

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 205 of 2017

- BETWEEN:** EMELE RABOU usually of 21 Le Hunte Street, Suva Retired Accounts Officer but of Auckland, New Zealand from time to time.
Plaintiff
- AND:** JENNIFER NEERISON QUERESHA ALI aka JENNIFER ALI as Administratrix of the estate of Ashik Bakar Ali.
1st Defendant
- AND:** HOME FINANCE COMPANY LIMITED a duly incorporated company having its registered office at Suva.
2nd Defendant
- AND:** THE REGISTRAR OF TITLES
3rd Defendant
- AND:** THE ATTORNEY GENERAL OF FIJI
4th Defendant

Representation

Plaintiff: Mr. V. Singh & Ms. N. Devi (Parshotam Lawyers).

1st Defendant: Ms. P. Verma (Mitchel Keil).

2nd Defendants: No representation.

3rd and 4th Defendants: Ms. C. Mangaru (AG's Chamber)

Date of Hearing: 16th June 2024

Ruling

Introduction

[1] The 1st Defendant's lawyers filed summons seeking determination of the following questions or issues:

- "1. ...raised in paragraph 8 of the Amended Statement of Defence filed on 8 February 2024 whether the Plaintiff is guilty of prolonged, inordinate and inexcusable in bringing this action and seeking the relief claimed and whether the Plaintiff caused the First Defendant to believe and she did believe that she (the Plaintiff) did not intend to make any claim against the First Defendant and in this belief the First

Defendant acted on her prejudice, and she has otherwise been prejudiced?

2. *Has the Plaintiff by her conduct in delaying bringing this action waived her right (if any) to claim any relief against the First Defendant?*
3. *Whether it is inequitable and unjust to grant the Plaintiff the relief as claimed in the Statement of Claim filed on 12 July 2018 (“hereafter “Claim”)?....”*

[2] The 1st Defendant through the summons is seeking that the claim be dismissed with costs. The application is made pursuant to Order 33 rule 3 and 4 of the High Court Rules 1988. It is supported by an affidavit of the 1st Defendant. In the submissions the reference by the 1st Defendants lawyers is Rule 7 and not rule 4. Rule 7 is the relevant rule in this application.

[3] An affidavit in response was filed on behalf of the Plaintiff.

Brief History and Background

[4] The Plaintiff instituted action by way of originating summons, which was filed on 17th July 2017. Later the Plaintiff filed a statement of claim on 12th July 2018 seeking that the 1st Defendant specifically performs the memorandum of terms of sale dated 7th June 1989.

[5] On 24th January 2024, Master Lal delivered a ruling refusing the 1st Defendants application to strike out the claim. The 1st Defendant had annexed a New Zealand Police Report alleging forgery of signatures. Master Lal was of the view that “evidence under oath has to be heard and the Plaintiff has a right to cross-examine the witnesses and challenge the evidence.”

[6] Amended statement of defence and counterclaim of the 1st Defendant was filed on 8th February 2024. Amended reply to amended defence and counterclaim was filed on 16th February 2024 by the Plaintiff’s lawyers. The minutes of the PTC was filed on 5th July 2024. The summons to enter action for trial was filed on 2nd August 2024.

[7] The matter was first called before me on 1st September 2024. Ms Verma informed me then their clients intended to make an offer to Plaintiff to settle without prejudice out of court. She also stated that they had received instructions to file under Order 33.

Determination

[8] The rules covering Order 33 rules 3 and 7 of the High Court Rules 1988 are set out as follows:

“3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.” and

“7. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.”

- [9] The submission on behalf of the 1st Defendant is that there has been unreasonable delay on the part of the Plaintiff in pursuing her claim and that such delay has caused prejudice to the Defendant in effectively defending the claim and it will be unjust to grant the relief sought to the Plaintiff.
- [10] The contention on behalf of the Plaintiff is that the question of “prejudice” is a factual question that can only be properly tested through evidence at trial. The Plaintiff took possession in 1989 and paid the mortgage since then and acted based on an understanding of her proprietary rights. The 1st Defendant on the other hand failed to seek discovery or legal redress until 2022 despite being served with statement of claim in 2018.
- [11] The scope and applicability of Order 33 of the High Court rules was considered by the Supreme Court in **Fiji Electricity Authority v Punjas Flour Ltd [2022] FJSC 37; CBV0013.2019 (26 August 2022)** where it is stated:

“[97] The word “may” used in the said Order shows that an order to try a preliminary issue cannot be obtained as of right. Further, the word “may” has conferred power on the court either to allow or refuse such an application.

[98] Further, by the use of the words “or otherwise” legislature made provision for any party to make an application to obtain an order to try the issues before the trial. Thus, the said Order casts a duty on the court to judicially evaluate such an application and make an appropriate Order by using judicial discretion. Hence, in order to use judicial discretion to evaluate such an application. It is necessary to have materials before court.

[99] Moreover, such an application should justify the court to try the preliminary issues before the trial. In this regard, such an applicant should satisfy court that trying the preliminary issues at the first instance shall dispose the case or substantial part of the case, and thereby, it will reduce the time taken to decide the case and the costs of the parties involved in the litigation. Further, the words “and may give directions as to the manner in which the question or issue shall be stated.” Hence, Order 33 rule 3 requires the court to evaluate the materials before it and make an appropriate order.

[100] Furthermore, once such an application is made under Order 33 rule 3, it should be served on the other party so that the other party can either consent to the said application or oppose it. Thereafter, the court should hear the parties and make an appropriate Order.

*[101] Moreover, the courts will not try issues before the trial which are complicated and mixed with law and facts. A similar view was expressed in **Salim v iTaukel Land Trust Board** where it was held:*

“The issue is mixed law and fact and needs the hearing of the witnesses in this matter by the court. This type of case is not justified to deal in terms of

Order 33 of the High Court Rules of 1988, as the matter is not complicated and will not serve any purpose except the delay and cost by proceeding this path. It is the court that needs to decide there is no need to proceed with Order 33 of the High Court Rules of 1988.

Further, in **Tilling and Another v Whiteman** [[1979] UKHL 10; 1979] 1 All ER 737 Lord Wilberforce (p738-739) it was held;

“I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional.””

- [12] I have considered the pronouncement of the Supreme Court in **Fiji Electricity Authority v Punjas Flour Ltd [2022] FJSC 37; CBV0013.2019 (26 August 2022)**. As with the application before the Learned Master to strike out the claim, this application is ill conceived. It is an attempt to quickly dispose the matter without trial. Without witnesses being called. The parties filed the PTC on 5th July 2024. Issues for determination were identified by the parties. This matter needs to be determined on the merits. Which means that witnesses and evidence need to be called.
- [13] A caveat was placed on the property. It had been extended until determination of the matter on 10th September 2018 by the Learned Master. The issue of unreasonable delay by the Plaintiff in bringing the action need to be determined based on evidence. These evidences need to be tested through cross-examination. I am not in a position to deal with them at this stage. These are matters for trial.
- [14] The summons filed by the 1st Defendant for determination of issues under Order 33 of the High Court Rules 1988 is dismissed for the given reasons. The 1st Defendant is to pay the \$2000.00 as costs with 21 days to the Plaintiff. The costs have been summarily assessed.

Court Orders

- (a) The Summons filed by the 1st Defendant for determination of issues under Order 33 of the High Court Rules 1988 are dismissed.
- (b) The 1st Defendant is to pay the \$2000.00 as costs with 21 days to the Plaintiff. The costs have been summarily assessed.



.....
Hon Justice Chaitanya S.C.A. Lakshman
Puisne Judge



29th August 2025