

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

HBC No.: 143 of 2011

BETWEEN : **SALOCCHNA LATA and MALTIK KUAR CHAND** both of
2/8 Hilltop Road, Manukau, Auckland, New Zealand, Internal
Banking Consultant and Retired respectively as the executor/rix
and trustees in the Estate of Tika Ram.

PLAINTIFF

AND : **BAL CHAND** of Opposite Engineers Army Camp, Cunningham
Road, Suva, Self Employed.

1ST DEFENDANT

AND : **LEKH RAM** of Lot 14 Nabitu Place, Caubati

1ST DEFENDANT

Counsel : **Mr. A. Nand for the Plaintiff**
Ms. Karan N. A. for the 1st Defendant

Date of Hearing : **2nd October, 2014**

Date of Decision : **9th February, 2015**

DECISION

INTRODUCTION

1. This is an application for stay of my judgment delivered on 13th February, 2014. The trial commenced on 3rd February, 2014. The present application for stay was filed on 6th June, 2014. The Defendant relied on a purported last will made in 2010, five days prior to the demise of the testator, and there was a will made in 2007 and the statement of defence admitted the existence of said will made in 2007. Not only there was a report from hand writing expert disproving the signature of the will made in 2010, but the hand writing expert gave oral evidence in court and elaborated the reasons for the opinion expressed in the report. After considering all the evidence produced the purported will made in

2010, was not accepted by the court. There was a caveat filed by the 2nd Defendant against the grant of the probate of the estate, but there was no appearance for the 2nd Defendant and the caveat was also struck off.

ANALYSIS

2. In the *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (decided 18 March 2005) (unreported) Fiji Court of Appeal dealt with the principles in granting stay of order of the court and held,

'Principles on a stay application

[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005):

"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful": Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.

The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48, at p 50 and *Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission* (1993) 7 PRNZ 200:

- (a) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
- (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."(emphasis added)*

3. At the outset it is pertinent to note that it is not a comprehensive list, and the consideration should be to ‘carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful’.
4. The Defendant admitted the will made in 2007 upon which the Plaintiff’s claim was made. The Defendant was unable to prove the will made in 2010. The present application for stay was made four months after the delivery of the said judgment.
5. If a stay is not granted the Defendant’s proposed appeal will not be made nugatory. The grant of the probate to the executor stated in the will made in 2007 will save a property of the estate from being put for mortgagee sale, according to the affidavit filed by the Plaintiff. At the same time the estate was unadministered for more than 4 years due to the present litigation and needs due administration without delay. This will not only save the estate property but also it will benefit all the beneficiaries of the estate including the Defendant who is also a beneficiary of the estate. The refusal of stay would benefit all the beneficiaries including the Defendant as the refusal will assist the distribution of the estate according to the will made in 2007.
6. The Plaintiff will injuriously affected if the stay is granted. As stated one of the estate property is now mortgaged to a commercial bank and it accrues interest for each day and this has to be settled and for that Plaintiff needs to exercise the rights derived from the will made in 2007. Further delay would make irreparable loss to the estate that will have an impact on all the beneficiaries of the said will including the Defendant.
7. The bona fides of the Defendant is also a question to be considered. The Defendant was not represented by a legal practitioner, but he had come to court with a friend who assisted him to conduct the hearing as the Defendant. Though the Defendant had filed a notice of appeal within the stipulated time there was no application for stay for nearly 4 months. The Defendant was unable state a reason for the grant of stay. The Defendant is

clearly abusing the process and trying to delay the due process of law and if a stay is granted this action would prolong.

8. If a stay is granted the legal executor will further prevented from dealing with the property of the estate. This will adversely affect any mortgaged property and sometimes such property would be lost for the estate due to a mortgagee sale and interest is accrued daily to the estate. So the rights of third parties like other beneficiaries and also the bank would adversely affected.
9. The overall balance of convenience also lies in favour of the Plaintiff in refusing the stay. The grant of stay would further frustrate the beneficiaries of the estate and delay the due administration of the estate according to the wishes of the deceased. Unadministered estate would be open for abuse by persons who are in physical possession or control over them. Due administration of estate property is essential without inordinate delay and there is no justification in granting the stay of judgment considering all the circumstances of the case.

CONCLUSION

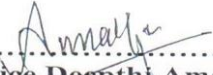
10. For the abovementioned reasons I refuse the grant of stay and the cost of this application is summarily assessed at \$750.

FINAL ORDERS

- a. The application for stay refused.
- b. The cost of \$750 to be paid by the Defendant to the Plaintiff.

Dated at Suva this 9th day of February, 2015.




Justice Deepthi Amaratunga
High Court, Suva