IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 294 OF 2021

BETWEEN	:	**INOKE MOMONAKAYA SEVAKARUA** as **TRUSTEES OF THE ESTATE OF WAISIKI SEVAKARUA** of Legalega, Nadi. **FIRST PLAINTIFF**
AND	:	**INOKE MOMONAKAYA SEVAKARUA** and **ASERI NASILASILA** of Legalega, Nadi, Fire Officer **SECOND PLAINTIFF**
AND	:	**TALICA MELI** of Legalega, Nadi, Domestic Duties **FIRST DEFENDANT**
AND	:	**ITAUKEI LAND TRUST BOARD** **SECOND DEFENDANT**
BEFORE	:	Hon. Mr. Justice Mohamed Mackie
APPEARANCES	:	Mr. Maopa, for the 1st plaintiff Mr. Bauleka, for the 1st defendant Mr. Rasiga, for the 2nd defendant
DATE OF HEARING	:	7th July, 2023
DATE OF JUDGMENT	:	18th August, 2023

RULING

[Application Pusuant to Order 18 Rule 18 1 (a) (b) & (d) of the High Court Rules, 1988]

A. APPLICATION

1. Before me is the Summons dated and filed on 2nd November 2022 by the 1st Defendant hereof seeking an order to Strike Out and dismiss the Plaintiff's Writ of Summons and the Statement of Claim filed on 17th December 2021 against the Defendants, on the following grounds;-

    a) That it discloses no reasonable cause of action;
    b) Frivolous and vexatious;
    c) It is otherwise an abuse of the Court process.
    AND FOR FURTHER ORDERS that the Plaintiff pays the costs of this application on the Solicitor/ Client indemnity basis.

2. The Application was made pursuant to Order 18 Rule 18 (1) (a), (b), and (d) of the High Court Rules 1988 and under the inherent jurisdiction of the High Court. The Application was supported by the 1st Defendant's Affidavit sworn and filed on 2nd November 2022, together with annexures marked as "A" to "H".

3. The Plaintiffs, who opposed the said Application, on 17th January 2023, filed their Affidavit in Response sworn on 20th December 2022 by the 1st named Plaintiff, namely, INOKE VMOMONAKAYA, along with the authority given by the 2nd Plaintiff. The 1st Defendant filed her Affidavit in reply on 16th February 2023.

4. The 2nd Defendant, iTAUKEI Land Trust Board also supports the Application by the 1st Defendant. The Application was heard in terms of the Affidavit evidence filed by the Plaintiff and the 1st Defendant, coupled with the oral submissions made and the written submissions filed by the learned Counsel for all 3 parties.

B. BACKGROUND:

5. The Plaintiffs by way of their writ of Summons and the Statement of claim filed on 17th December 2021 prayed for , inter-alia, the following reliefs against the Defendants;

   1. *Special damages in a sum of $1, 300.00;*
   2. *General damages against the defendants for fraud and negligence;*
   3. *A declaration that the Plaintiffs have equitable (proprietary) interest/ share in the Native Reserve Land owned by the Tokatoka Vunamasei, situates at Legalega , Nadi;*
   4. *A Declaration that the Plaintiffs have equitable (proprietary) interest/share on the use of the Native Resave Land owned by the Tokatoka Vunamasei , situates at Legalega, Nadi;*
   5. *A Declaration that the Plaintiffs have equitable (proprietary) interest/share in the Native Land Lease Ref. No. 4/10/ 2067 being Native Lease No 14042 Land known as Vunaniu No. 1 situates at Legalego , Nadi ;*
   6. *An Order that the Plaintiffs and descendants of the late Mrs. Voro are entitled to live and reside at Tokatoka Vunamasei land known as Vunaniu No-1 situates at Legalega , Nadi as long as they wish;*
   7. *An Order that the parcel of the Land (approximately 2.5 acres) given and or sold by the 1st Defendant to the Land Bank to be called and revert as part of Vunaniu No.1.* The Law and Practice

6. The 1st and 2nd Defendants through their respective Solicitors filed their acknowledgment of services on 30th December 2021 and 20th January 2022 respectively. But, none of them either filed their Statements of defence or had their right to do so reserved.

7. Subsequently, the Plaintiffs filed an Ex-parte Notice of Motion on 20th June 2022, supported by an Affidavit sworn by the 1st Plaintiff on 1st June 2022, moving for certain injunctive reliefs against the Defendants.

8. The Application for injunction orders was supported before Justice A. Tuilevuka, and no orders sought Ex-parte were granted. Subsequently when it came up for inter-parte hearing on 22nd July 2022, as learned Counsel for the Plaintiff had intimated that he was withdrawing the Application for injunction, the matter was directed to Master's court to ffollow the normal course.

9. Accordingly, when the matter was mentioned before the Master on 1st August 2022, the learned Master made direction for the matter to be called before him upon filing of the Summons for directions.

10. As the 1st and 2nd Defendants had not filed their Statement of Defence, the plaintiffs' Solicitors on 6th October 2022 filed the Summons seeking for formal proof, subsequent to which the 1st Defendant on 2nd November 2022 filed his Summons at hand for Striking out the Plaintiff's action. The Plaintiff filed his Affidavit in opposition on 17th January 2023 and the 1st Defendant filed his Affidavit in reply thereto on 16th February 2023.

11. When the matter came up for hearing on 7th July 2023, Court decided to deal with the Striking out Application first and put the Summons for Formal Proof on hold till the ruling is pronounced in this Summons. Counsel for both the parties were duly heard on this Summons and they have filed their respective written submissions as well.

C. RELEVANT LAW:

12. The law on striking out pleadings and endorsements is stipulated under Order 18 Rule 18 of the High Court Rules 1988 which states as follows-

> *18.-(1) 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.*
>
> *(2) No evidence shall be admissible on an application under paragraph (1) (a).*

13. In ***Paulo Malo Radrodro vs Sione Hatu Tiakia & Others, HBS 204 of 2005,*** the Court stated that:

> *"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:*

a. *A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in* ***Drummond Jackson v British Medical Association [1970] WLR 688.***

b. *Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable – Lindley LJ in* ***Attorney General of Duchy of Lancaster v L.N.W Ry[1892] UKLawRpCh 134; [1892] 3 Ch 274 at 277.***

c. *It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson [1898] UK Law Rp KQB 176; [1899] Q.B 86.***

d. *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*

e. *"The first object of pleadings is to define and clarify with position the issues and questions, which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet, must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed" –* ***ESSO Petroleum Company Limited v Southport Carporation [1956] A.C at 238" – James M Ah Koy v Native Land Trust Board & Others – Civil Action No. HBC 0546 of 2004.***

f. *A dismissal of proceedings "often be required by the very essence of justice to be done"....... –* ***Lord Blackburn in Metropolitan – Pooley [1885] 10 OPP Case 210 at 221*** *- so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation –* ***Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"***

14. His Lordship Hon. Justice Kirby in ***Len Lindon –v- The Commonwealth of Australia (No. 2) S. 96/005*** summarized the applicable principles as follows:-

a. *"It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*

b. *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious...*

c. *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

d. *Summary relief of the kind provided for by O.26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer.... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

e. *If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action, which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading.*

f. *The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.*

D. PLAINTIFF'S CLAIM:

15. Essentially, the Plaintiffs in their Statement of claim plead and pray for Equitable and Proprietary Interest against the 1st Defendant by alleging fraud, and Negligence on the part of the 2nd Defendant. The claim by the Plaintiff hinges, according to the Statement of claim, on the inheritance of the land in dispute from their Grand Mother, the Late Mrs. **Asinate Varo**, who was a known surviving land owning unit of the Mataqali Vunamoli, Tokatoka Vunamasei since 1920, who had four (4) issues, including the Plaintiff's late Father Waisaki Sevakarua, out of her marriage. The Plaintiffs claim that the disputed part of the land being willed and gifted by their Grand Mother to their Father **Waisiki**, who in turn willed it to them as they are his Son and the Daughter.

The Plaintiffs state that the Defendants were fully aware of the relationship between the 1st Defendant and the Plaintiffs and about their occupation of the land.

E. ISSUES FOR DETERMINATION:

16. Following are the issues which require determination by this court;-

   a. Whether the Plaintiff's Writ of Summons and the Statement of Claim disclose any reasonable cause of action or not?
   b. Whether the Plaintiff's Writ of Summons and the Statement of Claim is frivolous and vexatious?
   c. Whether the Plaintiff's Writ of Summons and Statement of Claim is an abuse of the process of the Court or not?

F. ANALYSIS and DETERMINATION

17. It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional cases: ***Timber Resource Management Limited v. Minister for Information and Others [2001] FJHC 219; HBC 212/2000 (25 July 2001).***

18. In ***National MBF Finance (Fiji) Ltd v. Buli Civil Appeal No. 57 of 1998 (6 July 2000)*** the Court stated as follows:-

> *"The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved.*
>
> *If a legal issue can be raised on the facts as pleaded, then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court...."*

a. ***Whether the Plaintiff's Writ of Summons and the Statement of Claim discloses any reasonable cause of action?***

19. The following notes to Order 17 r19 of the Supreme Court Practice (UK) 1979 Vol. 1 or 18/19/11 on what is meant by the term 'a reasonable cause of action' sufficiently provides the answer to the applications.

> *"......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 ER 1094 CA). So long as the statement of claim or the particulars (Davey v Bentinck [1892] UKLawRpKQB 216; [1893] 1 QB 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 out (Moore v Lawson (1915) 31 TLR 418, CA.; Wenlock v Moloney [1965] 1 WLR 1238 1 W.L.R. 1238 [1965] 2 All ER 871, CA)...."*

20. Reference is also made to Lindley M.R. in ***Hubbuck & Sons, Ltd v Wilkinson, Heywood & Clark Limited [1899] 1QB 86*** at page 91 said:

> *".....summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases".*

21. In the instant case, in summary, the Plaintiff in paragraphs 4, 8 and 16, having averred in detail about the History, the Lease the Last Will and Testament respectively , in the rest of the paragraphs averse about the Dispute, Equitable & Property Interest, Fraud against the 1st Defendant and the Negligence on the part of the 2nd Defendant.

22. It is for the Plaintiff to establish that he has a Cause of Action in this case in terms of the facts and the Pleadings filed herein, and the mode of proof has to be by leading evidence.

23. On the other hand, the Defendants must establish that the Plaintiffs do not have a Cause of Action and their claims are beyond their reach. Given the nature of claim and the complexities involved, it is too early in the proceedings to decide Prima Facie that there is no cause of action and/or any valid claim within this proceeding pending before this Court.

24. The Striking out Application of the Defendant is a summary proceeding and is only appropriate to cases which are plain and obvious.

25. Bearing in mind the facts of this case and the nature of the pleadings filed by the parties, particularly, when the Defendants have not filed their Statement of Defence , this Court cannot arrive at any hurried decision in this manner and it cannot be classed as 'plain and obvious' in nature. Therefore, it is too early at this stage of the proceedings for this Court to ascertain and determine whether there is a reasonable cause of action or not.

Whether the claim is frivolous and Vexatious?

26. In this regard, reference is made to paragraph 18/19/15 of the Supreme Court Practicec1993, Vol. 1 (White Book) which reads as follows:-

> *"By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in Attorney General of Duchy of Lancaster v. L. & N.W.Ry [1892] UKLawRpCh 134; [1892] 3 Ch. 274, 277; The Pleading must be "so clearly frivolous that to put it forward would be an abuse of the Court" (per Juene P. in Young v. Halloway [1894] UKLawRpPro 42; [1895] P 87, p.90; ...."*

27. In ***Devi v. Lal [2014] FJHC 75; HBC 120.2008 (7th February,2014)***- It was held as follows-

> *"The Oxford Advanced Learners Dictionary of Current English 7th Edition defines the words "frivolous" and "vexatious" as:-*
> *Frivolous: "having no useful or serious purpose"*
> *Vexatious: "upsetting" or "annoying"*

28. Therefore, for a claim to be frivolous or vexatious, the party opposing the claim must establish that the claim lacks merit (i.e. has no useful purpose) and is only to upset or annoy the Defendants.

29. The claim, prima facie, cannot be judged summarily to be frivolous or vexatious; it needs to be appropriately examined by a Court through the process of trial. Therefore, in the given circumstances and at this stage, the Plaintiff's claim cannot be said to be frivolous or vexatious.

Whether the claim is otherwise an abuse of the process of the Court?

30. It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process and reference is made to paragraph 18/19/18 of the Supreme Court Practice 1993 Vol. 1.-

At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol 1 it is stated as follows:-

> *"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."*
>
> *"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite [1990] 2 E.R. 990, C.A)."*
>
> *"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process" (see Reichel v. Magrath [1889] UKLawRpAC 20; (1889) 14 App.Cas. 665). (para 18/19/18)*

31. In ***Halsbury's Laws of England Vol 37 page 322*** the phrase "abuse of process" is described as follows:

> *"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court.*

32. The phrase "abuse of process" is summarized in ***Walton v Gardiner (1993) 177 CLR 378*** as follows:

> *"Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"*

33. Again, the summary procedure should not be used to determine the "abuse of process of the court', rather the matter to be heard to determine the issue of the writ making a claim whether it is groundless and unfounded in the sense that the plaintiff does not know of any facts to support it.

34. Further reference is made to the case of ***Timoci Uluivuda Bavadra v The Attorney General (Sup.(Sup. Ct. (now High Court) C.A. No. 487 of 1987*** where Rooney J said:

"I am not required to try any issues at this hearing. All I have to decide whether there is an issue to be tried. It is not enough for the defendant to show on this application that the plaintiff's case is weak and unlikely to succeed".

35. In ***Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008 (28 January 2010),*** Master Tuilevuka (as he was then) summarized the law in this area as follows;

"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262 at 267"

36. I cannot end this without referring to a very recent Judgment by the Court of Appeal in ***Singh v Singh [2023] FJCA 147; ABU0089.2020 (28 July 2023)*** **-Lautoka Civil Action No. HBC 63 of 2019** wherein his Lordships A. Gunaratne-J - had raised a pertinent question and went on to state as follows;

"[45] Before I part with this judgment I would like to make some final comments".
"Should a party defendant be allowed to intervene in an application to strike off a claim (originating in summons) without filing a Statement of Defence within time as requisite in law?"

*[46] **My unreserved view writing for this court is that it should not be allowed for the simple reason that, a defaulting defendant's such conduct amounts to an attempt to do indirectly to do he/she is not entitled to do directly.**(emphasis mine)*

[47] In such situations a court (in this instance, the High Court) should not permit such an exercise, if not for anything else, for regular procedure laid down by the legislature as per the High Court Act, would be rendered otherwise although I am mindful of Order 18 Rule 18 (1)(a) as being an exception to that regular procedure.

[48] That provision in Order 18 Rule 18(1) (a) is applicable to a situation where an "Amendment is sought" to pleadings and an order ensues thereon which would therefore make such ensuing order "interlocutory" in contrast to a situation as in the present case where the High Court "struck off" (and therefore "dismissed" the plaintiff's action) bringing the suit to an end, leaving no room for "any application" for the court to consider thereafter.

[54] The 1st respondent (defendant) did not file a Statement of Defence but sought to "strike off" the plaintiff's action on the basis of affidavits filed.

[55] Here is a case where the plaintiff filed a Statement of Claim and pleaded a cause of action with particulars in regard to his alleged seminal of a right. That first step the plaintiff satisfied. The second step was to establish his claim by calling witnesses' subject no doubt to cross-examination given the substantive content of the claim.

*[56] **That regular procedure should not have been allowed (permitted) to be short-circuited in entertaining "a striking off application" I go further in expressing the view that, a court should not encourage such a course of action.** (Emphasis mine)*

[57] Consequentially, I agree with the submissions of the appellant's counsel's that, the learned Judge erred in "striking off" the plaintiff's action on affidavits filed by parties without proceeding to a regular trial".

37. Coming back to the action in hand, I firmly believe that the leading of oral evidence in Court in relation to the facts pleaded in the Statement of claim, *inter- alia*, the family history, the Lease, the Last will of Mrs. Voro and the deed of Gift by Mrs. Voro in favor of Plaintiffs' Father Waisaki, would throw enough light in the ascertainment of the propriety of the Plaintiffs' claim. This is possible only through the trial, not through the Affidavit evidence. The submissions made orally and in writing on behalf of the Defendants, in my view, will be of immense use in the final determination of the substantial matter, after the trial.

G. FINAL ORDERS:

a. That the 1st Defendant's Summons dated and filed on 02nd November 2022, seeking the striking out of the Plaintiff's Writ of Summons and the Statement of Claim is hereby struck out and dismissed.

b. That the 1st Defendant to pay the Plaintiff a sum of $2,000.00 as costs of this Application.

c. Mention the matter to consider the Application for formal proof.

HIGH COURT OF FIJI * LAUTOKA *

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 18th day of August, 2023.

SOLICITORS:

For the 1st Plaintiff :	**Messrs.: Babu Singh & Associates – Barristers & Solicitors.**
For the 1st Defendant :	**Messrs.: Alpha Legal – Barristers & Solicitors.**
For the 2nd Defendant:	**In-house Solicitors- Legal Department, Itaukei Land Trust Board**