

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 204 of 2018

BETWEEN:

HIRDEI WATI SHARMA
PLAINTIFF

AND:

CHANDRA PRAKASH SHARMA
1ST DEFENDANT

AND:

REGISTRAR OF TITLES
2ND DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

Shelvin Singh Lawyers for the Plaintiff
Lal Patel Bale Lawyers for the 1st Defendant
Attorney General's Chamber for the 2nd Defendant

Date of Hearing:

By way of Written Submissions

Date of Ruling:

28 October 2024

RULING

01. The Plaintiff filed the current summons on 08/11/2023 with the Supporting Affidavit of Manisha Kumar, a solicitor employed by the Plaintiff's solicitors and moved the court for the following orders/reliefs,

1. *That the within action be reinstated and the matter re-instated to the cause list.*
2. *That orders of the Acting Master of 28th August 2023 be extended for compliance.*
3. *That the time for service of this Summons be abridged.*
4. *That costs of this application be costs in the cause.*
5. *And such further or other orders and directions as this Honorable Court deem appropriate to make.*

02. As per the Supporting Affidavit of Manisha Kumar, it is submitted that, pursuant to the orders of the Court made on 28/08/2023 for filing the PTC minutes within 07 days could not be complied with as the comments on the final draft of the PTC minutes by the 2nd Defendant was not received by the Plaintiff within time. A timeline of the events as relevant to the email communications between the parties regarding the PTC minutes have been given at averment 6 of the Affidavit.

03. The 1st Defendant objected to this application and as per directions of the Court filed an Affidavit in Opposition on 05/03/2024. The opposition of the 1st Defendant was the undue delay in the proceedings as caused by the inaction of the Plaintiff. 1st Defendant has pointed out that the order for filing the PTC minutes within 07 days was made on 24/08/2024 and the Plaintiff only circulated the draft PTC minutes 04 days later which was on 28/08/2023.

04. Plaintiff thereupon filed an Affidavit in Reply on 12/04/2024 and has claimed that the overall delay in these proceedings was due to several interlocutory applications that were made to substitute parties to the action owing to the death of these parties.

05. The 1st Defendant filed comprehensive written submissions on 21/03/2024 and the Plaintiff filed its written submissions on 06/06/2024 after several adjournments to file the same. On 19/06/2024, the Court fixed this application for Ruling on written submissions.
06. At the outset, it is to be noted that this Court in particular, had made orders for filing of PTC, Order 34 Summons and Copy Pleadings on two occasions. On 03/07/2023 the Court ordered the PTC to be finalized and minutes to be filed by 07/07/2023 and the Order 34 Summons and Copy Pleadings by 14/07/2023. Plaintiff failed to comply with this order and on the 24/08/2023 moved for extension of time to file PTC and the Order 34 Summons and Copy Pleadings.
07. On the 24/08/2023, the Court granted an extension with consent of the Defendants and ordered the PTC minutes to be filed by 04/09/2023 and the Order 34 Summons and Copy Pleadings by 13/09/2023 with an Unless Order to strike out the Writ and the Statement of Claim in default.
08. Plaintiff had failed to comply with the above order too and the Writ and the Statement of Claim were accordingly struck out by the Court on 06/10/2023.
09. The 1st Defendant has also submitted through its Affidavit that since this is a matter initiated in 2018, the 1st Defendant is being prejudiced as a result of the passage of time and the fact that the 1st Defendant has already made an application for a Writ of Possession of the disputed property following the appeal judgment in a related case of HBC 289/17.
10. It is highlighted by the 1st Defendant that the previous Master of the Court on 20/03/2023 had made orders for filing of the AVLD's, completion of discovery and for filing of PTC minutes and Order 34 Summons and Copy Pleadings. As per the said order the PTC minutes were to be filed by 12pm on 09/06/2023 and the Order 34 Summons and Copy Pleadings by 12pm on 30/06/2023. The Plaintiff had failed to comply with this order as well.

11. The 1st Defendant submits that the Plaintiff has only circulated the draft PTC minutes after 4 days from the Court order for filing the PTC minutes within 07 days. It is submitted that this conduct of the Plaintiff clearly shows that the Plaintiff has no regard to having the orders of the Court duly complied with. It is also submitted that the Plaintiff has failed to explain the non-compliance of all the previous orders of the Court for filing of the PTC minutes and the Order 34 Summons and Copy Pleadings. It is therefore in the submission of the 1st Defendant that the non-compliance of the orders of the Court by the Plaintiff is intentional and contumelious amounting to an abuse of the process of the Court.
12. The 1st Defendant has also outlined the prejudice caused to it through the undue delay owing to the conduct of the Plaintiff and has highlighted that the 1st Defendant has filed application for a Writ of Possession over the property in dispute following the appeal judgment in the case of HBC 289/17.
13. Counsel for the 1st Defendant has therefore, highlighted the overall lengthy delay in these proceedings and the fact that such delay is bound to cause prejudice to the Defendant due to the nature of these proceedings and effects of passage of time on enjoying the fruits of a judgment obtained in a related matter regarding the same disputed property. The counsel has further highlighted that the Defendant's constitutional rights guaranteed under sec. 15 of the Bill of Rights Chapter in the Constitution of Fiji is being infringed due to the conduct of the Plaintiff in this case.
14. Plaintiff, on the other hand, in its submissions has claimed that the non-compliance was due to an 'impossible scenario' where the final confirmation on the PTC minutes were not received within the 07 days the Court granted to file the same. It is also submitted that the Plaintiff is alleging fraud as against the Defendants in relation to the transfer of the property in dispute and thus if the matter is not re-instated, it shall be the Plaintiff that would be prejudiced of not having an opportunity to have his matter determined through the Court.

15. Counsel for the Plaintiff has also submitted that the proper cause for the Court to take at this instance is to re-instate the matter. In support of the Plaintiff's stance, the counsel for the Plaintiff has relied on the principles identified in the following case authorities, namely *Samat v Oelai* [2012] FJHC 844; HBC201.2002L (30 January 2012) and the celebrated English authority of *Brikett v James* (1987) AC 297 and accordingly refer to the cases of *Wati v Wati* [2017] FJHC 690; HBC144.2014 (19 September 2017) and a previous ruling of this Court made in the case of *Ugesh Prasad v Rakesh Prasad & Ors* (Suva HC Civil Action HBC 84 of 2018/24th May 2023).
16. It is evident from the case law in Fiji that there are two lines of authorities on the proper course to be taken once a matter is struck out for non-compliance of an 'unless order'. There are conflicting decisions to suggest that there must be an appeal against the order for striking out, whilst the others hold, an application for reinstatement must be made before the same court which struck out the matter.
17. Inoke J, having referred to several High Court cases on this point came to a conclusion in *Peters v Seashell @ Momi Ltd* [2012] FJHC 868; HBM09.2011L (15 February 2012) and held that:

*"There appears to be much confusion as to whether the striking out or dismissal of an action pursuant to an "unless" order where no hearing on the merits took place should be appealed or whether it should be the subject of an application to re-instate before the Master or Judge that made the order. Recently, several decisions of this Court were delivered on the question: *Westmall Ltd v CUL (Fiji) Ltd* [2010] FJHC 448; HBC175.2001L (6 October 2010); *Nakesu v Lakoinluslladi* [2012] FJHC 828; HBC113.2009 (27 January 2012); *Samat v Oelalai* [2012] FJHC 844; HBC201.2002L (30 January 2012); *Gulf Seafood (Fiji) Ltd v Native Land Trust Board* [2012] FJHC 853; HBA28.2011 (2 February 2012); *NBF Asset Management Bank v Krishna* [2012] FJHC 835; HBC129.1999L (2 February 2012). The consensus is that the proper procedure is an application to re-instate rather than an appeal."*

18. In the case of **WESTERN LAND DEVELOPMENT AND INVESTMENT COMPANY LIMITED v ANIL KUMAR & OTHERS** Civil Action No. 214 of 2015 (Ruling on 23/09/2022), Master Mohamed Azhar (as he then was) stated thus.

“The court, which has power to extend the time for compliance of its order, must have the power to reverse the sanction it imposed when proper cause is shown and it is proved that, there is no real risk that the particular non-compliance would render fair trial impossible, because the purpose of imposing a sanction is to control the proceedings and not to summarily oust a party from the case without hearing his or her grief in merits. The court imposes a conditional order exercising its inherent power to regulate its procedure and to protect its proceedings from being abused. Similarly, the same court has the inherent power to extend such order or to reverse and/or cancel it when proper cause is shown. As a result, the court which imposed a conditional order is not functus officio and application for reinstatement, with proper justification for default, can be made before the same court to review its order. Accordingly, when a claim or defence is struck out due to an ‘unless order’, the proper procedure to be followed by the party at default is to make an application for reinstatement and also to move the court for extension of time for compliance of the order of the court.”

19. In the Fiji Court of Appeal case of **Trade Air Engineering (West) Ltd and 3 Others v Laisa Taga and 2 Others** [2007] FLR 88, **Thomas (Fiji) Ltd v. Bank of Hawaii** [2006] FJCA 77, **Suresh Prasad v Housing Authority** [2014] FJCA 41, **WM Angus (Fiji) Ltd v Ram Karun** [2008] FJHC 165, **Avinesh Ashwin Prasad v Fiji Development Bank** [2013] FJHC 152, **Dhirendra Singh v Atendra Singh** [2016] FJHC 1060 the Courts have held that the preferable cause when a matter is struck out on a peremptory order is for the aggrieved party to appeal against such order.
20. I have no reservation on the fact that the High Court shall have inherent jurisdiction and/or inherent powers to regulate its own process. However, I have no hesitation, whatsoever, in holding that such inherent jurisdiction and/or inherent powers shall not extend to a limit that a Court itself may exercise such power to revisit its own orders and to revise such orders at a later stage, unless in very exceptional and recognized instances in law. The High Court, in my view, clearly has no such power to revisit its own orders, which could be included in its arsenal of inherent jurisdiction or powers, unless statutorily recognized in Fiji.

21. However, in this case, there is no objection by the 1st Defendants on the point whether this Court would be revisiting its previous orders if the application for re-instatement is considered and whether the application for re-instatement in this instance is therefore erroneous in law.
22. Moreover, it is noted by the Court that the matter was, in fact, struck out on the 06/10/2023 following the Unless Order made on 24/08/2023 and no further ruling was made on any application for extension of time. As such, I find that the Plaintiff is not in error for making this application for re-instatement. However, the Court shall consider the relevant legal principles and the factual matrix in this case whilst considering whether this application is meritorious and thus whether it should be allowed or not.
23. Accordingly, I shall proceed to consider the merits of this application pursuant to the relevant legal principles applicable in the given situation. I shall refer to the case authorities of ***Maharaj v Matuku***; HBC 92 of 2015 (Judgment in Lautoka HC dated 04/10/2019) and the case of ***WM Angus (Fiji) Ltd v Karun***; HBC 426 of 1986 (Judgment in Lautoka HC on 30/07/2008).
24. Pursuant to above authorities, in deciding an application for re-instatement, the following factors need to be considered in deciding the application.
 - a) Adequate reason.
 - b) Whether the application was made promptly.
 - c) Prejudice.
25. This is a matter that was initiated on 10/07/2018. The matter was struck out on 06/10/2023 after 05 years and 03 months from the date of inception. A civil matter in the Master's Court should literarily prevail for 06 months according to the Rules of the High Court, if all pre-trial proceedings are completed according to the timeline provided in the Rules.

26. It is noted that the Summons for Directions have been filed in this case on 08/10/2020 and the orders on the same have been made on 18/02/2021. It is on this day that the Court had initially made orders for filing of PTC minutes, Order 34 Summons and the Copy Pleadings. However, from that date onwards the Plaintiff had taken over 01 year for filing of its AVL, which was done only on 02/03/2022.
27. It was then revealed on the 17/06/2022, as per the notes of the previous Master, that the 1st Defendant had passed away. However, the Plaintiff only took steps to file an application for substitution only on 31/10/2022. The orders for substitution were finally granted on the 15/02/2023.
28. On 20/03/2023, the Court made further orders for filing of the PTC minutes and Order 34 Summons and Copy Pleadings by 09/06/2023 and 30/06/2023 respectively. The Plaintiff failed to comply with the same.
29. On 03/07/2023, this Court extended the orders for filing of the PTC minutes and Order 34 Summons and Copy Pleadings by 07/07/2023 and 14/07/2023 respectively with an unless order for payment of costs. The Plaintiff failed to comply with the same.
30. Then again on the 24/08/2023, this Court extended the orders for filing of the PTC minutes and Order 34 Summons and Copy Pleadings by 04/09/2023 and 13/09/2023 respectively with an unless order for striking out the Writ and the Statement of Claim. The Plaintiff failed to comply with the same as well.
31. Except for the delay in compliance with the orders made on 24/08/2023 there are no explanations given for the extensive time wasted by the Plaintiff in filing the PTC minutes in this matter. The conduct of the Plaintiff in this case is clearly contumelious and unacceptable. The overall delay of 5 years 03 months in this case is largely owing to the lethargic and unscrupulous conduct of the Plaintiff.
32. As the 1st Defendant has pointed out, it was the 1st Defendant that had filed an application for vacant possession of the land in dispute pursuant to HBC 289/17. The

current matter by the Plaintiff was filed thereafter. As per the appeal decision in HBC 289/17, the 1st Defendant has submitted that the Plaintiff has been ordered to submit the vacant possession of the disputed land and the 1st Defendant has already filed an application for a Writ of Possession following the same. The conduct of the Plaintiff in unduly delaying the proceedings in this case, therefore, undoubtedly prejudices the 1st Defendant.

33. If the Plaintiff is alleging fraud against the 1st Defendant and is claiming that the transfer of the disputed land was fraudulent it is more the reason for the Plaintiff to expedite the proceedings in this case without any delay at all. Given the fact that in another case, the Plaintiff has already been ordered by the Court to handover the vacant possession of the disputed property to the 1st Defendant, then the Plaintiff should have prosecuted this case with due diligence and expeditiously. However, the conduct of the Plaintiff is clearly contrary to the above.

34. Moreover, I do not find the reasons given on behalf of the Plaintiff to explain the delay in wasting 04 days from the orders made on 24/08/2023 to file the PTC minutes within 07 days, to circulate the draft minutes only on 28/08/2023. The Plaintiff was well aware of its continuous non-compliance of the orders and that there was an unless order made by the Court.

35. Peremptory orders of the Court are made for the parties to comply with and not for a declarative purpose. Unless there's unavoidable circumstance, non-compliance of such orders shall strictly bring about the unfavorable consequences implied in such order. The lethargic and/or unscrupulous conduct of a party or its solicitor shall not provide an escape from the consequences of such an order.

36. In considering all the above facts, I have no hesitation in rejecting the reasons given by the Plaintiff in explaining the non-compliance of the Court order and find that the reasons are in fact an attempt to cover up the lethargic and sporadic conduct of the Plaintiff in these proceedings.

37. Conduct of the Plaintiff in these proceedings and the delay caused therein is, in Court's considered view, a breach of the constitutional right provided in Sec. 15 (3) of

the Constitution of Fiji. A party to a civil dispute in Fiji has a constitutional right to have that dispute determined within a reasonable time. A period of 05 years and 03 months to partially complete the pre-trial steps in this matter is a clear violation of that right.

38. At the same time, it is further noted that upon the matter being struck out the Plaintiff took over a month to file this application for re-instatement, thus making this application not being filed promptly. There is no explanation given by the Plaintiff for this delay as well.

39. In view of the above findings of the Court, I conclude that this summons for re-instatement of the Writ and the Statement of Claim has no merits and that it shall necessarily fail based on the discussions and findings of the Court in the foregoing paragraphs.

40. Court shall accordingly strike out the Plaintiff's summons filed on 08/11/2023 subject to the following orders.

41. Orders of the Court.

1. The Plaintiff's summons dated 08th November 2023 for re-instatement of the Writ of Summons and the Statement of Claim is refused and accordingly struck out and dismissed.
2. The Plaintiff shall pay a cost of \$ 3000.00 to the 1st Defendant in this matter within 14 days from the date of this Ruling.
3. Proceedings accordingly dismissed.



A handwritten signature in black ink, appearing to read 'L. K. Wickramasekara'.

**L. K. Wickramasekara,
Acting Master of the High Court.**

**At Suva,
28/10/2024.**