

IN THE HIGH COURT

AT SUVA

CIVIL JURISDICTION

Civil Action No.: HBC 295 of 2015

IN THE MATTER of an Appeal from a Decision and/or Order and and/or Judgment of Master Vishwa Datt Sharma dated the 5<sup>th</sup> September, 2016 in the Civil Action No. HBC 295 of 2015.

BETWEEN : DEVINA DEVI PRASAD both of Lot 23, Nukunuku Place, Navosai

APPELLANT/DEFENDANT

AND : DEEP SINGH of Razak Road, Lautoka.

RESPONDENT/PLAINTIFF

Counsel : Ms. Chetty K. for the Respondent -Plaintiff (the Plaintiff)  
Mr. Young M. for the Appellant - Defendant (the Defendant)

Dates of Hearing : 13<sup>th</sup> October, 2016

Date of Decision : 14<sup>th</sup> October, 2016

### DECISION

#### INTRODUCTION

1. This is an application for stay of the Decision of the Master delivered on 5<sup>th</sup> of September, 2016. The said decision relate to an application for possession made in terms of the Section 169 of the Land Transfer Act (Cap 131). The property belongs to the ex-husband of the Plaintiff. In the property distribution the Plaintiff obtained it in the Magistrate's Court and in appeal it was affirmed. Apart from distribution of property, there is a pending application before the Magistrate's Court where the Learned Resident Magistrate had made an order for the Defendant to remain possession of the said premises (matrimonial home) until order of the court. This order was annexed by the Defendant in the affidavit in opposition filed before the Master, and the Plaintiff in the affidavit in reply was silent about it. There was no

order to vacate or vary that order and despite being noticed about it the Plaintiff proceeded with the matter before the Master.

2. The Master in his decision delivered on 5<sup>th</sup> September, 2016 did not mention about the order made by the Learned Magistrate on 12<sup>th</sup> September, 2013 in the maintenance application before the Magistrate's Court. The Master granted the vacant possession to the Plaintiff, but stayed the execution of the same for one month. The time period for one month had lapsed.
3. The Plaintiff had now sought to execute the said orders and to obtain possession. The Defendant having appealed the decision of the Master, seeks to stay the said decision until final determination of the Appeal.
4. Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13; ABU0011.2004S (18 March 2005)(Unreported) Fiji Court of Appeal laid down the criteria for granting stay 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)

5. The above list is not a comprehensive list and the competing consideration of rights of the successful party to enjoy the fruits of the judgment and effect of that on the appellant if the appeal is successful needs careful evaluation. The above list though not comprehensive is a guide in that evaluation process.

6. I would deal each of the above criteria, briefly for the purpose of this application in the following manner.

- a. Whether the Appeal would render nugatory - the Defendant is the ex-wife of the Plaintiff. She lives in the said property in pursuant an order of the Learned Magistrate, in her application for Maintenance. If she is evicted then her Appeal would be made nugatory as it would dispossess her and child of the residence they had been living for a long period of time. Even if I am wrong on that, this is not the determinative factor. The counsel for the Plaintiff said that fruits of the judgment need to be enjoyed. By the same token, there is a competing interest to maintain status quo, if there is more than an arguable case for the Appeal to be successful.
- b. Whether Successful party will be injuriously affected the Plaintiff is presently residing and working in Lautoka and he would not be injuriously affected by the stay. It should be noted that any party who has obtained a judgment would be affected to some extent by the grant of a stay, but this again has to be weigh with the degree of injury to the said party. At the hearing there was no argument raised on this issue by the counsel for the Plaintiff.
- c. The bona fides of the Appeal-The Defendant's position is that the Master did not mention the order of the Magistrate in the decision delivered on 5<sup>th</sup> September, 2016. I cannot see any reasoning regarding it in the decision. Even the Plaintiff in the affidavit in reply had failed to address this order made by the Learned Magistrate in the application for maintenance. There are merits on that ground and the success of that needs to be determined in the hearing. If the said ground is successful the Master's decision will be quashed.
- d. The effect on third parties- I do not have material on this aspect but I was told at the hearing that there is one child who is still studying and residing in the said premises. If stay is not granted the child will also be evicted and even if that is not done the child had lived with the mother in the said premises and eviction of her may have negative effect on the child as well as progress of the education.

- e. Novelty and importance of question involved- there is no issue of novelty raised. But the issue is there are two conflicting orders granted by two courts. The Master had granted the possession to the Plaintiff and the Learned Magistrate had made an order for her to remain in the possession until the said order is varied by the order of the court. The counsel for the Plaintiff argued that this order of the Learned Magistrate is superseded by the Master's Order as it is an order made by higher court. She also contended and since the order of the Learned Magistrate was an interim order it could vary by the Master. She also argued that "order of the court" means any order of a court hence Master's decision is a variation of Magistrate's order.
- f. The Public interest in the proceeding- there is no public interest in this matter.
- g. overall balance of convenience and the status quo-The Plaintiff is working in Lautoka for a considerable time and the Defendant and a child lived in the premises in issue during that time. The child is still studying and is yet to enter employment market. The child lived with the mother for a long time in the said premises. There is no evidence what the Plaintiff would do to the premises once he obtains possession. Considering the balance of convenience it favours to the Defendant to remain in possession until determination of the appeal against the Master's decision.
7. The grant of stay is not automatic in every appeal. The Appellant needs to demonstrate that there is more than an arguable case and the prospect of success is high. The prospect of success in the grounds allege should lead to quashing of the decision intended to stay. Supreme Court of Fiji stated, "Once successful, the litigant should not lightly be deprived of the fruits of his successful litigation; The Annot Lyle 91886 11P.D at 116CA; Monk v. Bartram (1891) 1 AB 346. The Power of the Court to grant a stay is discretionary. The Attorney-General v. Emerson and Others (1890) 24 QB 56<sup>1</sup>. So the threshold for stay is high, nevertheless a court should not hesitate to grant it in an appropriate case.

## CONCLUSION

8. Having considered all the circumstances in the case in my judgment it is a fit and proper case to exercise my discretion (see Winchester Cigarette Machinery Ltd v. Payne and Anor (No.2) (1993) TLR 647 at 648) in granting stay of the decision of the Master delivered on 5<sup>th</sup> September, 2016 until final determination of the Appeal.

<sup>1</sup> New World Ltd v Vanua Levu Hardware [Fiji] Ltd [2016] FJSC 29; CBV0004,2016 (4 August 2016) (unreported)(SC of Fiji decided on 4.8.2016)

There are two conflicting orders by two courts and though the Master had the opportunity of dealing with the effect of the order of the Magistrate, in the context of the application under Section 169 of the Land Transfer Act (Cap 131) he did not do so. There is a ground for appeal that has reasonable prospect of success, as it appears at this stage. The Defendant had shown special reason as to why this decision needs a stay. (see Winchester Cigarette Machinery Ltd v. Payne and Anor (No.2) (1993) TLR 647 at 648).


9. Considering the circumstances of the case I do not award a cost for this application.

#### FINAL ORDERS

- a. The decision of the Master delivered on 5<sup>th</sup> September, 2016 is stayed till the final determination of the Appeal.
- b. The application for execution filed by the Plaintiff should be stayed till final determination of the Appeal.
- c. No costs.

Dated at Suva this 14<sup>th</sup> day of October, 2016



  
Justice Deepthi Amaratunga  
High Court, Suva