

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL ABU 0005 of 2016
(High Court HBC 45 of 2014)

BETWEEN : NEWWORLD LIMITED
Appellant

AND : VANUALEVU HARDWARE (FIJI) LIMITED
First Respondent

AND : BASHIR KHAN
Second Respondent

Coram : Calanchini P

Counsel : Ms T Leweni for the Appellant
Mr T Tuitoga and Mr F Haniff for the Respondents

Date of Hearing : 7 June 2016

Date of Ruling : 22 July 2016

RULING

[1] This is an application filed by the Appellant for an order, amongst others, that there be a stay of execution pending appeal. The decision in respect of which the stay is sought is

the judgment of the High Court delivered on 4 December 2015. The notice of appeal to which this application relates was filed on 14 January 2016.

[2] The application was made initially by way of an ex parte summons. However the Registry was directed to give notice to the Respondents for the application to proceed inter partes. The application was supported by an affidavit sworn on 28 May 2016 by Sudesh Kumar Chand.

[3] When the application was called on for mention on 7 June 2016 the Court raised two preliminary issues. The first issue related to whether the judgment delivered on 4 December 2015 was a final or an interlocutory judgment. The answer will determine whether the appeal is timely. Pursuant to Rule 16 of the Court of Appeal Rules (the Rules) an appellant is required to file and serve appeal papers in the case of an appeal against an interlocutory judgment within 21 days and in the case of a final judgment within 42 days from the date of pronouncement of the judgment. In this case the judgment was pronounced on 4 December 2015. The notice of appeal was filed on 14 January 2016 and served on the same day. Filing and service were effected 41 days from the date of the judgment. If the judgment is an interlocutory judgment, then the appeal has been filed and served out of time. On this point it must be noted that pursuant to a notice dated 6 July 2015 and subsequently published in the Government Gazette the time of the legal vacation does not count for determining the times appointed for the delivery or filing of pleadings. For all other purposes time continues to run during the vacation.

[4] The second issue is whether this application for stay has been made contrary to Rule 26(3) of the Rules. Pursuant to Rule 34(1) of the Rules an appeal shall not operate as a stay of execution unless the Court below or the Court of Appeal otherwise directs. Rule 26(3) provides that where, under the 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. This application has been made to the Court of Appeal before the application for a stay had been made to the Court below.

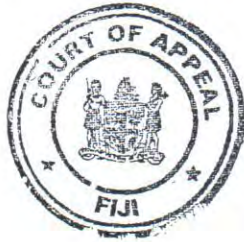
- [5] Before considering those issues it is necessary to retrace the path taken by these proceedings. Newworld has been a tenant of the Respondents for some years. There was initially an agreement between the parties dated 10 August 2006 for a sub-lease of the premises for what turned out to be a total period of 8 years and expiring on 31 August 2014. It would appear not to be disputed that the necessary consent under section 13 of the State Lands Act Cap 132 had been obtained in respect of that sub-lease.
- [6] The term of the agreement dated 10 August 2006 was for a period of three years with a right of renewal for a further 5 years for a total term of 8 years. Litigation had been commenced to determine whether the right of renewal had been exercised by Newworld in accordance with the agreement. Newworld claimed in its statement of claim in the present proceedings that the earlier action had been settled by an agreement entered into between the parties on 25 January 2014. The Respondents denied that there was any such agreement.
- [7] The present proceedings were commenced by writ. A statement of claim was filed on 5 August 2014 seeking a declaration that in terms of the agreement dated 25 January 2014 Newworld is a tenant of the Respondent's for a period of 10 years from 1 January 2014. Newworld also sought an order that the Respondents specifically perform that agreement and an interim injunction restraining the defendant from interfering with Newworld's peaceful possession, access and egress of the demised premises.
- [8] The Respondents subsequently filed a summons under Order 33 Rule 4 of the High Court Rules seeking determination of a preliminary issue as to the legality of the purported new tenancy agreement dated 25 January 2014. The preliminary issue for the Court to determine under Order 33 Rule 4 was set out in the summons as:

"Whether the purported agreement of 25 January 2014 (more fully described in paragraphs 4 and 5 of the Statement of Claim) is null and void in terms of section 13 of the State Lands Act Cap 132 for want of written consent of the Director of Lands should be determined as a preliminary issue."

- [9] The learned High Court Judge decided the preliminary issue in a judgment delivered on 21 October 2015. The Court held that the purported agreement dated 25 January 2014 was null and void in terms of section 13 of the State Lands Act for want of written consent of the Director of Lands. Newworld being dissatisfied with that determination appealed to the Court of Appeal by notice of appeal dated 22 October 2016 (civil appeal ABU 76 of 2015). In my judgment, the appeal quite properly proceeded as an appeal against a final judgment of the High Court. On 27 May 2016 the Court of Appeal dismissed the appeal by Newworld and upheld the preliminary determination that the agreement was null and void.
- [10] In its judgment dated 4 December 2015 the High Court had considered a number of applications all arising out of the purported agreement dated 25 January 2014. First the Court refused to grant a stay in respect of the orders made on 21 October 2015. Secondly the Court ordered that Newworld give to the Respondents on or before 4 January 2016 vacant possession of the premises currently occupied by Newworld. Thirdly, the Court declined to grant an injunction to Newworld. Finally, interim injunctions previously granted to Newworld in related High Court proceedings were dissolved. These orders were clearly consequent to the determination made by the High Court in its judgment dated 21 October 2015 that the purported agreement was null and void. As previously noted that decision was upheld by the Court of Appeal on 27 May 2016.
- [11] I was informed by Counsel for Newworld that the matter is now before the Supreme Court. Unless and until the Supreme Court determines otherwise the position is that the purported agreement dated 25 January 2014 is null and void. Any application for a stay of execution as a consequence of the Court of Appeal decision is a matter for the Supreme Court.
- [12] Newworld's claim to occupy the premises as a tenant and its claim for specific performance are based on the validity of the purported agreement dated 25 January 2014. Since the decision of the Court of Appeal on 27 May 2016 determined that the agreement

was null and void there is no basis for Newworld to seek any further relief relating to either its occupation of the premises nor under the purported agreement.

- [13] The applications determined by the learned Judge in his judgment dated 4 December 2015, the present appeal against those orders and the present application for a stay have all been overtaken by the decision of the Court of Appeal dated 27 May 2016 upholding the High Court judgment dated 21 October 2015. Consequently the present application is dismissed. I note that this application was listed for hearing on 7 June 2016 which was only a matter of a week or so after the Court of Appeal Judgment. I therefore order that each party pay its own costs in respect of the application for stay.



W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL