police Officer.

**Plaintiff**

**AND** : **DHARMENDRA KUMAR** of Naboutini Sabeto, Driver and Police  
Special Constable.

**1<sup>st</sup> Defendant**

**AND** : **YEES COLD STORAGE LIMITED** a limited liability company having  
its registered office at Queens Road, Namaka, Nadi.

**2<sup>nd</sup> Defendant**

Before : Master U.L. Mohamed Azhar

Counsel : The Plaintiff absent and unrepresented  
Mr. V. Vananalagi the Defendants

Date of Ruling: 05<sup>th</sup> May 2023

**RULING**

01. This is the summons filed by the defendants pursuant to Order 25 rule 9 of the High Court Rules seeking to strike out the plaintiff's action for want of prosecution or as an abuse of the process of the court. The plaintiff appeared in person and opposed the summons. She filed the affidavit in opposition; however, she did not appear at hearing even though the hearing date was fixed in her presence.
02. The Order 25 rule 9 provides for the jurisdiction of the court to strike out any cause or matter for want of prosecution or as an abuse of process of the court if no step has been taken for six months. The said rule reads;

"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.

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".

03. Justice Scott, striking out of plaintiff's action in **Hussein v Pacific Forum Line Ltd**, [2000] 1 FLR 46 (6 March 2000), stated that;

"The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are **Allen v. McAlpine** [1968] 2 QB 299; [1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example, **Merit Timber Products Ltd v. NLTB** (FCA Reps 94/609) and **Owen Potter v. Turtle Airways Ltd** (FCA Reps 93/205)".

04. The Court of Appeal of Fiji in **Trade Air Engineering (West) Ltd v Taga** (supra) reiterated that, the new rule (Or 25 r 9) does not confer any additional or wider power to the court except the power to act on its own motion. It was held in that case that;

"In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority".

05. Lord Diplock, articulating the principles for striking out the actions for want of prosecution and abuse of the court process held in **Birkett v. James** (supra) that:

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.

06. On the other hand, the House of Lords in "**Grovit and Others v Doctor and Others**" (1997) 01 WLR 640, 1997 (2) ALL ER, 417 held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. Lord Woolf stated in that case as follows;

"The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".

07. This action stemmed from a road traffic accident that took place on 10.08.2002 at Sovi Bay, Queen's Road Sigatoka. The plaintiff was travelling in a vehicle bearing registration number DP 492 towards Suva from Sigatoka direction. The first defendant was driving the vehicle bearing number DV 309 and heading towards Sigatoka from Suva direction. The vehicle driven by the first defendant collided with the vehicle in which the plaintiff was travelling. It was alleged that, the said accident took place due to the sole negligence of the first defendant. The second defendant was the registered owner of the said vehicle driven by the first defendant. The plaintiff sustained injuries and sued the defendants for damages. The liability was admitted 19.09.2011 and the matter was fixed for assessment of damages.
08. Whilst the matter was pending for assessment of damages, the plaintiff filed two applications for interim payments. The then Master of the High Court by his ruling dated 30.01.2012 ordered the defendants to pay a sum of \$ 75,000 as the interim payment and by subsequent ruling dated 23.11.2012 ordered further sum of \$ 10,000. Accordingly, the plaintiff was paid a sum of \$ 85,000 in total as interim payment pending the assessment of damages.
09. The attitude of the plaintiff in proceeding this matter had changed after receiving the interim payment at it appears from the record itself. The hearing for assessment of damages was vacated on numerous occasions due to either the absence of the plaintiff or withdrawal of appearance by her solicitors. The case record itself is evident to this change of attitude. The affidavit filed on behalf of the defendants in support their current application has listed some of the dates on which the hearing was vacated to show there was nil progress in the proceedings. It is not necessary to list them all again here as the case record is self-explanatory. The hearing fixed for three days on 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> of July 2017 was vacated. The hearing was re-fixed for three days on 21<sup>st</sup>, 22<sup>nd</sup>, and 23<sup>rd</sup> of November 2017 was vacated on request of the plaintiff's solicitor which was consented

by the defendant's solicitor as well. Thereafter, the plaintiff and her solicitors failed to appear in this matter to fix for hearing and the matter was taken off the cause list.

10. The plaintiff then filed an Inter-Parte Motion for reinstatement of the matter. However, the plaintiff and her solicitors were absent on the Motion's returnable date. The defendant was represented and moved to dismiss the Motion with costs. The Motion was accordingly dismissed with the costs to the defendant. The plaintiff filed another Inter-Parte Motion for reinstatement of the matter. When the Motion was taken up, the defendant's solicitor objected the Motion as the plaintiff failed to comply with certain rules of the court. The objection was upheld and the Motion was dismissed with costs. Thereafter the plaintiff did not take any step at all in this matter.
11. This prolonged inaction of the plaintiff prompted the defendants to bring the current summons for striking out for want of prosecution pursuant to Order 25 rule 9 of the High Court Rules. The plaintiff filed an affidavit and opposed the summons. The hearing was fixed when the plaintiff was present. However, the plaintiff was not present at hearing, nor she was represented by a solicitor. The conduct of the plaintiff as stated above clearly demonstrates that the failure to take steps in this matter, including her absence on the hearing day which was fixed in her presence, is intentional and contumelious. The plaintiff has no interest in bringing this matter to conclusion as she received a substantial amount of compensation by way of interim payment made in two occasions.
12. Even though the plaintiff filed an affidavit opposing the summons, the said affidavit lacks reasons that can justify her inaction in this matter. This matter has been hanging over the heads of the defendant for quite long time since 2005 without being brought to an end. This is much prejudice to the defendant.
13. Lord Denning discussed the prejudice that may be caused to a party, due to the long delay of the other party in **Biss v. Lambeth, Southwark & Lewisham Health Authority** [1978] 2 All E.R. 125 and stated at page 131 that:

“The prejudice to a defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial; like the prejudice to Damocles when the sword was suspended over his head at the banquet. It was suspended by a single hair and the banquet was a tantalizing torment to him. So in the President of India case, [1977] Court of Appeal Transcript 383, which we heard the other day. The business house was prejudiced because it could not carry on its business affairs with any confidence, or enter into forward commitments, whilst the action for damages was still in being against it”.



14. There are litigants who pursue their cases according to the timetable set out by the rules or within the reasonable time, with diligence and expedition. On the other hand there are some who pursue their cases sporadically or make default with the intention to keep the matters pending against the defendants forever. The courts should not ignore the second category of practice. It should be disallowed for several reasons. Firstly, it is an abuse of the process of the court. Secondly, it is the waste of court's time and resources which are not infinite. The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition, and want their cases to be heard within a reasonable time' (see: Singh v Singh [2008] FJCA 27; ABU0044.2006S decided on 8 July 2008). Thirdly, it violates the fundamental rights guaranteed by the sections 15 (2) and (3) of the Constitution which read;

(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.

(3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.  
(Emphasis added)


Fourthly, it constitutes as a serious prejudice to the other party as justice may not be able to be done between the parties since the matter is pending idle without the steps being taken by the relevant party. In this case, the matter has been idle in the registry for more than six months. The plaintiff stated that, she was facing financial difficulties and was unable to pay to the lawyers to proceed with this matter. The plaintiff cannot expect that the court and the defendants should wait until she gets sufficient funds to prosecute her own case.

15. For the reasons expounded above, I am fully entitled to say that, the very existence of this action in which the plaintiff has no interest at all in pursuing it, is inexcusable and intolerable. The plaintiff's overall failure is intentional and contumelious. The plaintiff failed to show cause as to why her action should not be struck out under Order 25 rule 9 of the High Court Rules.

16. In result, the final orders are;
- a. Plaintiff's action is struck out, and
  - b. There is no order for cost.

At Lautoka  
05.05.2023



  
U.L. Mohamed Azhar  
Master of the High Court