

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 012 of 2023
[In the High Court of Fiji at Suva No. HBC 191 of 2022]

BETWEEN : **OSEA VEITALA TOGETHER WITH HIS RELATIVES AND OTHER OCCUPANTS AND/OR THEIR AGENTS AND/OR SERVANTS** of ATS Subdivision, Namaka, Nadi

Appellant
[Original Defendant]

AND : **HOME FINANCE COMPANY PTE LIMITED trading as HFC BANK** a duly incorporated company having its registered office at 371 Victoria Parade, Suva, Fiji.

Respondent
[Original Plaintiff]

Coram : **Prematilaka, RJA**

Counsel : **Mr. I. Romanu for the Appellant**
Mr. N. Lajendra for the Respondent

Date of Hearing : **10 April 2025**

Date of Ruling : **25 April 2025**

RULING

[1] The appellant on 15 March 2023 had filed a notice of appeal against the judgment of the High Court delivered on 01 February 2023¹ in the High Court. Security for cost had been duly paid. The appellant on had on 17 August 2023 filed summons seeking leave to amend the grounds of appeal. The respondent is opposing the said application. Both parties had filed

¹ **Home Finance Company Pte Ltd v Veitala** [2023] FJHC 40; HBC191.2022 (1 February 2023)

relevant affidavits and written submissions in this regard. The appellant had also filed summons on 16 October 2023 seeking stay pending appeal and injunction in the Court of Appeal. The respondent on 06 November 2023 had made an application by way of summons to have the summons for stay pending appeal and injunction struck out. This court on 07 December 2023² had struck out summons filed on 16 October 2023 seeking stay pending appeal and injunction and left the application for amending grounds of appeal to be heard on another date.

- [2] The High Court on 28 March 2024 had dismissed the appellant's summons for stay pending appeal and injunction³. The appellant had made a second application by way of summons on 08 April 2024 in this court to have the proceedings in the High Court stayed and for a restraining order on the respondent. The respondent once again is opposing the said summons. Both parties have filed respective affidavits and written submissions with regard to this application. Thus, the two application before me are the appellant's application for amendment of grounds of appeal and summons seeking stay of proceedings and a restraining order.

Stay of proceedings

- [3] The matters that should be considered by this Court in an application for stay pending appeal were discussed in **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU 11 of 2004 [18 March 2005]. It is of course not always necessary to consider all seven matters⁴ as their relevance will often depend upon the nature of the proceedings and the orders made by the court below⁵. A stay should not be granted unless the Court is satisfied that there are good reasons for doing so. Whether there are good

² **Veitala v Home Finance Co (trading as HFC Bank)** [2023] FJCA 272; ABU012.2023 (7 December 2023)

³ **Home Finance Co Pte Ltd v Veitala** [2024] FJHC 200; HBC191.2022 (28 March 2024)

⁴ (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative), (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 and (g) The overall balance of convenience and the *status quo*.

⁵ See for example **Singh v Singh** [2019] FJCA 165; ABU 49 of 2018 (16 August 2019); **Prasad v Sagavam** [2019] FJCA 15; ABU82.2018 (22 February 2019)

reasons established will be determined by reference to the principles set out by this Court in the *Natural Waters of Fiji*⁶.

[4] In the case of money judgments, generally a successful litigant should not be deprived of the fruits of successful litigation by withholding funds to which he is otherwise entitled, pending an appeal. For this Court to interfere with that right the onus is on the appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are mostly taken into account of course among others by court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay⁷. The power to grant a stay conferred by section 20 of the Court of Appeal Act gives the court a wide discretion to grant a stay when the interests of justice so requires⁸.

[5] This Court is required to consider the *bona fides* of the appellant in the prosecution of the appeal (which is often taken to be a reference to the chances of the appeal succeeding⁹) 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 for stay should be refused¹⁰.

[6] It should be noted at the outset that this is not an appeal against a money judgment. Nor is it an appeal against a judgment concerning a commercial property upon which a business is being actively carried on. As for money judgments, since the decision of this Court in **Attorney-General of Fiji and Ministry of Health v Dre** [2011] FJCA 11; Misc. 13 of 2010 (17 February 2011), the ability of the appellant to recover the judgment amount in the

⁶ *Singh v Singh* (supra); **Neo (Fiji) Ltd v Ausmech Services (Australia) Ltd** [2019] FJCA 174; ABU39.2018 (11 September 2019)

⁷ **Newworld Ltd v Vanualevu Hardware (Fiji) Ltd** [2015] FJCA 172; ABU76.2015 (17 December 2015)

⁸ **Gallagher v Newham** [2003] FJCA 18; ABU0030.2000S (16 May 2003)

⁹ **Neo (Fiji) Ltd v Ausmech Services (Australia) Ltd** [2019] FJCA 174; ABU39.2018 (11 September 2019)

¹⁰ *Newworld Ltd v Vanualevu Hardware (Fiji) Ltd* (supra)

event a stay is not granted is not decisive and is only one of a number of factors that must be considered¹¹.

- [7] In my view the most relevant considerations in this matter are (a) whether, if a stay is not granted, the applicant's right of appeal will be rendered nugatory (this being not determinative), (b) whether the respondent will be injuriously affected by the stay, (c) the *status quo* bona fides of the appellant as to the prosecution of the appeal *i.e.* the prospect of success in the appeal and (g) the overall balance of convenience.
- [8] However, before considering these factors, I have got to consider the respondent's legal argument that the High Court matter has been concluded and there is nothing pending in the High Court as far as the said High Court proceedings are concerned. It is the submission of the respondent that there is nothing to stay on the proceedings of the High Court and therefore the appellant's application for stay of proceedings cannot be granted as the High Court proceedings have been concluded.
- [9] In this context, it is pertinent to mention that the appellant's summons seeks two orders pending the determination of the appeal; firstly, for a stay of proceedings in the matter in the High Court and secondly, a restraining order preventing the respondent from interfering with the quiet use and occupation of the double story building. The respondent's argument is only concerned with the stay of proceedings which, in my view, is right. However, this court will have to consider the second interim relief the gist of which is the stay of execution of the judgment.
- [10] The respondent's originating summons had sought *inter alia* delivery by the appellant together with his relatives and other occupants and/or their agents and/or servants to the respondent of vacant possession of ALL THAT property comprised and described in STATE LEASE NO. 19499 being Lot 1 on Plan No (d) SO 6902, Waqadra (pt of) formerly (pt of) Bal Lot 3, SO 279 situated in the Province of Ba and District of Nadi, having an area size of 1000m² (hereinafter referred to as the subject matter). The late Mr. Sekove Vuiyayawa No. 2 is the registered proprietor of this property and the double storey concrete dwelling is

¹¹ *Neo (Fiji) Ltd v Ausmech Services (Australia) Ltd (supra)*

supposedly erected on the said property. Mr. Sekove Vuniyayawa No. 2 had applied for and granted two loans on two occasions by the respondent who in consideration for the loan facility, amongst other things took the First Registered Mortgage (i.e. MORTGAGE REGISTRATION NO. 818449 dated 28 August 2015) over the residential property legally described as Lot 1 on SO 6902 as contained in State Lease No. 19499, situated at ATS Subdivision, Namaka, Nadi as security. Subsequently, Mr. Sekove Vuniyayawa No. 2's loan account with the Plaintiff fell in arrears. The respondent had served an eviction notice under the mortgage requiring Mr. Sekove Vuniyayawa No. 2 and his agents and/or servants to vacate the premises but Mr. Sekove Vuniyayawa No. 2 failed to vacate the said property. The respondent then filed an eviction proceedings against Mr. Sekove Vuniyayawa No. 2 in Suva High Court, obtained an eviction order against him and proceeded to advertise the said property under mortgagee sale. The High Court granted the respondent an order for leave to issue a Writ of Possession. Mr. Sekove Vuniyayawa No. 2 has in the meantime passed away and the subject matter is currently occupied by the appellant together with his relatives and other occupants. Hence, the respondent sought orders for vacant possession of the said property and an injunction restraining the appellant together with his relative and other occupants and/or their agents and/or servants from interfering with the improvements on the said property in a way so as to deplete its value.

[11] The appellant had not filed any affidavit in opposition to the respondent's application whose application therefore remained factually unchallenged. However, the appellant through one David Nainoka Veilwa (the nephew of the deceased Sekove Vuniyayawa No. 2) had instead filed a summons and a supporting affidavit seeking an order for stay, disputing the jurisdiction of the High Court and for striking out of the respondent's originating summons which, of course, had been opposed by the respondent.

[12] David Nainoka Veilawa as one of the occupants (occupiers) of the subject matter in his affidavit in reply had said that "*That the Bank has the right to only take possession of the property that was secured under the Mortgage and not to convolute the story to include the double story as part of the property when it is not.*" The appellant and others are apparently in occupation of this double story building. Thus, the appellant's contention is

that the double storey structure is not on the land over which the respondent holds a mortgage.

[13] On the other hand, the respondent was seeking an order for vacant possession of the State Lease No, 19499 being Lot 1 on Plan no. (d) SO 6902 Waqadra situated in the Province of Ba and District of Nadi having an area of 1000m². It appears that the same State Lease No. 19499 being Waqadra (Pt of) formerly (Pt of) Bal Lot 3, SO 279, has been secured under the mortgage to the respondent. LD Reference No. 4/10/5141 (State Lease No. 19499) is under respondent's mortgage. A portion of the double storey structure is on LD Reference No. 4/11/5141.

[14] It is clear that the double story house is not built on Lot 14 only with the property description as LD Reference no. 4/10/1406 but on both LD Reference No. 4/10/5141 (in the Lease No. 19499, Lot 1 on S.O 6092 Waqadra (Pt of) which is the subject matter in the High Court proceedings and LD Reference No.4/11/1403, Lot 14. The double storey structure is a one continuous building which partly sits on LD Reference No. 4/10/5141 and LD Reference No. 4/10/1403 and therefore cannot be physically separated. Therefore, the double storey house which the appellant admits moved into sits both on LD Reference No. 4/10/5141 and LD Reference No. 4/11/1403.

[15] The single storey house that sits entirely on Lot 1 SO 6902 Waqadra (Pt of) 2 was not an issue for the High Court as the appellant had admittedly moved from the single storey house to the double storey building at the time the respondent's eviction proceedings was heard in the High Court which had concluded that the double storey building is one complete continuous house that sits on both the parcels of land and impossible to be demarcated as two separate structures and the appellant is occupying a portion of the house with a structure that is partially on the respondent's mortgaged property that cannot be physically separated from the neighboring Lot (LD Reference no. 4/11/1403).

[16] The appellant had attempted to cast doubt on the validity and authenticity of the Plan prepared by F Khan Associates on Redefinition of plan of Lot 1 SO 6902 Waqadra (Pt of)

by producing DNV 3 and DNV 4 which were apparently not placed before the High Court. DNV3 and DNV 4 are part of David Nainoka Veilawa's affidavit in support of the summons for amendment of grounds of appeal and also his affidavit in support of stay pending appeal. The respondent has in its affidavit in opposition to summons for amendment of grounds of appeal had submitted a report and another plan by Chands Land Surveying and Consultant (marked B) which confirms the Plan prepared by F Khan Associates. Both plans seem to show unequivocally that the double storey building encroaches the subject matter whereas the single storey house sits entirely on the subject matter. I do not think that the High Court had any confusion in this regard. The photographs submitted by the appellant clearly show the same. In other words, part of the double storey building is on the subject matter and rest of the building sits on the adjoining land. Therefore, the appellant has no right to remain in that part of the building that sits on the subject matter under mortgage to the respondent. The question, whether the two parts could be separated or not for the purpose of the eviction proceedings to be carried out from the subject matter, I cannot answer at this stage.

[17] The High Court considered both summonses together and in the impugned judgment ordered the appellant together with his relatives and other occupants and/or their agents and/or servants to deliver vacant possession of the subject matter and restrained them from interfering with the improvements on the State Lease No. 19499. The execution of the order for vacant possession was stayed and suspended for 30 days to allow them time to relocate. The appellant's summons was dismissed subject to cost.

[18] In coming to its decision, the High Court had considered Order 88 Rule (1) (d) of the High Court Rules 1988, Section 75 of the Property Law Act, the clauses in mortgage registration No. 818449 and **National Bank of Fiji v Hussein** [1995] FJHC 29; Hbc0331j.94s (9 February 1995).

[19] Thus, as for the success of the appeal, given the discussion above on the main contentious issue arising from the grounds of appeal [three of which are based on Plan prepared by F Khan Associates on Redefinition of plan of Lot 1 SO 6902 Waqadra (Pt of) and other is the appellant's attempt to explain the failure to file an affidavit in opposition to originating

summons], I cannot form the view that the appeal has a realistic chance of success¹². However, I do think that the execution of the order for vacant possession must be carried out as allowed in order [2] of the judgment strictly within the scope of the order [1] of the judgment. To that extent I do not doubt the *bona fides* of the appellant.

[20] The appellant has not established that the appeal will be rendered nugatory in the event that a stay is not granted.

[21] On the questions of the balance of convenience on either party by the grant or refusal of the stay and how injurious it would be for the respondent if stay is granted, I am of the view that those considerations would not favour the appellant in so far as the subject matter in concerned.

[22] Therefore, I am not inclined to grant the stay of proceedings in the High Court and the execution of the judgment pending appeal. However, I am of the view that the respondent must carry out the execution of the order for vacant possession as allowed in order [2] of the judgment strictly within the scope of the order [1] of the judgment.

[23] As far as the appellant's summons for amendment of the grounds of appeal is concerned the respondent has submitted that proposed amended grounds of appeal are not raising any new issues and in actual fact, it is just a rehash and repeat of the grounds of appeal which are already pursued under the original grounds of appeal filed. To a great extent, I agree with the respondent. However, having perused the proposed amended grounds of appeal, I also make the observation that if any one or more of those grounds of appeal are going to be pursued before the Full Court, they must be confined to and based on the material placed before the High Court prior to the impugned judgment. If not, particularly in the case of documents including DNV3 and DNV4 the appellant must make a formal application to lead fresh evidence in appeal before attempting to argue such grounds of appeal¹³. Otherwise, the respondent is

¹² **Devi v Samy** [2025] FJCA 44; ABU032.2024 (24 March 2025)

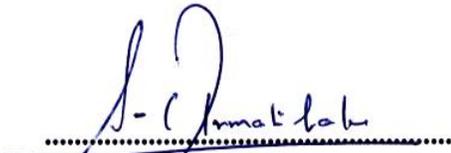
¹³ See **Devi v Vishwa** [2013] FJCA 100; ABU0031.2011 (3 October 2013)

entitled to object to such grounds of appeal at the hearing. Subject that qualification, I am inclined to allow the amended grounds of appeal.

Orders of the Court:

1. *The summons/application for stay of proceedings and stay of execution of the High Court judgment is rejected/refused subject to Order 2 below.*
2. *The respondent shall carry out the execution of the order for vacant possession (if it decides to do so) as allowed in order [2] of the High Court judgment strictly within the scope of the order [1] of the High Court judgment.*
3. *Neither party shall attempt to alienate the mortgaged property or encumber the title thereof till the determination of the appeal by the Court of Appeal.*
4. *Summons/application for the amendment of the grounds of appeal is allowed.*
5. *Appellant must file and serve an amended notice of appeal and amended grounds of appeal, within 21 days hereof.*
6. *Failure to comply with order [5] will result in summons for the amendment of the grounds of appeal being dismissed without further orders.*
7. *The appellant is directed to act expeditiously to have the appeal ready for hearing before the Full Court in terms of the Court of Appeal Act and Practice Directions.*
8. *Costs lie where they fall.*




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Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

MIQ Lawyers for the Appellant
Lajendra Lawyers for the Respondent