

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL ABU 7 of 2012**  
**(High Court Action HBC 8 of 2007)**

**BETWEEN** : **MOHAMMED SAMSHOOD and**  
**ROZEENA BANO**  
*Appellants*

**AND** : **VUNIMOLI SAWMILL LIMITED**  
*First Respondent*

**AND** : **BASHIR KHAN aka BASHEER KHAN**  
*Second Respondent*

**Coram** : **Calanchini AP**

**Counsel** : **Mr H Nagin for the Appellants**  
**Mr S Valenitabua for the Respondents**

**Date of Hearing** : **12 April 2013**

**Date of Decision** : **3 May 2013**

**DECISION**

[1]. This is an application by the Appellants for an order staying execution of the judgment dated 15 December 2011 of the High Court pending the determination of an

appeal filed by the Appellants. The application to this Court purports to be a renewed application under Rule 34 of the Court of Appeal Rules.

- [2]. The application was made by summons dated 30 July 2012 and filed on 1 August 2012. The application was supported by affidavits sworn on 30 July and 6 August 2012 by Mohammed Samshood. An answering affidavit sworn on 15 October 2012 by Bashir Khan was filed on behalf of the Respondents.
- [3]. The application was eventually heard when the parties presented oral submissions on 12 April 2013. The lengthy delay between the date of filing the application and the date of hearing was due to the absence of one of the parties from Fiji, the inability of Counsel to obtain instructions for the drafting of affidavits and consequential non-compliance with interlocutory orders made by the Court.
- [4]. Under Section 20 of the Court of Appeal Act Cap 13 a single judge of the Court of Appeal may exercise the power of the Court of Appeal to, amongst other things, stay execution pending an appeal. The power of the Court of Appeal to grant a stay of execution pending an appeal is found in Rule 34 of the Court of Appeal Rules which so far as relevant, states:

*“(1) Except so far as the court below or the Court of Appeal may otherwise direct:-*  
*(a) an appeal shall not operate as a stay of execution*  
*”*  
*(b) ———.*  
*————.”*

- [5]. It is clear from Rule 34 that the Court of Appeal and the court below exercise what is termed a concurrent jurisdiction in relation to, amongst others, an application for stay pending appeal. There is however a requirement in the Rules as to how an appellant is to invoke this concurrent jurisdiction. Rule 26 (3) states:

*“Whenever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.”*

- [6]. Therefore, whenever the Court of Appeal and the court below have concurrent jurisdiction in relation to a particular application such as an application for a stay of execution pending an appeal, that application must first be made to the judge in the court below (in this case the High Court).
- [7]. The Appellants expressly seek an order that execution of the judgment be stayed pending appeal. The application thus raises a preliminary issue as to whether the Appellants have complied with Rule 26 of the Court of Appeal Rules. In other words has an application for stay of execution pending appeal been made to the court below, i.e. to the learned judge in the High Court. This issue must be determined before the merits of the stay application can be considered.
- [8]. The final judgment of the High Court in these proceedings was delivered by Wati J on 15 December 2011. Notice and Grounds of Appeal were filed on 24 January 2012. A certificate of service was filed on 25 January 2012. Summons to fix security for costs was filed on the same day. As a result there has been compliance with Rule 17 of the Court of Appeal Rules.
- [9]. Attached to the Supplementary Affidavit in support sworn on 6 August 2012 by Mohammed Samshood is a copy of the Ruling on Stay delivered on 31 July 2012 by learned Judge in the court below. This written Ruling indicates that there was an ex tempore Ruling made on 26 June 2012 granting a stay of execution on the condition that the Appellants pay into Court the sum of \$350,000.00 within 14 days from the date of the ex tempore Ruling. The same ex tempore Ruling ordered that in default there would be no stay of execution and that the Respondent could proceed to execution of the judgment.
- [10]. It is clear that a stay application has been made to the court below. An order was made by that court granting a conditional stay in default of which the stay ceased to have effect. The written Ruling on stay clearly indicates that when the ex tempore Ruling was delivered on 26 June 2012 in Suva, the Appellants were represented by Mr A Ram of the firm of Gibson & Co. of Labasa which firm is on record as legal practitioners for the Appellants.

- [11]. It would appear that the condition of the stay order has not been complied with. There is no explanation in the affidavit material as to why the order made ex tempore in the presence of Counsel for the Appellants was not complied with. The material set out in paragraphs 3, 4 and 5 of the supporting affidavit is of no assistance to the Appellants as the “*uplifting of the written Ruling*” on 3 August 2012 has nothing to do with the Appellants’ non-compliance with the conditional stay order made ex tempore on 26 June 2012.
- [12]. In my view the Appellants cannot rely on the effect of their non-compliance with the conditional stay order as the basis for a fresh stay application to this Court relying on its concurrent jurisdiction.
- [13]. In their written submissions filed on 25 September 2012 the Appellants claim that when the hearing of the application for stay was completed the learned Judge in the Court below indicated that a stay would not be granted and that a written ruling would be handed down in due course. The effect of this submission is that the written Ruling dated 31 July 2012 purported to make a conditional stay order that was incapable of compliance since 14 days from the ex tempore Ruling had expired on 10 July 2012. I reject that submission for two reasons. First, the factual basis of the submission is not verified by affidavit. Secondly, it is a matter of fantasy to suggest that a judge of the High Court would deliver a written Ruling that contains a conditional order that was incapable of performance. There is simply no material before me that would enable me to conclude that the learned Judge in the Court below by the written Ruling intended to do anything other than confirm the contents of the earlier ex tempore Ruling and to give reasons for the same.
- [14]. During the course of his oral submissions before me Counsel for the Appellants argued that on the basis of its concurrent jurisdiction, the Court of Appeal could look at the stay order made by the judge in the court below and if it considered the condition to be onerous, it could conclude that the stay had been refused and as a result could hear the application afresh.
- [15]. In my view a distinction needs to be made between the concurrent jurisdiction given to the Court of Appeal with the court below and the appellate jurisdiction of the Court

of Appeal. The concurrent jurisdiction is original in nature. An applicant is required to first make an application for a stay of execution pending appeal to the judge who adjudicated in the court below or if that judge is not available to another judge in the court below. A concurrent original jurisdiction is given to the Court of Appeal. This enables an appellant to make a fresh application for a stay of execution pending appeal to the Court of Appeal in the event that the first application was unsuccessful.

- [16]. In other words, the application for a stay pending appeal, although ancillary to the appeal, invokes the concurrent original jurisdiction of both courts. Rule 34 does not bestow upon this Court an appellate or review function. In the event of the application in the court below being refused the application is heard afresh in the Court of Appeal without any reference to the earlier decision of the judge in the court below. In my view when a stay order has been granted in the court below, the concurrent jurisdiction of the Court of Appeal has been extinguished as the original jurisdiction given to both courts concurrently has been exercised at first instance by the court below. In reaching this conclusion I have been guided by the decision of the Court of Appeal in **J. Lucas (Batteries) Ltd and Another –v- Gaedor Ltd and Others** [1978] RPC 389. In that appeal Sir David Cairns observed at page 391:

*“ \_ \_ \_ I entertain no doubt that where a stay has been granted the only way of getting rid of it is by appeal. The appeal would be interlocutory in character and would therefore require the leave either of the judge below or of this court.”*

- [17]. In that case the Appellants sought to challenge a stay of execution granted to the Respondents by the court below in regard to an inquiry as to profits pending appeal. They did so by filing a motion for the setting aside of that stay order. In the present case the Appellants are in effect applying for an order to set aside the conditional stay order made by the court below and in its place for an order granting a stay without conditions. Such an application requires this Court to review the conditional stay order made in the court below which is outside the original concurrent jurisdiction given to this Court under Rule 34.

- [18]. As a single judge of the Court of Appeal and in view of the strict requirements prescribed by Rule 26 (3) of the Court of Appeal Rules I am not inclined to regard the

present application as an application for leave to appeal the interlocutory conditional stay order made by the court below. The reason being that the leave to appeal application itself must first be made in the court below.

[19]. In response to the Appellants' reliance on the decision of a single judge of the Court of Appeal in **Uluivuda and Others –v- Qarase and Others** (unreported civil appeal decision in ABU 78 of 2008 delivered 20 November 2008), I simply say that whatever the nature of the impracticality that justified the single judge adjudicating the stay application before it had been made to the court below, no such impracticality as justification was demonstrated in the present proceedings.

[20]. The Appellants referred me to another earlier decision of a single judge of this Court. In **Bajpai –v- NBF Asset Management Bank** (unreported decision in civil appeal ABU 8 of 2000 delivered 14 September 2001) the court below had granted a conditional stay of execution pending appeal. The Appellants made a fresh application to the Court of Appeal for an unconditional stay. The issue of jurisdiction was not raised and the learned judge did not have the advantage of hearing argument on that issue nor the opportunity to consider the authorities. The learned single judge heard the application but refused to grant the application for an unconditional stay. I am not convinced that had the issue of jurisdiction been argued before the learned single judge that the application would have proceeded to a hearing on the merits.

[21]. Finally I should comment briefly on the basis upon which the Appellants appear to have sought to invoke the concurrent jurisdiction of this Court.

[22]. On the one hand it appears to have been argued on the basis that there was no stay granted by the court below because the order in the written stay ruling was incapable of compliance. It was also argued that there was no stay order because the condition was so onerous that it should be regarded as a refusal to grant a stay order. Finally it was argued that there was jurisdiction given to the Court of Appeal to hear a fresh application for stay even when the court below had made a conditional stay order.

[23]. For the reasons stated in this decision I have concluded that the concurrent original jurisdiction that this Court has been given under Rule 34 does not entitle it to review

or reconsider a stay order albeit conditional granted by the court below in accordance with Rule 26 (3). Under those circumstances the only course of action is to appeal the interlocutory decision of the court below and for that purpose an application for leave must first be made to that Court. It is clear that section 12 of the Court of Appeal Act allows an appeal, with leave, to the Court of Appeal from any interlocutory order made by a judge of the High Court. In **Shahim –v- Chand** (unreported civil appeal ABU 70 of 2005 delivered 9 March 2007) the Court of Appeal described the appropriate procedure in paragraph 33:

*“After the appeal was lodged, the appellant applied for stay of execution. The judge granted a stay conditional on the payment of the full sum into court pending appeal. The appellant lodged a separate appeal against that order but the Court directed that it be considered with this appeal.”*

- [24]. The application for an order granting a stay of execution pending appeal, being the only application before this Court, is dismissed.
- [25]. The costs of the application are to be costs in the appeal.

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**HON. JUSTICE W. D. CALANCHINI**  
**ACTING PRESIDENT**





