IN THE COURT OF APPEAL, FIJI

[APPELLATE JURISDICTION]

Civil Appeal No. ABU 0040 of 2018

(HPP No. 009 of 2012)

BETWEEN	:	**JAGAN NATH** **JAGAN NATH AND NOKAIYA** ***Appellants***
AND	:	**DENIS NARAYAN** **NATHAN RAMA NAIDU** **SARGENT SAMI NAIDU** ***Respondents***
Coram	:	**Almeida Guneratne, JA**
Counsel	:	**Mr. E. Maopa for the Appellants** **Mr. G. O'Driscoll for the Respondents**
Date of Hearing	:	**22 May 2020**
Date of Ruling	:	**02 June 2020**

RULING

[1] This is an application for stay of execution pending Appeal of the Judgment of the High Court dated 27 April, 2017.

[2] That Judgment of the High Court is one that arose in the context of a probate action.

[3] For the purpose of determining this application, I shall first reproduce the Grounds of Appeal urged by the Appellant against the said Judgment which bring out the antecedent history to the dispute and the basis on which the said Judgment is sought to be put under scrutiny.

Grounds of Appeal

"1. *That the learned trial Judge erred in law and in fact in considering the misrepresentation of the children of the deceased by the Appellant and, in absence of any finding of fraud, he ordered that the plaintiff take all necessary actions... and also transfer of the property obtained through grant of Letters of Administration No. 48213. [P9 para 38 Line 8 of the judgment] to the second defendant.*

2. *That the learned trial Judge erred in law and in fact when he failed to consider or give effect to the statutory bar pursuant to Section 38 of the Land Transfer Act Cap.131, ie. In relation to the indefeasibility of title that protects the registered owner, without first arriving at a finding that the title (on the property) is void under Section 41 of the said Act.*

3. *That the trial Judge acted beyond Order 76 Rule 1(2) of the Probate Proceeding when he ordered the plaintiff to transfer the property obtained through the grant of Letters of Administration No. 48231 to the second defendant.*

4. *That the learned trial Judge erred in law and in fact and contradicted himself when he said:-*

"So this action will only confine to the grant of probate of the will of the deceased person or for revocation of the grant already made

in favour of the 1st defendant (at p4 paragraph 14 of the judgment) but proceeded to order the plaintiff to transfer the property obtained through grant of letters of administration No. 48231. [at p9 line 3 from the top paragraph].

5. *That the learned trial Judge erred in law and in fact when he admitted and considered as exhibits the affidavit evidence by the defendants filed and used in HPP No.11 of 2011 without proper application for and for leave being granted, and despite objection by the plaintiff, hence consider irrelevant matters.*

6. *That the learned trial Judge erred in law and in fact when he failed to fully consider the content the affidavit of Manormani deposed on 7th May 2014 and filed on 18th August 2015 and there was no objection by the defence counsel for the original Will being tender as exhibit being PE x2".*

[4] Those grounds of appeal, I viewed against the "final orders" made by the High Court in the said Judgment viz:

"FINAL ORDERS

a. *The grant of Letters of Administration No. 48213 is revoked.*
b. *If grant No. 48213 is not deposited in the court the Plaintiff is ordered to deposit it forthwith.*
c. *The Defendant's counterclaim as to the grant of Letters of Administration to 2nd Defendant, is granted.*
d. *The counter claim of the Defendants, for money is refused.*
e. *The cost of this action is summarily assessed at $4000 to be paid by the Plaintiff to the Defendants within 21 days."*

[5] As requisite in law the Appellant made an application for stay before the High Court but the same being refused by the High Court (Vide: Paragraph 8 of the Appellants submissions dated 15 October, 2018, that refusal ruling by the High Court not furnished to me but given the fact that in terms of the relevant Rules of Court, this Court having concurrent Jurisdiction to consider the granting of a Stay) I assumed Jurisdiction as to whether to grant a stay or not as urged by the Appellant.

Principal Argument adduced by the Appellant in the regard

[6] The Appellant in his written submissions has contended thus:

> *"11. (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 and importance of questions involved,*
>
> *(f) The public interest in the proceeding,*
>
> *(g) The overall balance of convenience and the status quo (See Natural Waters of Viti Ltd. v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13; ABU 0011.2004S (18 March 2005)".*

[7] Of these criteria, in the facts and circumstances of the present case that prevailed on me for consideration were (a), (b), (c) and (g) in context and in addition to the **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13, cited by the Appellant, I felt in order to have regard to the decisions in **Prasad v Hamid** [2004] FJCA 10 and **New World v Vanualevu Hardware (Fiji) Ltd** [2015] FJCA 172 among some others (of the Court of Appeal) and the Supreme Court decision **in Stephen Patrick Ward v Yogesh Chandra** [CBV 0010].

[8] Of course, it may be open to the argument that, the threshold bar for a stay sought in the Highest Court is higher than in the Court of Appeal. Be that as it may, the broad principle which must take primacy is as to whether a successful party ought to be denied the fruits of his victory particularly when that successful party has waited patiently in not having taken steps to have the Judgment executed pending the appeal from April, 2017.

An Additional Factor to consider Granting Stay

[9] That is an additional factor I add to the criteria that ought to weigh in granting or refusing an application for stay which I propose to formulate conceptually as a criterion as follows.

[10] That is, the conduct of a judgment-creditor (the Respondent) not proceeding to execution on account of the appeal that is pending.

Conclusion

[11] I have refrained from expressing any views on the learned Counsel for the Respondents submission that the grounds of appeal urged by the Appellant lacks merit. If I were to do that I would be pre-empting the powers of the full court in the main appeal in regard to (a) the argument on the part of learned Counsel for the Appellants that, in the context of an order which was on transfer of title notwithstanding the concept of indefeasibility of title (on the Torrens System) within the framework of the Land Transfer Act and consequently the aspect of "fraud" impacting thereon and (b) the counter-argument adduced by learned Counsel for the Respondents that, in the light of his counter-claim there being no order for transfer of any property, "fraud" therefore having no relevance, I saw merit in both the said argument and counter-argument.

[12] However, leaving these matters to be determined by the full court in Appeal, as far as the additional criterion I have introduced for the reasons I have adduced at paragraphs [9] and [10] above in regard to the granting or otherwise of a stay pending appeal, I am not inclined to grant "a stay" as sought by the Appellants.

[13] Accordingly, I proceed to make the following orders:

Orders of the Court

1. The Application for "stay" sought by the Appellants is refused and dismissed.

2. Having regard to the considerations articulated at paragraphs [8] and [10] in this Ruling I make order that, the Appellant shall pay costs of this cause in a sum of $1,500.00 within 28 days of this Ruling.

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Almeida Guneratne

JUSTICE OF APPEAL