

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

**CIVIL APPEAL NO. ABU 104 of 2017**  
**(High Court HBC 54 of 2013)**

**BETWEEN** : **SARJEET SINGH**

*Appellant*

**AND** : **MANJIT KAUR**

*Respondent*

**Coram** : **Chandra RJA**

**Counsel** : **Mr. N. R. Padarath for the Appellant**  
**Mr. R. Singh for the Respondent**

**Date of Hearing** : **1 November 2017**

**Date of Ruling** : **7 May 2018**

**RULING**

- [1] This is an application for stay pending appeal pursuant to Sections 12(1) and 20(1)(e) and (k) of the Court of Appeal Act and Rules 26 and 34 of the Court of Appeal Rules.
- [2] The stay sought by the Appellant is in respect of the orders made by the High Court in Civil Action No.HBC 54 of 2013 on 21<sup>st</sup> August 2017.

### **Factual background**

- [3] As set out in the affidavit of the Appellant:
- (a) Pyara Singh had been the registered lessee of Crown Lease No.5319 in respect of Lot 13 on Ba 2275 Nanu and Narera, in the Tikina Ba and Province of Ba, the lease having commenced on 1<sup>st</sup> April 1973 and expired on 31st December 2014.
  - (b) On 23<sup>rd</sup> September 2008, the Appellant had been given a building by his father, Pyara Singh which was referred to as the kindergarten.
  - (c) On or around September 2008, the Respondent had taken possession of a completed house and the Appellant and the Respondent had lived in their respective dwellings since then.
  - (d) On 11<sup>th</sup> May 2010 the Respondent had applied for a lease over the land occupied by her and had represented that the land upon which she sought the lease was vacant.
  - (e) On 15<sup>th</sup> February 2011 the Appellant had applied for a lease over the portion of land occupied by him.
  - (f) On 21<sup>st</sup> February 2013, the Director of Lands had written to the Appellant stating that his lease was being processed.
  - (g) When the Respondent had taken steps to evict the Appellant from the property occupied by him, he had been surprised as his application for lease was being processed and that he was under the belief that if any lease was granted to the Respondent, it could not possibly include his area of the land.
  - (h) That he had commenced proceedings in the High Court against the Respondent (for misrepresentation and fraud) and the Director of Lands for failing to issue a lease to him.

- (i) That the above information was available to the learned High Court Judge at the time that submissions were made and prior to the delivery of the decision sought to be appealed.
- (j) That an order was made by the learned High Court Judge for the Appellant to give immediate vacant possession of the land.
- (k) That the Appellant had taken steps to lodge an appeal and has done so.
- (l) That his application for stay pending appeal made to the High Court had been refused on 20<sup>th</sup> September 2017.
- (m) That he was living in a separate dwelling house from the Respondent and that he was living in the said premises before the lease was issued to the Respondent.
- (n) That currently the house was occupied by him, his mother-in-law who is bed ridden, his wife and son.
- (o) That if he was removed from the house, he would have nowhere to live and would be rendered homeless with his family.
- (p) That he does not believe that the Respondent would suffer any prejudice if the stay is granted.

[4] The Respondent in her affidavit in reply states:

- (a) That the Appellant's father, Pyara Singh had permitted her to reside on the land on which a lease has been issued in her name.
- (b) That at no time did the Appellant nor herself resides on Crown Lease Number 5319.
- (c) That the Appellant in a previous affidavit dated 18<sup>th</sup> December 2013 had stated that Pyara Singh was only a caretaker of the land, that she had built her home on

her land and had lodged the required plan for approval with the relevant authorities which had been approved.

- (d) That she moved onto the subject land well before the Appellant.
  - (e) That the Appellant's father, Pyara Singh had attempted to evict her by serving a notice.
  - (f) That she applied for a lease over the subject land in May 2010 and paid the requisite fee.
  - (g) That the Director of Lands had issued the lease in her favour after assessing her application and the Appellant's application.
  - (h) That the Appellant is occupying the land illegally and is operating a garage from the land without any permit or approval from the Director of Lands.
  - (i) That the Appellant has caused a lot of problems whilst occupying the subject property as he illegally operates a garage, and that he and his family cause her and her family a lot of nuisance by turning up their radio very loud at nights and weekends and that she and family have not been able to get proper rest.
- [5] Both parties filed their written submissions and made oral submissions at the hearing.

#### **Consideration of the Application for Stay**

- [6] Both parties relied on the authority of **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** (2005) FJCA ABU 0011.2004s (18 March 2005) where the following principles were highlighted:

- (a) *Whether, if not stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See **Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd** [1977] 2 NZLR 41 (CA).*
- (b) *Whether the successful party will be injuriously affected by the stay.*

- (c) *The bona fides of the applicants as to the prosecution of the appeal.*
- (d) *The novelty and importance of questions involved.*
- (f) *The public interest in the proceeding.*
- (g) *The overall balance of convenience and the status quo.”*

- [7] In considering the grant of a stay, the Court of Appeal had also noted in the above case that the likelihood of success in the appeal is also an essential element.
- [8] The Judgment against which the Appellant has lodged his appeal was in an application to the High Court in terms of S.169 of the Land Transfer Act.
- [9] An action pursuant to S.169 of the Land Transfer Act is dealt with summarily by a High Court on the strength of affidavits filed by the parties. It is the strength of the material deposed to by the parties in their affidavits that determines the right to possession. It is usual to infer that when the party seeking eviction has a registered lease in his/her favour, that the defendant has to establish a right to the possession that he or she has, to remain in possession of the land.
- [10] The learned High Court Judge has relied on the decision in **Prasad v Hamid** [2004] FJCA 10; ABU0059.2003 (19 March 2004) in arriving at his decision to order the eviction of the Appellant where the defendant was not in a position to demonstrate that he had any interest in the land or had a reasonably arguable case that he has an interest in the land.
- [11] The learned High Court Judge has decided that **Hamid's** case was authority for the proposition that the Court will not interfere with the Director of Land's discretion as to whom he intends to grant the lease of the land and that (Director of Lands) is entitled to grant to whoever is most entitled or qualified.
- [12] Dealing with the Appellant's affidavit the learned High Court Judge was not satisfied with the reasons deposed to therein and he has referred to the fact that the Appellant had

failed to adduce evidence that the defendant's father was ever issued a license or that he had been asked to look after the land by the former Lessee.

- [13] The learned High Court Judge's view that the Appellant had not established that his father had been asked to look after the land by the former Lessee would indicate that if there were sufficient evidence to establish that fact, that may have been favourable to the Appellant.
- [14] In this case on the material before the High Court it would be apparent that the Appellant and the Respondent are in occupation of two separate dwellings which they had come into occupation almost at the same time. When seeking a lease of the land the Respondent had stated in her application that the land for which she sought the lease was vacant whereas the Respondent was already in occupation of his dwelling on that land.
- [15] Further, the Appellant had applied to obtain a lease for the land where his dwelling was and where he was in occupation which application had been acknowledged by the Director of Lands and had informed the Appellant that the application was in the process of being considered. The Appellant had further taken steps and had in fact filed a separate action against the Respondent and the Director of Lands regarding his claim for a lease of that land.
- [16] Both parties had come into occupation on being permitted to do so by Pyara Singh. It would appear that both parties had commenced occupying the land in dispute, which had later been found to be Lot 18 and not Lot 13 of which Pyara Singh was the Lessee, on the assumption that it was part of Lot 13. The Respondent appears to have made her application for the Lease on discovering that it was Lot 18.
- [17] Although it is established that the institution of separate proceedings is no bar to a hearing of an application under Section 169 of the Land Transfer Act, it would appear in view of the circumstances in this case, consideration should have been given to that

factor too in the circumstances of this case. There is no reference in the High Court judgment about the institution of these separate proceedings by the Appellant.

- [18] In terms of the principles regarding stay pending appeal, it is too obvious to state that if no stay is granted that the appeal of the Appellant would be rendered nugatory. However, it has to be considered whether the other principles are satisfied by the Appellant.
- [19] If a stay is granted, would the Respondents be prejudiced? It is generally observed that a successful litigant should be entitled to the fruits of a judgment in his/her favour as early as possible. It is necessary to consider whether the Respondent would be injuriously affected by the grant of a stay. The Respondent has in her affidavit made certain allegations about the causing of nuisance by the Appellant and his family. Apart from that averment in the affidavit there is no evidence to substantiate same.
- [20] In considering the bona fides of the Appellant in the prosecution of the appeal, it is observed that the Appellant has taken all necessary steps to prosecute his appeal. However, it has to be seen whether the appeal is one which is arguable. Justice Calanchini in Newworld Ltd v. Vanualevu Hardware (Fiji) Ltd [2015] FJCA172; ABU76.2015 (17 December 2015), at paragraph 16 stated:

*“The respondent’s principal objection to the granting of a stay pending appeal was that the appeal had no merit whatsoever. This court is required to consider the bona fide of the appellant in the prosecution of the appeal and whether the appeal involves a novel question of some importance. However, at the same time the authorities suggest that the merits of the appeal will rarely be considered in any detail it is usually sufficient if an appellant has an arguable case. If the appeal is obviously without merit and has been filed merely to delay enforcement of the judgment then the application should be refused.”*

[21] The grounds of appeal urged on behalf of the Appellant are:

1. The learned Trial Judge erred in law in ordering immediate vacant possession without giving immediate reasons in writing for his decision.
2. The learned Trial Judge erred in law in not holding that the Respondent's registered proprietorship was in question and being challenged in separate proceedings (being High Court Civil Action number 158 of 2015) and therefore the proceedings were not appropriate for summary eviction pursuant to Section 169 of the Land Transfer Act. In particular the learned Judge failed to take into account or consider that evidence had been led that the Respondent obtained her lease by fraud by misinterpreting to the Director of Lands (the head lessor) that the land upon which she was applying for a lease was vacant land when she knew that the Respondent was in occupation of it.
3. The learned Judge erred in law in not considering that the Appellant had established a right to remain in possession of the land in question on the grounds that:-
  - 3.1 The Appellant had applied for a lease over the portion of land he occupied and after a lease was issued to the Respondent, he was informed by the Director of Lands (head lessor) that his lease was being processed; and
  - 3.2 It was not established on the balance of probabilities that the Appellant was in occupation of the land belonging to the Respondent and if it was then the Respondent had misinterpreted to the Director of Lands that the land upon which she was applying for a lease was vacant land.
4. The learned Judge erred in law in not awaiting the outcome of the civil proceedings taken by the Appellant against the Respondent and the Director of Lands seeking a declaration that a lease be issued over the portion of land he occupied and to determine whether he was actually in occupation of the Respondent's land.



5. The learned Judge erred in law in not holding that there was substantial dispute of material facts and that the proceedings were not appropriate to be dealt with in a summary manner under Section 169 of the Land Transfer Act.
6. The learned Judge erred in law in not holding that there was substantial dispute of material facts and that the proceedings were not appropriate to be dealt with in a summary manner under Section 169 of the Land Transfer Act.
7. The learned Judge erred in law in the interpretation and application of Section 40 of the Land Transfer Act in holding that all that was in evidence was a mere knowledge of an unregistered interest when the evidence clearly established that in addition to the interest of the appellant, there was evidence that the respondent expressly misled the Director of Lands to obtain a lease in her name together with other evidence of fraud.
8. The learned Judge erred in law in holding that the Director of Lands exercised discretion when there was no evidence to establish the basis on which the lease was granted to the Respondent and there was representation made in writing by the Director of Lands to the Appellant that he would be granted a lease over the portion of land occupied by him.
9. The Appellant may add further grounds of appeal upon receipt of the Record.

[22] As stated in the case of Newworld Ltd. (supra) there is no need at this stage to delve into the merits of the grounds of appeal advanced by the Appellant. I am of the view that these grounds are arguable considering the material that was placed before the learned High Court Judge.

[23] The parties to this action are only the Appellant and the Respondents and does not affect third parties.

[24] As to the novelty and importance of questions involved, as the merits of the appeal need not be considered at this stage, it would be sufficient to say that important questions


relating to the nature of the inquiry that has to be conducted by a High Court Judge in an application for eviction pursuant to S.169 of the Land Transfer may come up for consideration at the hearing of the appeal, especially in situations such as the present case where questions relating to the identity of this land and the *bona fides* of the Applicants for lease are at issue.

- [25] In view of the above observation as regards the nature of the inquiry it would be in the public interest to have such matters discussed at the appeal hearing.
- [26] In view of the fact that both the Appellant and the Respondent have been in their dwellings since 2008 and except for allegations of the Appellant creating some acts of nuisance (which has been considered above) it would be in the best interests of justice to maintain status quo until the appeal is concluded.
- [27] For the reasons set out above, I grant the application made by the Appellant for a stay until the final determination of the appeal.

**Orders of Court:**

- (1) *That all orders made by the High Court on the 21<sup>st</sup> of August 2017, and the execution of any writ of possession are stayed until the final determination of the appeal.*
- (2) *The parties shall bear their own costs.*



  
Hon. Justice S. Chandra  
**RESIDENT JUSTICE OF APPEAL**