

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

Civil Action No. **HBC 68 of 2006L**

**BETWEEN** : **SOHARAT ALI**

**Plaintiff**

**AND** : **HAZURAT ALI**

**Defendant**

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**INTERLOCUTORY JUDGMENT**

**Of: Inoke J.**

**Counsel Appearing:**

**Solicitors:** **MK Sahu Khan & Co for the Plaintiff**  
**GP Lala & Associates for the Defendant**

**Date of Hearing:** **22 September 2009; Judgment on written submissions**

**Date of Judgment:** **2 October 2009**

**INTRODUCTION**

[1] The Writ of Summons was filed on 9 March 2006. On 18 May 2006 solicitors for the Defendant, Hazurat Ali, filed an application to strike it out on the grounds that it is an abuse of process in that it is a duplication of another action HBC 44 of 2005 in this Court which has been finally determined.

**CASE HISTORY**

[2] The parties' solicitors filed written submissions and judgment was to be delivered in December 2006. It remained undelivered and the solicitors involved were requested to appear on 18 September 2009 to advise the Court

as to how they wanted the Court to deal with the outstanding ruling. Mr Vipul Mishra and Mr Roopesh Singh who were in Court on that day appeared out of courtesy to the Court for the Plaintiff and Defendant, respectively, because the solicitors on record had not instructed Counsel. I adjourned the matter to 22 September 2009 to give time to the solicitors to properly instruct Counsel. Again on 22 September 2009, Mr Babu Singh and Mr Haroon Ali Shah appeared out of courtesy for the Plaintiff and Defendant respectively so the Court was left with no choice but to deliver judgment based on the submissions and affidavits that were filed in 2006.

### **THE APPLICATION**

[3] Hazurat Ali's application is made pursuant to **O 18 rule 18(1)(d)** of the **High Court Rules 1988**. It was supported by his affidavit filed on 18 May 2006. A law clerk in the firm of solicitors representing the Plaintiff, Soharat Ali, swore and filed an affidavit in reply on his behalf on 6 June 2006. Both parties filed submissions on 25 July 2006 and 24 August 2006.

[4] The only ground put forward by Hazurat Ali for his application is that in civil action HBC 45 of 2005 in this Court between the same parties in this action, Finnigan J on 28 June 2005 dismissed an application by Soharat Ali for immediate vacant possession. That application was made under s 169 of the Land Transfer Act. In his judgment, Finnigan J held that the summary procedure under that provision was not suitable and to resolve the dispute witnesses needed to be called to give evidence.

### **CONSIDERATION OF THE APPLICATION**

[5] Clearly, Soharat Ali was not prevented from bringing this action. There was no hearing on the merits. Further, in Premji v Lal [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975) the Court of Appeal said:

"These sections and equivalent provisions of the Land (Transfer and Registration) Ordinance (Cap. 136-1955 Laws of Fiji) have been considered in a number of cases in

this court and the Supreme Court. In Jamnadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd. (Civil Appeal No. 39 of 1972 - unreported) this court said –

"Under Section 172 of the Act the judge is required to dismiss the summons if the respondent proves to his satisfaction a right to possession and it is also provided that the judge may make any order and impose any terms that he may think fit. The dismissal of the summons is not to prejudice the right of a plaintiff to take any other proceedings to which he may be otherwise entitled.

In the past, on earlier but similar legislation, the Supreme Court has held that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide them on summary proceedings of this nature, but will dismiss the summons without prejudice to the plaintiff's right to institute proceedings by Writ of Summons. Instances quoted by counsel are Caldwell v. Mongston (1907) 3 F.L.R. 58 and Perrier Watson v. Venkat Swami (Civil Action 9 of 1967 - unreported). The power of the court to adopt this approach has not been challenged so it is not material to consider whether it arises under section 172 of the Act or from inherent power to reject as unsuitable procedure, where another, comprehensive and better suited to the determination of controversial matters, is available." "

[6] The application is therefore dismissed.

### **COSTS**

[7] This is a family dispute, their lawyers appear to have lost interest in pursuing the case so I make no order as to costs.

### **PLAINTIFF TO SHOW CAUSE**

[8] The matter has lain dormant since 1 December 2006 and cannot lay dormant forever. The Plaintiff must show cause why his action should not be dismissed so I order that this matter be called before the Master on **12 October 2009 at 9.00am** to show cause why it should not be struck out for want of prosecution.

### **ORDERS**

[9] The Orders are as follows:

1. The Defendant's application by summons filed on 18 May 2006 is dismissed with no order as to costs.

2. The matter is adjourned before the **Master on 12 October 2009 at 9.00am** to show cause why it should not be struck out for want of prosecution and the Registry is to send the Notice of Adjourned hearing to the parties' solicitors on record accordingly.

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**Sosefo Inoke**  
**Judge**