

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

CIVIL APPEAL NO. ABU 0061 OF 2017
(High Court Civil Action No. HBC 32/2011 & HBC 22/2012 at Labasa)

BETWEEN : 1. **THE TRUSTEES OF VANUALEVU MUSLIM LEAGUE**

2. **BASHIR KHAN**

Appellants

AND : 1. **VCORP LIMITED**

1st Respondent

2. **LABASA TOWN COUNCIL**

2nd Respondent

Coram : S. Lecamwasam, JA

Counsel : Mr. A. K. Singh for the Appellants
Mr. S. Raramasi for the 1st Respondent
Mr. S. C. Sharma for the 2nd Respondent

Date of Hearing : 15 November 2018

Date of Ruling : 28 November 2018

RULING

[1] In this application the Appellants sought the following orders:

“(a) *That the decision or order or the judgment delivered by her Ladyship the Honourable Madam Justice Wati in Labasa High Court action No. HBC*

32 of 2011 and HBC 22 of 2012 dated 11th May 2017. ***Be Stayed*** pending the hearing and determination of the appeal filed by the Appellants at the Fiji Court of Appeal.

(b) *That the costs be in the cause.*”

[2] In her judgment the learned judge made the following orders:

- “(a)The plaintiff’s claim for declaratory and injunctive orders are dismissed in its entirety.*
- (b) The plaintiffs are jointly and severally liable to pay to VCORP exemplary damages in the sum of \$50,000.*
- (c) The plaintiffs are jointly and severally liable to pay VCORP damages for trespass to land in the sum of \$50,000.*
- (d) The plaintiffs must within 14 days remove any structure that is erected on VCORP’s ITL No. 300080, failing which, VCORP is entitled to remove the said structure from its property to develop its land.*
- (e) The plaintiffs are immediately and permanently restrained from trespassing onto VCORP’s ITL No. 30080 and also from discharging waste or storm water onto the same.*
- (f) VCORP is at liberty to develop its land. The plaintiffs are restrained from interfering with VCORP’s development of the land. VCORP must comply with condition 8 in paragraph 97 of the judgment. Until VCORP is able to comply with condition 8, the plaintiffs are to discharge its storm water only in the common drain provided by LTC.*
- (g) VCORP’s counterclaim for special damages and claim for unlawful arrest, malicious prosecution and intimidation are dismissed.*
- (h) The plaintiffs are to pay costs to the defendants in the following manner:*
- (i) \$6, 500 to the 1st defendant.*
- (ii) \$2,500 each to 2nd and 4th, 5th and 6th defendants. The costs to the 4th, 5th and 6th defendants to be paid collectively which means that only \$2,500 shall be paid to 4th, 5th and 6th defendants.*
- (iii) \$1, 500 to 3rd defendant.”*

Costs to each defendant must be paid within 14 days.

- [3] The learned Judge made the above orders after careful evaluation of evidence placed before her and on the observations made upon scene visit.
- [4] At the stage of argument the learned counsel for the appellant stated that he is only concerned about the reliefs in regard to (b), (c) and (h) of the judgment, that is, about the payment of money involving damages and costs.
- [5] The applicable criteria have been laid down in a plethora of judgments. The essence that could be extracted from them being *“that the courts task is to carefully weigh all the factors in the balance between the right of a successful litigant to have the fruits of the judgment and the need to preserve the position in case the appeal is successful.”*
- [6] It is to be noted that the appellant had confined the application in regard to monetary payments only. In the light of the above position, considering all the basic principles such as:
- (a) the successful litigant should not lightly be deprived of the fruits of his litigation;
 - (b) the power to grant a stay is discretionary;
 - (c) the power is unfettered;
 - (d) the applicant needs to show special circumstances that a stay is warranted in as much as if no stay is granted the appeal will be rendered nugatory;
 - (e) whether the applicant for the stay demonstrates reason or an appropriate case to warrant the exercise of discretion in his favour;
 - (f) whether the appeal is one that is wholly meritorious or unlikely to succeed;
 - (g) consequently in the overall, whether the applicant for a stay demonstrates
- [7] There are also other factors such as:

- (a) the nature of the application;
- (b) relative prejudice to parties and as an adjunct there to,
As to where;
- (c) the balance of convenience lies.

- [8] A mere payment of money by the appellants will not affect their rights as it is still open for them to get the amount reimbursed with interest, if they are successful at the end of the appeal. I find that the payment involved in (b) of the orders of court deals with exemplary damages. Once exemplary damages are awarded such awards should not be stayed lightly in view of the fact that the above damages are quasi punitive in nature.
- [9] I find that the learned High Court Judge, when he considered the matter of a stay in the first instance in his judgment dated 15th March 2018 has already dealt with this matter and he has given strong reasons in refusing the stay application of the appellant. No doubt the appellants have the right to come before this Court again, yet I see no compelling reason to deviate from the reasons already expressed by the learned Judge.
- [10] That is not to say that, that is a reason for me, sitting as a single judge of the Court of Appeal, to surrender my own discretion in taking a decision. The Respondents have waited for a number of years to do their development work. It is in that background that the reasons given by the High Court Judge in refusing a stay as referred in paragraph 9 above that weighed on me as a factor. In exercising my own discretion which has been interpreted as being a wide discretion vide.. **Trevor Robert v Allan Charles** [2003] ABU 30/2000.
- [11] I did not however rest the exercise of my decision there. Looking at the material before me (as was before the High Court Judge in the first refusal for a stay) I was not convinced in the said material in the case made out by the Appellants as to how the balance of convenience/prejudice of the Appellants should succeed in the appeal could be held to be tilted in their favour.

[12] Accordingly, I exercise my discretion in refusing the application for a stay.

Orders of Court:

- 1) *Stay refused.*
- 2) *Appellant to pay \$2,500.00 cost to each Respondent (in all \$5000.00)*



S. Lecamwasam
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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL