

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

CIVIL APPEAL NO. ABU 037 of 2020
(Suva High Court Civil Action No: HBC 275 of 2013)

BETWEEN : **JOSEPH LUM KON WISE** *Appellant*

AND : **FIJI DEVELOPMENT BANK** *Respondent*

Coram : Almeida Guneratne, JA

Counsel : Ms L Jackson for the Appellant
Mr N Nand Respondent

Date of Hearing : 1st December, 2020

Date of Ruling : 29th December, 2020

RULING

Introduction

[1] This is a renewed application for stay of execution pending appeal against the judgment of the High Court dated 27th April, 2020.

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

ORDERS

- “1. The defendant is ordered to pay the plaintiff \$195,956.41 with interest at the rate of 9.5% per annum from 1st April until the entire sum is paid in full.
2. The defendant is also ordered to pay plaintiff \$10,000.00 as costs.”

[3] The Notice of Appeal dated 2nd June, 2020 sets out 10 grounds of appeal, some relating to procedural aspects and the rest on substantive matters.

[4] I shall not reproduce the said grounds for I felt that it would suffice to make reference to them in the light of my assessment of the rival contentions made by Counsel for the purpose of determination of the present application.

Principles or Criteria on applications for “a stay”

[5] Those principles or criteria are well established in the judicial jurisprudence of Fiji, 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 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 of the questions involved
- (f) The importance of the questions involved
- (g) The public interest in the proceeding
- (h) The overall balance of convenience and the status quo
- (i) The conduct of the contesting parties leading to the application for “a stay”
- (j) Taking the aforesaid factors in the overall, “a stay” being in the nature of interim relief the need to exercise discretion judicially.

[6] The said principles stand extracted (to name some) from the cases of:-

(a) **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 46; ABU0011&ABU0011A.2004L (22 April 2005)

(b) **Prasad v Hamid** [2004] FJCA 10; ABU0059.2003 (19 March 2004)

(c) **Newworld Ltd v Vanualevu Hardware (Fiji) Ltd** [2015] FJCA 172; ABU76.2015 (17 December 2015)

(d) **Nath v Narayan** [2020] FJCA 67; ABU0040.2018 (2 June 2020)

(e) **Saheed Ahmed v Manoj Kumar and Others** [2020] FJCA 89; ABU0043.2019 (17 June 2020)

Application of the principles or criteria to the facts and circumstances of the instant case

[7] In my endeavor to assess the merits (or otherwise) contained in the Appellant's grounds of appeal I gave my mind to, both sets of written submissions tendered and the oral submissions made by respective Counsel on behalf of the parties.

[8] Ms Jackson on behalf of the Appellant submitted that:-

- (a) the sum ordered by the High Court is an enormous amount by any standards (Order 1)
- (b) a 'guarantee bond' being the edifice on which the plaintiff (Respondent's) case was built which was not even referred to in the Respondent's pleadings or adduced by way of evidence
- (c) The principle matter in dispute being a loan agreement, interest at the rate of 9.5% per annum was ordered although there was no evidential basis for the Judge to have so ordered.
- (d) The subject of the dispute being one concerned with a maritime vessel which had resulted in its deterioration on account of the Respondent's failure to discharge its duty on the part of its side of "*the agreement*" between the parties.

[9] Apart from the above, Ms Jackson submitted that:-

- (a) The Judge had misinterpreted the circumstances in which the Appellant had preferred a counterclaim in the context of the conduct of the parties.
- (b) and, the Respondent being a bank had a duty to at least mitigate the losses claimed in view of the circumstances of the case.

[10] Finally, Ms Jackson submitted that, by any standards a sum of \$10,000.00 summarily assessed to be as such was excessive.

The gist of the Respondent's submissions

[11] Mr Nand for the Respondent submitted that:-

- (a) the orders made by the Court being the result of a protracted trial that his client was entitled to the fruits of its victory
- (b) In terms of Clause 9 of "*the Agreement*" the Respondent had discretion to terminate "*the agreement*"
- (c) Furthermore, it was within the Respondent's discretion to mitigate any loss or not
- (d) In seeking "*a stay*" the Appellant has not attached any material to show how he would be financially ruined if the orders of the High Court were to be executed.
- (e) On the loan agreement had with the Appellant, even the interest component was reduced after issuing "*a demand notice*"
- (f) Accordingly, Mr Nand submitted, that, there was no basis for the Appellant to seek and obtain "*a stay.*"

[12] In her brief reply Ms Jackson submitted that, the "*demand notice*" was disputed as alleged by the Respondent. She reiterated the matters urged in her initial submissions.

Assessment of the relative submissions and my determination

[13] In my assessment *prima facie* I could not see much merit in the argument which I have recapped at paragraph 8(a) above.

[14] On the other hand, I saw some “*arguable area*” as recounted at paragraph [8] (b), (c), (d) and paragraphs [9] and [10] above.

[15] However, that is not to say that, I saw strong or compellable reasons that did not bear scrutiny in the judgment of the High Court in as much as the findings of the Court were all based on factual matters which an appellate Court is obliged to be slow in interfering with.

[16] Nevertheless, given the fact that, there is a final appeal pending before the full Court it is not my function as a single judge to go into that aspect, while I do say that I agree with the submissions made by Mr Nand for the Respondent, recapped at paragraph [11] above.

[17] Indeed, had the present application been for leave to appeal or extension of time to appeal and cognate situations (applications) of that nature, I would have had no hesitation in refusing “*a stay*”

[18] But, the present application for “*a stay*” arising in the context of where a “*final appeal*” before the “*full Court*” is in the wings I felt that different considerations needed to be addressed under section 20(1)(e) read with Section 20(1)(k) of the Court of Appeal Act in the exercise of my discretion.

The considerations that weighed with me

[19] The present application for “*a stay*” is one pending the Appellant’s appeal before the full Court. Indeed, the said Appeal, if things had been normal, might have already been heard and determined.

[20] The Respondent being a bank (financial institution) presumably would be able to weather some more time until the hearing and determination of the appeal by the full Court. As against that, there is no denying that the Appellant is an individual businessman, relatively a lesser financial persona.

[21] Accordingly, the criterion of balance of convenience stands tilted in favour of the Appellant.

[22] I proceed to make my orders as follows:

Orders of Court

1. *The application for stay of execution of the Judgment of the High Court dated 27th April, 2020 (pending appeal) is allowed.*
2. *The Registrar is prevailed upon to have the appeal listed for hearing as soon as the list is prepared for the hearing of appeals.*
3. *The Appellant is to advise himself as to steps he may be required to take according to law to prosecute the appeal.*
4. *I make no order as to costs. Costs shall be in the cause.*



A handwritten signature in blue ink, which appears to read "Almeida Guneratne".

Almeida Guneratne
JUSTICE OF APPEAL