

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No.: HBC 17 of 2006

(On appeal from the Decision of Abeygunaratne J delivered on 25 September 2013 at the High Court at Lautoka in Civil Action HBC No.: 17 OF 2006)

BETWEEN: **VIJAY PRAKASH** of Lautoka, Joiner.

APPLICANT
(Original Plaintiff)

A N D: **USMAN ALI** of Brisbane, Australia.

RESPONDENT
(Original Defendant)

Counsels: Ms Lidise.V for Applicant/Plaintiff
 : Mr Naidu.D for Respondent/Defendant

Date of Hearing: 21/01/2014

J U D G M E N T

1. Summons for leave to appeal was filed on 16.10.2013 by the Applicant/Plaintiff and sought the following orders:
 - [i] That the leave be granted to appeal to the Court of Appeal from the decision and orders made by the Honourable Mr. Justice Lal S. Abeygunaratne on 25 September, 2013.
 - [ii] That the decision of the Honourable Mr. Justice Lal S. Abeygunaratne on 25 September, 2013 be stayed until the application for leave to appeal therefrom shall have been heard and decided.
 - [iii] That the Respondent individually and/or through his servants, agents, representatives be restrained from taking any action consequent to or

as a result of the decision and orders made by the Honourable Mr. Justice Lal S. Abeygunaratne on 25 September 2013 in particular:

(a) in commencing, ejectment or eviction proceedings against the Applicant from the premises on Lot 39 on DP 3367 containing 31 perches and 85/100th of a perch in the District of Ba under Certificate of Title No. 13605; or

(b) in selling or transferring ownership of all the land known as Lot 39 on DP No. 3367 containing 31 perches and eight five one hundredth of a perch in the District of Ba comprised under CT13605.

[iv] That in the event that leave to appeal is granted, the decision of the Honourable Mr. Justice Lal S. Abeygunaratne on 25 September 2013 be stayed until the appeal therefrom shall have been heard and decided by the Court of Appeal.

[v] That the costs of this application abide the result of the appeal or alternatively that each parties bear their own cost.

2. The said Application was made pursuant to Section 12 [2] [f] of the Court of Appeal Act and Rules and the Inherent Jurisdiction of the High Court.

3. The Applicant in his affidavit dated 16th October 2013 averred inter-alia the following:

3.1 That the Applicant was the Plaintiff in the proceedings in the Lautoka High Court. Civil Action No.: 017/2006 against Usman Ali the Respondent/Defendant.

3.2 That his Lordship Lal S. Abeygunaratne High Court Judge delivered the ruling in the High Court dismissing the summons filed on his behalf on 22nd March 2012 seeking variation of the Interlocutory Judgement dated 22nd February 2012 and summarily assessed costs in the sum of \$3000 payable to the Defendant and determined that the Unless order (a) on the said Interlocutory Judgement should be activated and accordingly struck out the Applicants action as well as the Respondents counter claim thereby dismissing the proceedings entirely.

- 3.3 That the order was sealed on 26th September, 2013 and served on the Applicants Solicitors Young and Associates on or about 1st October 2013.
- 3.4 Having been advised by Applicants Solicitors he verily believe that there are high prospects of successfully appealing the decision of 25th September 2013 and annex proposed Notice of Motion and Grounds of Appeal marked VP- 3.
- 3.5 That the High Court action was instituted by Applicant’s former Solicitors through Writ of Summons filed on 26th January 2006 and that the defendants filed a Defence and Counter Claim through his solicitors on or about 31st May 2007. Applicant solicitors filed a Reply to Defence and Defence to Counter Claim on or about 14th September, 2007.
- 3.6 During the course of the High Court proceedings the Respondent through his solicitors had filed an application on 8th September 2010 seeking to struck out Applicants claim on several grounds.
- 3.7 The application was dealt with on or about 8th September, 2010 the date upon which the trial was schedule to commence before former Honourable Mr. Justice Yohan Fernando.
- 3.8 Following submissions made on behalf of both parties Interlocutory Judgement was delivered on 22nd February 2013 dismissing the Respondents application but proceeded to make unless orders against the Applicant. The first of which was as follows;
- “(a) Unless the Plaintiff deposit in the Principal Registry [Suva High Court] the alleged Will referred to at paragraph 5 of the Statement of Claim with a copy of the judgement attached within 30 days and submit proof of having done so, the plaintiffs action and the Defendants Counter claim shall stand struck out and dismissed and,”*
- 3.9 That the Respondent did not seal the Interlocutory Judgement until 16th April 2012.
- 3.10 To comply with unless order (a) the Applicant attempted to locate his mothers will searching through all his mother’s personal records at home and the Applicant verily before that his Solicitors conducted searches at both Private Registry in Suva and the Deed section of the

Registrar of Titles office in Suva result of which indicated that the said Will had not been deposited with either office.

- 3.11 That the Applicant made inquiries with his siblings and was informed that none of them had a copy of his mother's will and as a result he informed his solicitors that he was unable to locate even a copy of his mother's will.
- 3.12 That his Solicitors on 22nd March 2012 filed a summons seeking that *“paragraph (a) of the Judgement of 22nd December 2012 be varied and deleting the requirement for him to deposit the will referred to on the paragraph 5 of the Statement of Claim and enable him to apply for letters of Administration in respect to Estate of Paan Kumari.”*
- 3.13 That the matter was called on 11th September 2013 before Honourable Justice Abeygunaratne and the Counsels for both parties indicated that they had no objection to his Lordship delivering the ruling on the matter based on the written submission that had been filed.
- 3.14 Thereafter Justice Abeygunaratne delivered his ruling on 25th September, 2013 thereby dismissing the application for variation of the Interlocutory Judgement (unless order) and struck out his claim entirely.
- 3.15 That he verily believe that the effect of the decision has substantially determined his rights in the High Court without affording him the opportunity of having his claim determined through trial. He was informed by his solicitors and verily believe that the intended appeal raised questions of general principles and importance relating to the public interest in the finality of litigation.
- 3.16 The applicant strongly believe that the Respondent who according to the Registrar of Titles office is registered as the owner of the property comprised Lot 39 on DP3367 under Certificate of Title No 13605 the ownership of which formed the basis of his claim on the High Court action will soon take enforcement proceeding against him and he will suffer irreparable harm if they are forced to leave the property.
- 3.17 The Applicant also fear that the Respondent may transfer ownership of the Property as a result of which he believe the appeal if leave is granted will be rendered nugatory.

The Submissions

4. On the day of hearing Ms Lidise appearing for the Applicant submitted a written submission and both Ms Lidise and Mr Naidu made oral submissions to Court. Mr Naidu also submitted that he is relying on the written submissions filed earlier.

Whether the Order is an interlocutory order or a final Order

5. I will first deal with the question whether the order delivered on 25th September 2013 is an Interlocutory order or a final order. Leave of this court is required under Section 12 (2) (f) of the Court of Appeal act only when an order is an interlocutory order.
6. There are two approaches to determine whether an order or a judgement is interlocutory or final.

They are:

- i) The order approach and
- ii) The application approach

In Salaman V Warner (1891)1 QB 734 it was held that a" *final order is one made on such application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final on interlocutory depends upon the nature of the application or proceeding giving rise to the order not upon the order itself.*"

This was referred to as the application approach.

7. The Courts of Fiji has adopted the application approach to determine whether an order or judgement is final or interlocutory. **Vinod Raj Goundar v The Minister of Health AB U75 of 2006 S.**
8. If the Applicants/Plaintiff application to vary unless order (a) in the Interlocutory Judgement was allowed it would clearly be an interlocutory order. It would not have finally determined the matter. Therefore, I determine that the order pronounced by me on 25th September 2013 is an Interlocutory order; as such leave to appeal is necessary before an appeal will lie to the Court of Appeal.

Relevant factors in considering leave

9. Relevant factors to be considered on granting leave are as follows:
 - a) Whether there are exceptional circumstances warranting the grant of leave and the prospects of succeeding.
 - b) Whether the decision of 25th September 2013 determines the substantive rights.
 - c) Whether if leave is granted a substantial injustice will be caused to one of the parties.
10. The onus is on the Applicant to establish that the proposed appeal has reasonable prospect of succeeding and there are exceptional circumstances warranting the grant of leave.
11. I accept the submission of the Applicants Counsel as regard the Applicants substantive rights being determined by order dated 25th September 2013. If the unless order (a) in the Interlocutory Judgement dated 22nd February 2012 was varied deleting the requirements for the Applicants/Plaintiff to deposit the will referred to in paragraph 5 of his Statement of Claim, applicant would have got the right of applying for letters of Administration in respect of the Estate of Paan Kumari.

Had he obtained the Letters of Administration he would have got an opportunity to proceed with the matter and got a Judgement on merits of the case.
12. Therefore whether an order can be pronounced to determine to substantive rights of the Applicant without determining such rights on merit is a serious questions for adjudication.
13. In considering the facts leading to this application it is my view that there are meritorious grounds for an Appeal.

Application for Stay.

14. In **Natural Waters of Viti Limited vs Crystal Clear Mineral Waters [Fiji] Limited ABU 0011 of 2004S** the Court of Appeal has considered the factors that should be taken into consideration in granting stay of execution.

15. The Court of Appeal has referred to **Dymocks Franchise System [NSW] Pty Ltd v Bilgola Enterprises Ltd [1999] 13 PRNZ 48**, which gives a non-comprehensive list of factors taken into account by Courts in considering a stay. The said list is as follows:

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

These principles were applied by the Honourable Chief Justice sitting as the President of the Supreme Court In **Native Land Trust Board v Lal (2012) FJSC 1; CBV0009.11 (20th January 2012)**

16. If a stay is not granted the Respondent will have the right to issue the Applicant with a Notice to vacate. Being the registered proprietor of the Land the Respondent will also get an opportunity to transfer the land if he gets vacant possession.

17. Therefore I conclude that if a stay is not granted the appeal will be rendered nugatory.

18. Without a stay being granted the Applicant/Plaintiff can be evicted from the property which will be harmful to him. There is no evidence before me to indicate that the Respondent/Defendant will be injuriously affected if a stay is granted.

In my views the overall balance of convenience of all the parties will be maintained if a stay is granted.

Orders:

19. Accordingly I make the following Orders:

1. The application for leave to appeal is allowed.

2. The application for stay pending the hearing and determination of the appeal is granted.
3. Costs of this application shall be costs in the appeal.

Lal S. Abeygunaratne
Judge.

14.02.2014