

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 132 of 2018

**BETWEEN : VINITA DEVI PRASAD
KAMILA WATI PRASAD**

PLAINTIFFS

**AND : KAILASH PRASAD
ATISH PRASAD
MICHEAL DEEPAK KUMAR
SURUJ DEO**

DEFENDANTS

APPEARANCES/REPRESENTATION

PLAINTIFFS : Mr. S. Singh with Ms. S. Dutt [Shelvin Singh Lawyers]

FIRST & SECOND

DEFENDANTS : Mr. O'Driscoll [O'Driscoll & Co]

THIRD & FOURTH

DEFENDANTS : Mr. P Katia [Siwatibau & Sloan]

RULING BY : Master Ms Vandhana Lal

DELIVERED ON : 01 August 2023

INTERLOCUTORY RULING

[Order 25 Rule 9 Notice]

1. The court on its own motion issued an Order 25 Rule 9 notice dated 30th September 2019 asking the parties to show cause why the action should not be struck out for want for prosecution or as an abuse of the process of the court.
2. The Plaintiff's claim is in respect of a motor vehicle accident whereby they are claiming damages.

3. The last action taken was when a statement of defence was filed by the First and Second Defendants on 22nd March 2019. Thereafter the Plaintiffs failed to file their reply to the respective defences and take the matter forward for trial.
4. According to the Plaintiffs, the Defendants had required particulars of claim and since the Plaintiffs were out of the country, they could not provide these.

The Plaintiffs state their solicitors have drafted the replies to the respective statement of defence filed Defendants and were in process of lodging this when the Order 25 rule 9 notice was issued.

The Plaintiffs claim the Defendants have no defence to the claim and the Plaintiffs have a good cause of action against them. The Defendants have done their investigation and have full particulars and will not be prejudice if the matter continues.

Due to the First Plaintiff's father's illness, the Plaintiffs have been in New Zealand with him and hence unable to provide timely instruction to their solicitors.

Her mother and her got injured in the motor vehicle accident and they both continue to suffer on daily basis due to the injuries sustained.

5. The First and Second Defendants have not filed any affidavit showing cause and submit the notice be treated as a summon for direction and that the matter proceeds for trial.
6. The Third and Fourth Defendants state that the Plaintiffs could have given instruction to their lawyers via phone or email and ought to have progressed with the matter.

They deny liability and claim the Plaintiffs suffered injuries due to their (Plaintiffs) own negligence.

More than 05 years have gone since the incident and it will be impossible to locate independent eye-witness and the recollection of the events will be severely affected with possibility of there not to have a fair trial.

7. Order 25 Rule 9 of the High Court Rules reads:

“(1) If no step has been taken in any cause or matter for 06 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 for prosecution or as an abuse of the process of the court

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

8. Since this is a case of personal injury there ought to have been automatic discovery (Order 25 Rule 1 of the High Court Rules) and pretrial conference convened to ensure matter proceeds for trial within reasonable time.
9. All the defences were filed on 22nd March 2019 and 03rd October 2019 respectively. The Plaintiff had after service of the same 07 days to file a reply and proceed towards trial.
10. This Order 25 Rule 9 notice was issued on 30th September 2019. There is a delay of 06 months within which the Plaintiff failed to move with the proceedings.
11. In **Trade Air Engineering (west) Limited –v- Taja, a Court of Appeal Civil Appeal Case ABU 62 of 2006** (delivered on (09th March 2007), the Court of Appeal at paragraph 16 held:

“While the power (under Order 25 rule 9 to strike out or give direction) may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or wider jurisdiction to the court to dismiss or strike out on grounds which differ from those already established by past authority.”

12. In **Brikett v James [1978] AC 297; [1977] 2 ALL ER 801**, Lord Diplock articulated the principles for striking out an action for want for prosecution:

“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 and/or his lawyer, and*
(b) that such delay will give rise to a substantial risk that is it 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.”

13. In **Bhawis Pratap –v- Christian Mission Fellowship a Civil Appeal 93 of 2005** delivered on 14th July 2006, the court reviewed the authority and explained that mere delay without prejudice to the other parties is not ordinarily a sufficient ground for striking out an action for want for prosecution.

14. In **Grovit –v- Doctor [1997] UKHL 13; [1997] 2 ALL ER 417**, it was pointed out, that it is an abuse of the court’s process to commence proceedings without the intention of prosecuting them with reasonable diligence.

15. In the current proceedings there is no disobedience of court order but rather the Plaintiffs have failed to move the action under the rules for trial.
16. There is no evidence of any substantial risk for a fair trial likely to cause the Defendants any seriously prejudice. The First and Second Defendants wish to proceed towards trial. The Third and Fourth Defendants have failed to outline who are the independent witnesses and why they could not be located.
17. Considering the above, this is not a case warranting a dismissal under Order 25 Rule 9.
18. Hence the Order 25 Rule 9 notice is converted into a summon for direction with following orders:
 - *The Plaintiffs are to file and serve their reply to defence out of time by 12 noon on 08 August 2023. The reply to defence is subject to a late filing fee;*
 - *The Plaintiffs to file and serve their affidavit verifying list of documents by 12 noon on 18 August 2023;*
 - *And should the Plaintiffs fail to abide by any of the above orders, the writ of summons and statement of claim shall stand struck out as the given respective time and the Defendants shall be entitled to costs of \$300 each and to be paid in 14 days from the date the matter stands struck out;*
 - *And should the Plaintiff abide by the above orders then the Defendants are to file and serve their respective affidavit verifying list of documents by 12 noon on 01 September 2023;*
 - *Discovery is to be completed by 15 September 2023;*

Matter will be called for review of compliance of orders.

19. Cost to be in cause.



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Vandhana Lal [Ms]
Master of the High Court
At Suva.

01 August 2023

TO:

1. Suva High Court Civil File No. HBC 132 of 2018;
2. Shelvin Singh Lawyers, Solicitors for the Plaintiffs;
3. O'Driscoll & Co, Solicitors for the First and Second Defendants;
4. Siwatibau & Sloan, Solicitors for the Third and Fourth Defendants.