



IN THE SUPREME COURT OF NAURU
AT YAREN
(CIVIL JURISDICTION)

CIVIL SUIT NO. 7 OF 2019

BETWEEN

DODO KEPAE AND OTHERS

Plaintiff

AND

JOHN JEREMIAH

First Defendant

AND

TEHANI JEREMIAH

Second Defendant

AND

NAURU LANDS COMMITTEE

Third Defendant

AND

PALIK AGIR

Fourth Defendant

AND

TYRAN CAPELLE

Fifth Defendant

Before:

Khan, ACJ

Date Hearing:

5 September 2022

Date of Ruling:

8 September 2022

Case to be known as: *Kepae and Ors v Jeremiah and Ors*

CATCHWORDS: Order 18 rule 3 of Civil Procedure Rules 1972 – Notice of Discontinuance filed without leave of the Court – Another fresh action filed after Notice of Discontinuance –

Whether it is an abuse of process of Court – Whether the Notice of Discontinuance should be set aside – Whether the Court in exercise of its discretion can grant leave to discontinue.

APPEARANCES:

Counsel for the plaintiff: N Ekwona
Counsels for the defendants: V Clodumar

RULING

BACKGROUND

1. On 1 March 2019 the plaintiff through her pleader Miss Olsson filed a claim alleging that the transfer of land “Atai” Portion 197 in Meneng District in favour of the first defendant was unlawful or illegal.
2. Apart from filing the claim an application for ex-parte injunction was also filed. The application was heard ex-parte by Vaai J he and made the following orders:
 - 1) Until further order of the Court an injunction is to be issued against the first defendant to prohibit and restrain the first defendant his servants or agent from receiving rent monies directly or indirectly, for the lease of the land called “Atai” Portion 197 Meneng District, by the Meneng Hotel.
 - 2) The Meneng Hotel is ordered to pay all rent monies for the lease of the “Atai” Portion 197 Meneng, to the Supreme Court Trust Fund until further orders of this Court.
3. After the orders were made all funds have been paid to the Supreme Court Trust Fund Account.
4. On 20 January 2021 Miss Olsson filed an amended statement of claim and included Nauru Lands Committee as third defendant.
5. The first and second defendants filed their statement of defence on 9 May 2019 and the plaintiff filed a reply to the defence on 16 May 2019.
6. On 15 June 2020 an application was filed under Order 15 rule 19 of the Civil Procedure Rules 1972 (CPR) on behalf of Nauru Lands Committee for it to be struck out as a party to the proceedings; and on 31 August 2020 Jitoko CJ ruled that Nauru Lands Committee shall be struck out as a party to the proceedings.
7. The orders made by Vaai J on 1 March 2019 was varied on 6 August 2019 and a sum of \$6,000 was released to the first defendant; and it was ordered that should the plaintiffs succeed in their claim then the first defendant should refund the said sum to the plaintiffs.
8. On 26 June 2020 Vaai J made an order by consent for the payment out of a further sum of \$23,566.00 to the first defendants.

9. On 7 February 2021 Miss Olsson filed an application to vary the orders made by Vaai J on 26 June 2020. Mr L Scotty appeared on her behalf when the consent orders were made and, in his affidavit, filed in support of the application for variation of the orders, he stated that he did not consent to the orders made by Vaai J.
10. On 9 March 2021 the matter was called before Fatiaki CJ and Miss Olsson again raised the issue of the consent order made by Vaai J and Fatiaki CJ stated as follows:

“Monies already paid into the Supreme Court Trust Fund is to remain until further order of the Court. The applicant is directed to discontinue the present application and to file and serve properly formulated proceedings to challenge and set aside the consent orders entered before Vaai J. If fraud is pleaded it is to be fully particularized and pleaded. Fresh Writ and Claim to be filed and served by 23 March 2021 and failing which the monies in Court will be paid out to the respondents without further notice.”
11. The matter was called before Fatiaki CJ on 23 March 2021 when Miss Olsson informed the Court that she was having difficulty drafting a fraud claim and asked for further time which was objected to by Mr Soriano and Fatiaki CJ made the following orders:

“The plaintiff is granted a further 21 days to file and serve a discontinuance as well as fresh writ and statement of claim. In the meantime, there will be an order for payment out to the defendants of the sum of \$23,566.00 held in the Court Trust Fund forthwith. Adjourned to 24 April 2021 for mention only.”
12. On 23 April 2021 Miss Olsson informed the Court that she complied with the orders and Mr J Scotty for the first defendant complained that his client did not receive the sum of \$23,566.00.
13. On 7 June 2021 Miss Olsson informed the Court that instead of filing a claim to challenge the consent orders made by Vaai J she has filed a fresh claim to challenge the transfer of the ownership of land to the first defendant without Cabinet’s approval.

NOTICE OF DISCONTINUANCE

14. On 23 April 2021 Miss Olsson filed a notice of discontinuance discontinuing this action under order 18 r.3(2) of the CPR.
15. After filing the notice of discontinuance on 23 April 2021 Miss Olsson also filed a fresh writ against the first defendant (John Jeremiah) and the third defendant (Nauru Land Committee) and on the same day it appears that the Registry gave the fresh writ the same action number, that is, 7 of 2019 and on 20 August 2021 Fatiaki CJ ordered that the Registry was to open a new file with a new number and the new number allocated subsequently was 25 of 2019.

MOTION FOR PAYMENT OUT OF FUNDS

16. On 14 February 2022 Mr Clodumar filed a motion seeking orders that in light of the discontinuance filed on 23 April 2021 all monies held pursuant to the injunction orders dated 1 March 2019 shall be refunded to the Menen Hotel and for it to pay out to the defendant and other land owners.

17. On 18 March 2021 Miss Olsson filed a summons under order 15 r.19 to strike out the motion dated 14 February 2022.

HEARING OF THE MOTION – 14 FEBRUARY 2022

18. Mr Clodumar submitted that under order 18 r. 3 Miss Olsson could not have filed the notice of discontinuance without leave of the Court, but having done so, and having filed action No. 25 of 2019 the orders made by Vaai J on 1 March 2019 have come to an end, and all the monies held in the Court Trust fund should to be paid out to the land owners including the first defendant. He further submitted that the plaintiff's action against the Nauru Lands Committee was struck out and the plaintiff was bound by the principles of res judicata but action No. 25 of 2019 still has Nauru Lands Committee as a defendant, and that this is an abuse of process.
19. Mr Ekwona conceded that Miss Olsson did not file summons under order 18 r.3 of the CPR to discontinue this action; and therefore, the plaintiff has the intention to continue with the action; and that the orders made for injunction on 1 March 2019 still stands until it is either lifted or varied by an order of the Court. He further submitted that notwithstanding the filing of Action No.25 of 2019 the injunction orders made on 1 March 2019 is still in place and is in transition between the two actions.

CONSIDERATION

20. Under order 18 r. 2 of CPR the plaintiff could have discontinued the action at any time not later than 14 days of the service of the defence by the defendants, however, the defence was filed on 9 May 2019 and the plaintiff filed a reply thereto on 16 May 2019 and the action was discontinued on 23 April 2021.
21. Under order 18 r.3 the plaintiff was required to seek leave before the discontinuance and he was obliged to file a summons for the grant of such leave (O18 r.3(2)); but the plaintiff's counsel chose not to file the summons.
22. Fatiaki CJ had granted leave to the plaintiffs to discontinue his application to challenge the payment out of \$23,566.00 (order made by Vaai J on 1 March 2019) by filing a fresh action to plead fraud; but the plaintiff chose not to take that course, and instead chose to file a notice of discontinuance and filing a fresh action. In doing so the plaintiff abused the process of the Court as in this action the plaintiff's claim against the Nauru Lands Committee was struck out and he was therefore bound by the principles of res judicata and yet he filed a fresh claim against Nauru Lands Committee.

WHAT IS AN ABUSE OF THE PROCESS OF COURT

23. In *Castanho v Brown & Root (UK) Ltd and another*¹ Lord Denning MR stated at page 80 as follows:

“Another way of reaching the same result is to hold, as Parker J did, that, once interim payments have been sought and received and spent, it is an abuse of process of the court

¹ [1980] 3 All ER 72

to discontinue the proceedings without leave of the Court. I summarised the cases on 'abuse of process' in *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 at 574-575, [1977] 1 WLR 478 at 489-490. I said:

'On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. [So here the notice of discontinuance, on the face of it, it is in time and correctly done without leave.] What may make it wrongful is the purpose for which it is used.'

24. Lord Denning further stated in *Castanho* at page 81 as follows:

"If I am right in thinking that leave is necessary, then the Court can do what is right and just. It can insist on repayment, at once in cash, as a condition of giving leave to discontinue; or alternatively, it can allow the plaintiff to retain the interim payments (and not repay them) on condition that no other action shall be brought for the same cause: see *Hess v Labouchere* (1898) 14 TLR 350 by AL Smith LJ; or it can refuse leave and insist on the case going to judgement: see *Fox v Star Newspaper Co* [1898] 1 QB 636; [1900] AC19. These are some words of Chitty LJ which fit this case (see [1898] 1QB 636 at 639:

'The principle of the rule is plain. It is that after proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms.'(Emphasis added)

25. It is stated in the Supreme Court Practice 1997 at page 380:


"... he will be guilty of an abuse of the process of the Court, and the Court will then have power to set aside his notice of discontinuance, but nevertheless, the Court in its discretion may grant him leave to discontinue on terms..."

26. The plaintiff's counsel Miss Olsson had no regard to the CPR and just filed a notice of discontinuance without following the due process and I give her leave on condition that the plaintiff has to pay the costs of this action up to the date of filing of notice of discontinuance; and I further order that Action No. 25 of 2019 can only proceed further after the costs of this action have been paid. I will hear further submissions from the counsels on the question of costs. In light of my determination that the plaintiff abused the process of court by filing the claim against the Nauru Lands Committee, the plaintiff will have to overcome that before Action No. 25 of 2019 can proceed further.
27. Having granted leave for the discontinuance of the action, I order that the interim injunction orders made by Vaai J on 1 March 2019 came to an end and I order that all monies held in the Supreme Court Trust Fund shall be returned to the Menen Hotel who is directed to pay out the same to the land owners of Portion 197 Meneng District as it was doing before the court order was issued on 1 March 2019.
28. The first defendant has already received the sum of \$29,566.00 (\$6,000.00 plus \$23,566.00) so I order that an appropriate adjustment is to be made when payments are made to him.

CONCLUSION

29. I order that the plaintiff is to pay the costs of this motion which is summarily assessed in the sum of \$1,000.00.

DATED this 8 day of September 2022


Mohammed Shafiullah Khan
Acting Chief Justice.

