

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 77 of 2014

BETWEEN : **TAMARISI SOPA** aka **SOPHIA YOUNG** of Lot 6 Jai
hanuman Road, Bhindi Subdivision, Vatuwaqa Industrial,
Suva, Fiji, Director.

PLAITNIFF/APPLICANT

A N D : **POPULAR PROPERTIES LIMITED** a limited liability
company incorporated under Companies Act having its
registered office at Lautoka, Fiji.

DEFENDANT/RESPONDENT

Counsel : Ms A Narayan for applicant

Mr V Sharma for respondent

Date of Hearing : 07 June 2016

Date of Ruling : 13 July 2016

R U L I N G

INTRODUCTION

[01] This is an application for a stay of execution filed under Order 45, rule 10 of the High Court Rules (as amended) 1988 ('HCR').

[02] By summons dated 26 August 2015 (*the application*) the applicant seeks stay of execution of the order made dissolving the injunction orders granted ex parte by Abeygunarate, J (as he then was) on 23 May 2014.

[03] The application is supported by an affidavit sworn by the plaintiff on 9 March 2016. The applicant has also filed an affidavit in reply to the affidavit in opposition filed by the respondent.

[03] The respondent has filed an affidavit in opposition on 10 March 2015.

[04] At hearing, both parties tendered their respective written submissions.

BACKGROUND FACTS

[05] The background facts are briefly as follows: The Plaintiff, Tamarisi Sopa (*the applicant* in these proceedings) is operating a business under the name and style of All Make Auto Spares Accessories ('AMASA') in Suva. She is also a Director of All Make Auto Spares Accessories & Civil Works Limited ('AMASACWL'), a limited liability company, along with Mohammed Hakim Khan as another Director of the Company.

[06] AMASACWL entered into an agreement to purchase the property comprised in iTLTB Lease No. 12856 (*the agreement*) from the Defendant, Popular Properties Limited ('PPL'), (*the respondent* in these proceedings). The agreement amongst other things contained a clause on sale by way of a nominee (*the nominee*) clause, which was expressed as follows:

"18. NOMINEE

The Purchaser may upon informing the Vendor nominate another person or entity to exercise any rights conferred by this Agreement provided that Purchaser shall not by such nomination be released from her obligation to observe and perform her obligations under this Agreement."

[07] Following the execution of the agreement, the parties executed Transfer Instrument, Application for Consent of iTLTB. The Plaintiff paid the Stamp Duty duly assessed and the stamped documents were forwarded to the

Defendant to carry out the Capital Gain Tax ('CGT') process. The Defendant's Director Mohammed Nagif picked up the documents from the Plaintiff's solicitors office.

[08] Thereafter, The Defendant raised an issue on the consideration sum for the sale and purchase in particular on the issue of VAT. That led to a dispute between the parties and the sale transaction then came to a standstill.

[09] The plaintiff brought writ action against the defendant seeking specific performance. At the same time the plaintiff also filed an ex parte application for injunction orders to restrain the defendant from dealing with the property pending determination of the substantive action. The court hearing the ex parte application granted the injunction sought by the plaintiff. The defendant thereafter made application for dissolution of the injunction. That application proceeded to hearing and on 4 August 2015 Abeygunaratne, J made order dissolving the injunctive orders granted ex parte. Being aggrieved with the decision, the plaintiff filed an application for leave to appeal in the Fiji Court of Appeal. The leave application is waiting determination. Pending the leave application, the plaintiff has filed the current application in this court for stay of judgment delivered on 4 August 2015 dissolving the injunction.

THE LAW

[10] The applicant has invoked HCR, **O.45, r.10** Rule 10 provides:

'10. 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 (Emphasis provide).’

THE GOVERNING PRINCIPLE

[11] An application made under HCR, O.45, r.10 appears to be similar to an application for stay of execution pending appeal under 34 (1) to the Court of Appeal Rules. Therefore cases decided stay of execution pending appeal may be relevant to such an application.

[12] In **Rt Solomoni Naga & 11 Ors v Fiji Electricity Authority** [2005] HBC 237/02S 31 October 2005, Winter, J set out the principle relevant to a stay of execution application as follows:

1. A successful litigant should not be deprived of the fruit of his litigation.
2. The power to grant a stay is discretionary.
3. The power is unfettered.
4. The applicant need to show special circumstances.

[13] The Fiji Court of Appeal in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** (FAC Civil Appeal No. ABU 0011 of 2004S (18 March 2005 at page 3) outlined the relevant principle on applications for stay pending appeal as follows:

“The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, Mc Gechan 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 PRNC 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"*

DISCUSSION

[14] The applicant is seeking to stay the execution of the order of Abeygunaratne made on 4 August 2015 dissolving the injunctive orders obtained by the applicant on 23 May 2014. The injunctive orders granted ex parte, amongst other things, restrained the defendant from removing/vacating or issuing any quit notice against the plaintiff to vacate from the subject property.

[15] The order issued dissolving the ex parte injunction is an interlocutory decision. There is no direct appeal against an interlocutory order or judgment. Such an interim order or judgment may be appealed within 21 days (see CAR, 16).

[16] The applicant has made leave to appeal the interlocutory order of 4 August 2015 to the Fiji Court of Appeal. Currently, what is before the Fiji Court of Appeal is an application for leave to appeal, and not the appeal. The

applicant will be able to file his appeal only after the Court grants leave to appeal the impugned order.

- [17] An appeal will not operate as a stay of execution or of proceedings. However, this court or Court of Appeal may direct a stay of execution pending determination of the appeal (see CAR, O.34-(1)).
- [18] The granting or refusing of stay is in the absolute and unfettered discretion of the Court; and the Court will, as a rule only grant a stay if there are special circumstances (see *Fresh Fish Exporters (Fiji) Ltd v Wasawasa Fisheries Ltd* [1996] FJHC 124; HBG0004d.1992s (28 June 1996).
- [19] Although the application is filed under HCR, 45, r.10-a stay of execution on the ground of matter which have occurred since the date of judgment or order, it was argued like an application filed under CAR, O.34-(1).
- [20] The applicant has filed an application in the Court of Appeal seeking leave to appeal the order made dissolving the injunction granted in her favour. It appears that the applicant considers filing a leave to appeal application is a matter that has occurred since the date of judgment or order. It is not clear whether the applicant had sought a stay of execution in the application for leave to appeal filed in the Court of Appeal.
- [21] In *Comsol (Fiji) Limited v Horizon Storm Pty Limited* [2011] HBC 238 of 2010 (Ruling 11 March 2011), Hon. Justice Calanchini held:
- '... It not necessary to file appeal papers to be filed in the CA when application is made to the HC. But if the appellant had applied to the CA for stay, then application before HC should be withdrawn and dealt with by the CA at the same time'*
- [22] Counsel for the plaintiff/applicant submits that the defendant agreeing to the plaintiff being nominated to carry out the transfer process and then with rest of the stage of the transfer being carried out despite the Sale & Purchase Agreement deadline expiring, the plaintiff was led to believe that

the contract to sell on the defendant's part continues to exist. The defendant never gave any notice to terminate the agreement but wanted the agreement to be amended to state that the purchase price now was VAT exclusive.

[23] On the other hand, counsel for the defendant contends that the Sale & Purchase agreement is quite clear under cl. 7.3 that *'the property shall remain in possession of and be at the risk of the Vendor until the settlement date on which date possession and risk pass to the Purchaser.'* He continues to contend that the applicant will not be successful in its appeal, as all evidence suggests that the applicant should not have possession of the property and the applicant is only a tenant until the settlement was effected.

[24] It would be premature for me to consider the proposed ground of appeal, because there is no appeal pending in the Court of Appeal. The application that is pending in the Court of Appeal is an application for leave to appeal. The applicant could only file appeal if the Court of Appeal granted the leave. Therefore, I will not consider the proposed ground of appeal at this state and I will not form any prospective opinion on the success of the same.

[25] It appears that the applicant as a tenant occupies the property although it is a requirement under the Sale and Purchase Agreement that the defendant as the vender should have possession of the property-the subject matter of the action until settlement. The applicant currently is depositing the rent with the High Court Registry.

[26] Since the applicant has been occupying the property by virtue of an arrangement made between the parties, the applicant may be ejected by an order of the court, but not otherwise. If the defendant wants to get possession of the property back, it needs to bring action for that purpose.

[27] The interim injunction that was granted restrained the defendant amongst other things from vacating the plaintiff from the subject property.

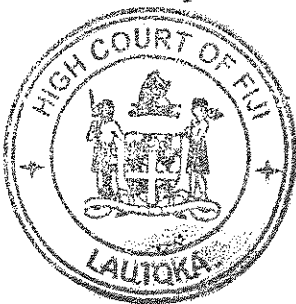
[28] As substantive relief the applicant had also asked for damages for breach of contract and for loss of business. In the circumstances, one cannot say the appeal would be rendered nugatory if a stay of execution is not granted pending appeal.

[30] The court will not grant a stay of execution of an interlocutory order pending appeal unless there are special circumstances. In this case I could not find any special circumstances to grant a stay pending appeal process.

[31] For all these reasons, I would refuse to grant a stay of execution of the interlocutory judgment of 4th of August 2015 pending determination of the appeal. I accordingly struck off the stay application filed 21 August 2015 with summarily assessed costs of \$500.00 in favour of the defendant.

FINAL OUTCOME

1. Stay application filed by the plaintiff is refused.
2. Applicant will pay summarily assessed costs of \$500.00 to the respondent.



Hallanger
13/7/16

M H Mohamed Ajmeer

JUDGE

At Lautoka

13th July 2016