

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

**Civil Appeal No. ABU 017 of 2020**  
**(HPP 056 of 2010)**

**BETWEEN** : **ANNE CATHERINE KADO MCGOON**

*Appellant*  
*(Original Plaintiff)*

**AND** : **MOSES EDWARD MCGOON**

*Respondent*  
*(Original Defendant)*

**Coram** : **Almeida Guneratne, JA**

**Counsel** : **Ms. S. Kunatuba for the Appellant**  
: **Mr. N. Sharma for the Respondent**

**Dates of Hearing** : **26<sup>th</sup> November, 2020**

**Date of Ruling** : **24<sup>th</sup> December 2020**

## **RULING**

### **Background to the present Application**

[1] The present application dated 17<sup>th</sup> March, 2020 seeks to stay execution of the decision of the High Court dated 3<sup>rd</sup> March, 2020.

[2] By that decision the High Court made the following orders:-

“Final Orders

- a. Originating Summons struck off
- b. Cost is summarily assessed at \$2,000 to be paid within 21 days”

[3] Whatever procedural steps that were taken subsequently in the Course of the initial originating summons by which the Applicant invoked the jurisdiction of the High Court, the Court made the orders as referred to at paragraph [2]) above by striking out the said Summons.

[4] The Applicant’s application before the court was in the nature of a caveat seeking an order that probate in respect of the estate in question be not sealed until the determination of her summons.

[5] The learned High Court Judge himself labelled his ensuing Orders as “Final Orders” (vide: paragraph [2] above).

[6] Notwithstanding the nature of the application and order which the Applicant sought as referred to in paragraph [4] above, but going on the nature of the orders the learned Judge made she filed Notice of Appeal dated 17<sup>th</sup> March, 2020 against the said orders urging as many as 15 grounds of appeal and followed with a summons dated 17<sup>th</sup> March, 2020 seeking “a stay” as referred to in paragraph [1] above.

[7] If one were to pause at this point, it is evident that the Applicant has proceeded on the basis that the impugned Orders of the High Court were in the nature of final orders for otherwise leave to appeal would have been required as envisaged in Section 12(2) (f) of the Court of Appeal Act (“The Act”).

- [8] It is in that background that, the matter was listed before me as a single Judge of this Court for mention (being in the nature of “a call-over date”), when I directed written submissions to be filed.
- [9] The Applicant consequently filed written submissions under the titular head “Written submissions for leave to Appeal” followed by two sets of “written submissions on the stay” dated 19<sup>th</sup> October, 2020 preceded by the Respondent’s written submissions dated 01 October, 2020.

**Some Preliminary Reflections that needed to be made before making a determination on the matter of the application for “a stay”**

- [10] To begin with, I refrain from expressing any views as to whether the impugned orders of the High Court dated 3<sup>rd</sup> March, 2020 were in the nature of “final or interlocutory orders”, in as much as, if they were to be construed as “interlocutory”, then leave to appeal needed to be sought to appeal against them. In the absence of a Summons seeking the same, written submissions under the titular head “seeking leave to appeal” as referred to at paragraph [9] above could not have in law sufficed and fulfilled that requirement.
- [11] Secondly, having perused the Respondent’s written submissions dated 1<sup>st</sup> October, 2020, it would appear that the Respondent has proceeded on the basis that, the “impugned orders of the High Court” were final in nature, while in the same breath touched on the aspect of leave to appeal urged in the Appellant’s written submissions referred to in paragraph [9] above, though his objection to “the stay” was not on the basis that there was no application for leave to appeal (vide: page 16 of the Respondent’s written submissions of 1<sup>st</sup> October 2020).
- [12] For the aforesaid reasons I proceed to consider the present application for “a stay” on the basis that the impugned orders of the High Court are final orders against which there is a “a pending appeal” as envisaged in Section 20(1) (k) of the Court of Appeal Act (“the

Act”), construing the background facts as recounted above to stand to the benefit of the Applicant (whom I shall proceed to refer to as “the Appellant” hereinafter).

**Principles or Criteria applicable to the grant or refusal of “a stay” pending an Appeal**

[13] In Natural Waters of Viti Ltd. v. Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13, the applicable principles or criteria were laid down as follows:-

Viz:

- “(a) whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory,*
- (b) Whether the successful party will be injuriously or prejudicially affected by the stay,*
- (c) The bona fides of the applicants as to the prosecution of the appeal,*
- (d) The effect on third parties,*
- (e) The novelty and importance of questions involved,*
- (f) The public interest in the proceeding,*
- (g) The overall balance of convenience and the status quo.”*

[14] I also had regard to the cases of Prasad v Hamid [2004] FJCA 10, New World v. Vanualevu Hardware (Fiji) Ltd. [2015] FJCA 172 and Jagan Nath & Ors v. Denis Narayan & Ors [ABU 0040.2018], 02 June 2020].

[15] Apart from the aforesaid precedents, I paid attention to the Supreme Court decisions in Stephen Patrick Ward v. Yogesh Chandra [CBV 0010.2010, 7<sup>th</sup> and 20<sup>th</sup> April 2011] and Singh v. Prasad [2002] FJSC 7 as well (although the Supreme Court therein was dealing with “a stay against Judgments of the Court of Appeal in the context of special leave to appeal where the threshold bar is higher).

[16] Being guided by the said precedents referred to in paragraphs [14] and [15] above, I extract the following to what has been laid down in the Natural Waters case (supra) viz:

- (i) The conduct of an applicant following an impugned (Order) of the High Court leading to the application for “a stay”.
- (ii) Is an appellant’s case prior to the hearing of an appeal “sufficiently exceptional to grant “a stay” of execution.
- (iii) “Exceptional” as to suggest that, there are merits in the pending or intended appeal to outweigh a successful party being denied the fruits of his victory as against the unsuccessful party’s appeal being rendered nugatory.

**Consideration of the aforesaid Criteria in the light of the facts of the instant case and the rival submissions made thereon**

[17] The essence of the 15 grounds of appeal and the application thereof in seeking a stay urged in the Appellant’s oral submissions may be distilled thus:

- (a) That the Appellant being the surviving widow of the testator, she and her son (also the testator’s) who prosecuted as the Power of Attorney holder of the Appellant have been deprived of their legal rights;
- (b) The Appellant had provided finances enabling the testator to have purchased a property on a loan;
- (c) The testator was not in a proper state of mind when he had executed the impugned last will. (Appellant’s affidavit).
- (d) The household goods bought during the subsistence of the marriage were “Matrimonial Property”.
- (e) Thus, should the probate be allowed to be sealed, the Appellant’s appeal will be rendered nugatory.

### The Respondent's Submissions

- [18] Learned Counsel launched a frontal attack on the grounds of appeal urged by the Appellant based on his written submissions dated 1<sup>st</sup> October, 2020 followed by his oral submissions.
- [19] He posed the question as to what “legal right” the Appellant was claiming in the absence of a concept of “a legitimate portion” known to the Law of Fiji, the Property Law Act of 2003 (through Section 661 thereof), the Inheritance and Pensions Act, (the Appellant not being even a dependant).
- [20] Furthermore, learned Counsel (Mr.) Sharma cogently argued that, in so far as the finances alleged to have been provided by the Appellant are concerned, the document produced does not show a link between it and the finances alleged to have been provided for the purchase of the property in question.
- [21] He contended further that, there was no material placed before the High Court as to the testator being “not in a proper state of mind” when he had executed “the last will” in question. Furthermore, there was no material before the learned High Court Judge as to the Appellant having contributed to the purchase of household goods as constituting “matrimonial property”.
- [22] In conclusion (Mr.) Sharma submitted that:-

*“For the reasons adduced by him, “originating summons” was not the correct procedure to have been adopted by the Appellant”.*

### Reply Submissions on behalf of the Appellant

[23] Learned Counsel for the Appellant in her reply submitted that there are two orders of the High Court she was putting in issue, namely, (a) the sealing of probate of the last Will in question, (b) the costs in a sum of \$2,000 as ordered by Court.

### Assessment of the rival contentions

[24] As a prelude to that exercise I proceed on the basis that there is an appeal before the full Court against the “final Orders” (labelled as such by the Honourable High Court and the other considerations I have reflected on earlier in this Ruling).

[25] Having said so, while I was inclined to agree with (Mr.) Prasad’s contention as to the prospects of success in appeal on the grounds of appeal urged as to both the procedural and substantive aspects involved in the case, *stricto sensu* on the law, I was however struck by the Appellant’s lament that, she was only seeking a stay pending the hearing of the appeal.

[26] In that regard, I had regard to the following principles or criteria:-

(i) The Conduct of the Applicant following the impugned “final orders” (Judgment) of the High Court

[27] After filing the Notice of Appeal (well within time as prescribed by Rule 16 of the Court of Appeal Act) she had moved for a stay by a summons of even date.

(ii) The Respondent being deprived of the fruits of victory as against the Appellant’s appeal being rendered nugatory should the High Court Orders be executed pending the Appeal

[28] In that regard I express the following views:-

- (a) Had there been no “pandemic” concerns, by now “the full Court” would have had heard and determined “the appeal”.
- (b) Consequently, while the successful party’s rights to vindicate the victory achieved, ought not be slighted, at the same time, a defeated party’s expectations also must be viewed with some degree of concern for as it has been said: *“finality is good, but justice is better.”*

#### **Determination with Reasons for the Ensuing Orders**

[29] On a balance of the aforesaid factors, should a stay be denied and should the Respondent move for execution of the “final orders” of the High Court, the probate will be sealed with the attendant consequence of the estate of the deceased being administered.

[30] Surely then (if that were to take place) the Appellant’s appeal before the final Court would be rendered nugatory.

[31] I must say at this point that, the Respondent has stayed his hand in not moving for execution of the High Court’s “final orders” from March, 2020 (which stands to the Respondent’s credit).

[32] Hopefully, the Appeal before the Full Court will appear in the Cause list of appeals sooner than later.

[33] For the aforesaid reasons I am inclined to grant the stay order sought by the Appellant.

#### **The Matter of Costs ordered by the High Court**

[34] To date the Appellant has not complied with the said order.



**Comply and Complain**

[35] This is a principle I believe in.

[36] Should the conduct of litigants in disregarding orders made by a Court be condoned? I do not think so.

[37] On the basis of the aforesaid considerations, taken in the overall, I proceed to make my orders as follows:

**Orders of Court:**

1. The application for stay in so far as “the sealing of the probate” is concerned, is allowed.
2. However, the Appellant is ordered to pay to the Respondent the sum of \$2,000.00 ordered as Costs by the Honourable High Court within 42 days from the date of this Ruling.
3. Should the Appellant fail to comply with Order 2 above, Order 1 shall stand vacated.
4. I make no order for costs in this application and costs shall await the hearing and determination of “the appeal”.



*Almeida Guneratne*

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**Almeida Guneratne**  
**JUSTICE OF APPEAL**