

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 94 of 2006

BETWEEN: ALI'S CIVIL ENGINEERING LIMITED a limited liability Company having its registered office at Labasa and carrying on business in Suva and elsewhere.

FIRST PLAINTIFF

A N D : VITIANA TIMBERS (FIJI) LIMITED a liability company having its registered office at Labasa and carrying on business in Suva and elsewhere.

SECOND PLAINTIFF

A N D : HABIB BANK LIMITED a banking body duly incorporated under the law of the Companies Act 1913 having its registered office at Habib Bank Plaza 1.1 Chandigar Road Karachi and carrying on the business of banking in Fiji and elsewhere.

FIRST DEFENDANT

A N D: CHALLENGE ENGINEERING LIMITEDa limited liability company having its registered office at Suva.

SECOND DEFENDANT

A N D: NATIONAL BANK OF FIJI trading as COLONIAL NATIONAL BANK having its registered office in Suva.

THIRD DEFENDANT

A N D : DIRECTOR OF LANDS AND SURVEYOR GENERAL

FOURTH DEFENDANT

A N D : REGISTRAR OF TITLES

FIFTH DEFENDANT

A N D : ATTORNEY GENERAL

SIXTH DEFENDANT

Date of Hearing: 9<sup>th</sup> July, 2015 and 24<sup>th</sup> July, 2015

Date of Decision: 31<sup>st</sup> August, 2015

## Introduction

- [1] The plaintiff filed writ of summons seeking declaration on the validity of the registered Mortgage No 8465 and the mortgagee sale made pursuant to that instrument of mortgage. The declarations were sought on the basis of admissions made by the 1<sup>st</sup> Defendant in the statement of defence and the same admissions were averred in affidavits. The court granted the orders sought by the said summons on the basis of the said admissions. The court also observed that there was no valid written consent of the Director of Lands (4<sup>th</sup> Defendant), when the Mortgage 8465 was executed in terms of Section 13 of the Crown Lands Act. The requirement for the consent of 4<sup>th</sup> Defendant cannot be clearer in said provision which stated 'without the **written** consent of the Director of Lands **'first had and obtained'** that no mortgage should be **'lawful'**. The judgment made on 11<sup>th</sup> March, 2013 declaring that Mortgage No 8465, null and void was appealed to the Court of Appeal and the 2<sup>nd</sup> Amended Summons for Stay seeks an order against the Plaintiff not to deal with the land described in the Mortgage No 8465.

## Analysis

- [2] The 2<sup>nd</sup> Amended Summons for Stay seeks following order;

*'That the Plaintiffs do not sell , dispose, transfer, assign, mortgage or encumber in any manner the State land described as Lot 1 SO 4379 State Foreshore in the ..... until delivery of judgment of the Court of Appeal in Civil Appeal ABU 007 of 2014 .....*'

- [3] According to the summons it was made pursuant to;

*'Section 20(1)(e) of the Court of Appeal (Amendment) Act 1988 ; Rule 26(3) and Rule 43 of the Court of Appeal Rules and or Order 45 rule 10 of the High Court Rules 1988 and inherent powers of the court.'*

- [4] The Section 20(1) (e) of the Court of Appeal Act (cap 12) states as follow:

*'20(1) A judge of the Court may exercise the following powers of the Court-*

*(a).....*

*.....*

*(e) to stay execution or make an interim order to prevent prejudice to the claims of any party pending an appeal.' (emphasis is mine)*



The above provision is applicable to single judge of the Court of Appeal. Interpretation section of the Court of Appeal Act defines the word 'the Court' exclusively as to mean only the 'Court of Appeal'. It cannot be interpreted in inclusive manner to mean High Court.

[5] **The Court of Appeal Rules 26(3)** states that whenever an application can be made either to Court of Appeal or to High Court it should first make the application to the High Court. So, in order to invoke jurisdiction of the High Court in terms of said provision of law there should be concurrent jurisdiction to Court of Appeal and also to the High Court. I have not been pointed out any provision that empowers High Court to make an 'interim order' pending an appeal in the Court of Appeal. An 'interim order' has wider application than a stay of judgment or execution which the High Court exercises discretion, in special circumstances (see *March v Bank of Hawaii (2003) 1 FLR 230*).

[6] **Order 34 of the Court of Appeal Rules** deals with the stay of execution pending an appeal. There is no stay of execution of appeal in this case as the judgment delivered on 11<sup>th</sup> March, 2013, only confined to two declarations and there was no need of execution of such declarations(See *Prasad v Republic of Fiji (No 5) [2000] FJHC 273; [2000] 2 FLR 115*). So the Order 34 of the Court of Appeal Rules has no application to the present summons.

[7] The next provision of law that was relied in the 2<sup>nd</sup> Amended Summons filed on 16<sup>th</sup> July, 2015 is Order 45 rule 10 of the High Court Rules of 1988 and it states as follows;

*'Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just'.*

[8] The above provision O .45 r.10 applies to the stay of execution of the judgment or order if there are matters that occurred since the date of delivery of the decision, but there were no allegations of matters arising '*since the date of judgment or order*'. The Order 45 rule 10 cannot be invoked in support of the stay order sought by the 1<sup>st</sup> Defendant.

[9] In *Prasad v Republic of Fiji (No 5) [2000] FJHC 273; [2000] 2 FLR 115* (decided on 20<sup>th</sup> December 2000)(unreported) Justice Gates (as His Lordship then was) held;

## 'Principles for Stay

*It is well known that the litigant once successful should not lightly be deprived of the fruits of his successful litigation: The Annot Lyle (1886) 11 P.D. 114 at 116 CA; Monk v. Bartram [1891] 1 QB 346. The power of the Court to grant a stay is discretionary: The Attorney-General v. Emerson & Others (1890) 24 QBD 56; and it is all unfettered discretion Winchester Cigarette Machinery Ltd. v. Payne and Anor. (No. 2) (1993) TLR 647 at 648.*

*If a stay was not granted by the Court at the time of making the order now appealed against, the applicant must show that special circumstances exist as to why a stay should now be imposed, and the successful litigant in effect held back from his remedy, Tuck v. Southern Counties Deposit Bank (1889) 42 Ch.D. 471 at 478 per Kay J; Atkins v. G.W. Railway (1886) 2 TLR 400; Barker v. Lavery (1885) 14 QBD 769. In the Winchester Cigarette case (*supra*) at 648 Lord Justice Hobhouse put it "The appellant had to show some special circumstances which took the case out of the ordinary. There is no suggestion that as a result of these declaratory orders the State will face economic ruin if the stay were not granted Lynotype-Hell Finance Limited v. Baker [1992] 4 All ER 887. Nor is this a case where an award of money is to be honored and paid over by the State which it has no hope of recovering if successful on appeal: Atkins v. Great Western Railway Co. (1886) 2 TLR 400; Barker v. Lavery (1885) 14 QBD 769, CA.*

*In the Winchester Cigarette case (*supra*) at 648 Lord Justice Ralph Gibson said the modern approach to stay was:*

*"... a matter of common sense and a balance of advantage. But in holding any such balance, full and proper weight had to be given by the court to the starting principle that there had to be a good reason for depriving a plaintiff from obtaining the fruits of a judgment."*

- [10] The judgment of the court made on 11<sup>th</sup> March, 2013 in pursuant to summons for judgment on admission, are as follows

*'judgment is entered for declaration the Mortgage registered as No 8465 is ab initio null and void.*

*Judgment is entered for declaration that the purported mortgage sale under the said Mortgage No 8465 is void'*



[11] The said declarations were made due to absence of prior written consent of the Director Land that was found wanting at the time of execution of the mortgage and also unreserved admission by the 1<sup>st</sup> Defendant that it had materially altered the said mortgage without the concurrence of the parties to it. The declarations of the court were based on the admissions and the grounds of appeal do not deny the plain and uncontroverted facts on which the judgment was made. There are no special circumstances to exercise discretionary power of granting the orders sought in this application.

### **Conclusion**

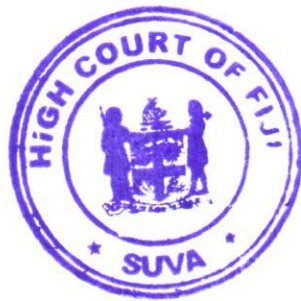
[12] The Plaintiff had obtained only two declarations in pursuant to the summons for judgment on admission. Both these declarations cannot be stayed as they were only declarations. The judgment delivered only confined to said declarations which were sought in the said summons for judgment on admission. The provisions of law that were expressly stated in the present summons have no application to the nature of the orders sought in the said summons. The orders sought in the 2<sup>nd</sup> Amended Summons for Stay, are in fact restraining orders against the Plaintiff, which may be considered as 'interim order' in terms of Section 20(1) (e) of the Court of Appeal Act, but this is a power expressly granted in Court of Appeal Act to the Court of Appeal. In my judgment there is no such express or implied power given to High Court to make 'interim orders' in the nature of orders sought in the "2<sup>nd</sup> Amended Summons for Stay". Even if I am wrong on that, the merits on the grounds of appeal does not warrant a stay. The declarations of the court are directly related to facts which are uncontroverted and admitted. The absence of the Director of Land's prior written consent at the time of the execution alone would make the document unlawful. Apart from that the 1<sup>st</sup> Defendant unreservedly admitted making material alterations to the said document. It should also be borne in mind that the Plaintiff could not deal with the land without the consent of the 4<sup>th</sup> Defendant. In the circumstances the application for stay is refused. Considering the circumstances of the case I will not be granting costs.

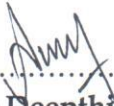
**FINAL ORDERS**

(a) The 2<sup>nd</sup> Amended Summons for Stay filed on 16<sup>th</sup> July, 2015 is struck off.

(b) No costs.

Dated at Suva this 31<sup>st</sup> day of August, 2015.



  
.....  
Justice Deepthi Amaratunga  
High Court, Suva