

IN THE HIGH COURT OF FIJI

WESTERN DIVISION AT LAUTOKA

DISTRICT REGISTRY
NO: HBC 47 OF 2012L

IN THE MATTER of
Section 169, 170 and
171 of the Land
Transfer Act Cap 131

BETWEEN : **PARSHU RAM** of 10 Covuli Street, Simla, Lautoka, Retired
School Teacher

PLAINTIFF/RESPONDENT

A N D : **DAYA NIDHI** of 1 Kama Street, Simla, Lautoka

DEFENDANT/APPLICANT

Appearance : Applicant in person
: R Pal Chaudhary for respondent

Date of Hearing : 14 March 2016

Date of Ruling : 8 April 2016

R U L I N G

Introduction

[01] This is an application filed by the defendant for stay on enforcement of judgment.

[02] By way of summons filed 8 February 2016 (*the application*) the defendant seeks an order that a stay of the judgment of the Honourable Mr. Justice R.S.S. Sapuvida dated 27 January 2016 in the action be granted pending determination of the appeal. The application is supported by an affidavit sworn by the defendant.

[03] The plaintiff strongly opposes the application.

[04] At the hearing, both parties made oral submissions. In addition the plaintiff has also filed his written submissions.

The Setting

[06] In March 2012, Parshu Ram, the plaintiff as the last registered proprietor of the property (house) situated at No.1, Kama Street, Simla, Lautoka, took out summary proceedings against Daya Nidhi (his son), the defendant pursuant to s.169 of the Land Transfer Act seeking vacant possession of the property. In August 2012 the Master after hearing the matters on affidavit evidence delivered a ruling and concluded that the defendant had an arguable case to remain in possession and made orders that the case be tried out as if begun by writ under Order 28 rule 9 of the High Court Rules 1988 and section 172 of the Land Transfer Act.

[07] The summary application filed by the plaintiff was then treated as a writ of summons. The trial on the writ came up before Hon. Justice Sapuvida. The parties gave *viva voce* (oral) evidence. On 27 January 2016 Justice Sapuvida delivered judgment in favour of the plaintiff. The defendant appealed the judgment to the Fiji Court of Appeal. In the current application the defendant seeks a stay on the execution of the judgment pending determination of the appeal.

The Law

[08] Order 34 of the Court of Appeal Rules ('CAR') would be applicable to an application for stay of execution. That rules so far as material provides:

'34.- (1) Except so far as the court below or the Court of Appeal may otherwise direct-

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) *no immediate act or proceeding shall be invalidated by an appeal.*

(2) ...'

The Governing Principle

[09] The relevant questions to be asked when considering an application for stay of execution include:

- (a) *If a stay is refused, what are the risks of the appeal being stifled?*
- (b) *If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?*
- (c) *If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?*

(See ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 1915, LTL 18/12/2001)

[10] In ***Reddy's Enterprises Ltd v Governor of the Reserve Bank of Fiji*** [1991] FJCA 4; Abu0067d.90s (9 August 1991), Fiji Court of Appeal took into account the following factors in considering a stay application:

- i) The nature and purpose of appeal;*
- ii) Prejudice to the parties; and*
- iii) Balance of convenience.*

The Grounds Appeal

[11] It is important to set out the grounds of appeal so that the court could identify the nature and the purpose of the appeal.

- '1. The Learned Trial Judge erred in law and in fact in holding that the Appellant was unable to establish any form of proprietary estoppels to say that the Respondent made any type of a promise or undertaking;

2. The Learned Trial Judge erred in Law and in fact in holding that the Appellant was unable to establish the pecuniary contributions towards the subject property;
3. The Learned Trial Judge erred in law and in fact in not being able to establish that an assurance had been given and that could be relied on and that the Appellant did rely on which created an estoppel and as such the Respondent was Estopped from vacating the Appellant;
4. The Learned Trial Judge erred in law and in fact in not being able to establish the doctrine of promissory estoppel which prevented the Respondent from acting in a certain way because a promise was made and the Appellant relied on that promise and acted upon it;
5. The Learned Trial Judge erred in law in fact in not taking into consideration the evidence adduced by the Appellant whereby he was assured by the Respondent that he would get the subject property and hence it was an implied agreement.
6. The Learned Trial Judge erred in law and in fact in not taking into consideration all the materials fact that the appellant had submitted before the Court and hence there was a substantial miscarriage of Justice.
7. That the appellant reserves the right to add further grounds of appeal upon receipt of Court record'

Discussion

- [12] The defendant applies for an order staying the execution of the judgment delivered against him in that he has been ordered to deliver up possession of the property to the plaintiff.
- [13] The defendant has appealed the judgment to the Court of Appeal. The hearing of the appeal is pending in the Court of Appeal.
- [14] Filing an appeal will not operate as a stay of execution or proceedings under the decision of the court below unless the court below or the Court of Appeal otherwise may order (see O.34, CAR).
- [15] The defendant believes that he has valid grounds of appeal and there is substantial prospect that the appeal will be upheld as set out in the grounds of Appeal.

[16] The defence advanced by the defendant for resisting the plaintiff's claim for immediate vacant possession of the property was that of proprietary estoppel.

[17] The defendant's appeal is against the judgment of Justice Sapuvida granting vacant possession of the property to the plaintiff. Under paras 29 & 30 of his judgment Justice Sapuvida states:

'29. **All what Nidhi stated in his affidavit** to say that he helped his father Ram's farm, helped the construction and improvement of the house in dispute, helped in the sugar cane farm and so on **are utter false** when it was revealed the fact that the period Nidhi referred to that effect was in 1967, and whereas it was blatantly revealed that Nidhi was a small child of just 5 years in 1967 during the period which Ram carried a farm. **No evidence** to accept Nidhi's version **that he helped building up the house and as Nidhi said that he even financially supported his father Ram to build the disputed house.**

30. *On the basis of foregoing reasons, I cannot hold that Nidhi has an arguable case against his father Ram. Nidhi has not established any form of evidence to prove the proprietary estoppel though he discussed the theory in detail in his written submissions supported with several case law authorities relevant to the theory he relied on.'*
(Emphasis provided)

[18] I have carefully considered the grounds of appeal. They do not raise any point of law of general public importance or serious question of law and fact to be determined by the Fiji Court of Appeal. The grounds of appeal simply attack the finding of Justice Sapuvida based on the evidence given in court by the parties. He has concluded that there was no evidence establishing proprietary estoppel. I would therefore reject the contention advanced by the defendant that his appeal will be upheld on the grounds of appeal as he has formulated.

[19] It seems to me that the purpose of the appeal is to delay the execution of the judgment.

[20] The general rule is that the proceedings under a judgment should not be stayed pending an appeal unless on special grounds (See *Shaw v Holland* (1900) 2 Ch. 305 C.A.).

[21] On special circumstances, Lord Esher, M.R. in *Monk v Batman* (1986) 1 Q.B. 346 said:-

‘It has never been the practice in either case to say execution after the judge at the trial has refused to grant it unless special circumstances are shown in exit. It is impossible to enumerate all the matters that might be considered to constitute special circumstances: **but it may certainly be said that all allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution.**’
(Emphasis added).

[22] Under para 7 of his affidavit in support the defendant states that, a grant of stay will not be prejudicial to the Plaintiff. However if a stay is not granted the appeal would be nugatory in that in the event the Honourable Justice of Appeal in the Fiji Court of Appeal uphold the Grounds of Appeal, should the Plaintiff sell or transfer the said property, it will be an impractical task to gain possession of the subject property.

[23] Conversely, Mr Chaudhary, counsel for the plaintiff submits that, a grant of stay will be prejudicial to the plaintiff. He has been deprived the use and income from his substantial house since 2010-an income of at least \$1,000.00 a month. A large substantial double flat house is fully occupied by the defendant. He needs to vacate immediately. If a stay is refused the defendant will not be ruined. He should find another place to stay. All he wants is to continue staying in the plaintiff’s house free.

[24] The defendant has been in possession of the property since 2010 without payment of any rent. The plaintiff's right to enjoyment of the property has been deprived.

[25] In my analysis of the grounds of appeal, I find that the grounds appeal fail to raise any point of public importance or serious questions of law to be determined by the Fiji Court of Appeal. The grounds of appeal barely attempt to challenge the judgment pronounced based on the credibility of the evidence adduced in the trial. The defendant fails to establish that there are special circumstances to stay execution of the judgment. The stay of execution would be prejudicial to the plaintiff in the circumstances.

[26] For the foregoing reasons, I would refuse to say execution of the judgment dated 27 January 2016 pending determination of the appeal. I would order the defendant to pay summarily assessed costs of \$400.00 to the plaintiff.

The result

[27] The result of this ruling is that:

- i. Application to stay execution of the judgment pending determination of appeal is refused.
- ii. The defendant will pay summarily assessed costs of \$400.00 to the plaintiff.

M H Mohamed Ajmeer
9/4/16
.....
M H Mohamed Ajmeer

JUDGE



At Lautoka

08 April 2016