

**IN THE HIGH COURT OF FIJI**  
**(WESTERN DIVISION) AT LAUTOKA**

**Civil Appeal No. HBA 09 of 2013**

(On an Appeal from a Judgment given by the Learned Master of the High Court of Fiji at Lautoka on the 30<sup>th</sup> of April 2013 in District Registry HBC No. 60 of 2012)

**BETWEEN :**                    **MAHESH PRASAD** of Tagitagi, Tavua, Cultivator.

**DEFENDANT/APPELLANT/APPLICANT**

**A N D**                    :                    **SOHAN SINGH** of 5917 Trawlerway, Citrus Heights, Sacramento, CA 95621, United States of America.

**PLAINTIFF/RESPONDENT/RESPONDENT**

**Appearance**                    : Mr N. Padarath for Defendant/Appellant

    : Ms V. Lidise for Plaintiff/Respondent

**Date of Hearing**                : 27 February 2017

**Date of Ruling**                : 21 April 2017

## **R U L I N G**

[On stay of execution]

### **Introduction**

[01] This ruling concerns with an application for a stay of enforcement of judgment pending appeal.

[02] By an inter partes summons filed 31 May 2016 (*the application*) the defendant/appellant/applicant (*the defendant*) seeks the following orders:

1. *That all orders made by the High Court on the 27<sup>th</sup> of April 2016 including the orders for costs, the order that the appeal to be dismissed and for the Appellant to vacate premises situated at Tagi Tagi, Tavua on land known as Lot 22 on RR 916 Tagitaginatua Subdivision in the Tikina of Tavua, Province of Ba containing 7 acres, 2 roods and 15 perches (NLTB No: 4/04/38908) and comprised in Native Lease No. 29433 be stayed pending the determination of this appeal;*
2. *The time for service and filing of this application and any Appeal be abridged, if needed;*
3. *That the costs of this Application be costs in the cause.*

[03] The application is supported by two affidavits of Mahesh Prasad (the defendant) sworn on 31 May 2016 and 29 July 2016 respectively.

[04] The plaintiff/respondent/respondent (*the plaintiff*) opposes the application and he filed an affidavit of Balbir Singh (Attorney of the defendant) sworn on 12 July 2016.

[05] At the hearing, both parties made oral submissions. The defendant also tendered skeleton submission. The plaintiff sought 7 days to file his written submission. However, the plaintiff did not file any.

[06] In the interim, I granted an interim stay on execution of the judgment on an application made by the defendant.

### **The Setting**

[07] Sohan Singh, the plaintiff as the last registered proprietor of the property (land) institutes summary proceedings against Mahesh Prasad, the defendant pursuant to s.169 of the Land Transfer Act seeking vacant possession of the property. On 30 April 2013, the Master of the High Court, after hearing the matters on affidavit

evidence delivers a ruling and orders that the defendant delivers up possession of the property to the plaintiff. The defendant appeals the order to the judge of the High Court. On 27 April 2016, the judge dismisses the appeal. The defendant appeals to the Fiji Court of Appeal. In the current application, the defendant seeks a stay of 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) *The balance of convenience.*

[11] The Fiji Court of Appeal considered the principles governing a stay of execution in **Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (Fiji) Ltd** Civil Appeal ABU0011.45 (18<sup>th</sup> March 2005) as follows:

- (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 proceedings.*
- (g) *The overall balance of convenience and the status quo."*

### **The Grounds of Appeal**

[12] 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 Judge erred in Law in holding that consent was required from the iTaukei Land Trust Board for the Appellant to show cause to remain on the land and in particular:-*

1.1 *The Learned Judge erred in interpretation and application of the Privy Council Decision of **Maharaj v Chand** [1986] 3 All ER 107 and **Chalmers v Pardoe** [1963] 3 ALL ER 552; and*

- 1.2 *The Learned Judge erred in interpreting the meaning of the phrase “alienate or deal with the land” under section 12 of the iTaukei Land Trust Act.*
2. *The Learned Judge erred in law in not holding that the issues raised in argument and the application of Section 12 of the iTaukei Land Trust Act could not be determined by way of summary proceedings such as an application under Section 169 of the Land Transfer Act.*
3. *The Learned Judge erred in ordering the Appellant to pay costs.*
4. *The Appellant may add further grounds of appeal upon receipt of the Record.*

### **The Decision**

[13] The defendant applies for an order staying, pending appeal, the execution of the judgment given against him whereby he has been ordered to deliver up possession of the property to the plaintiff. The defendant has appealed the judgment to the Court of Appeal. The hearing of the appeal is pending in the Court of Appeal.

[14] The filing of 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 ordered (see O.34, CAR).

Whether appeal would be rendered nugatory

[15] The judgment appealed against orders the defendant to hand over possession of the property to the plaintiff. The appeal concentrates on the issue of the defendant’s right to possession of the property deriving from the proprietary estoppel.

[16] In paras 9 to 16 of his affidavit the defendant deposes that:

9. *“On 13<sup>th</sup> January 2008, the Plaintiff’s son, Pradeep Singh, accepted a sum of \$3,000.00 on behalf of the Plaintiff. This was for the purchase cost of the house and house site which was on NLTB 4/4/268. This money was collected on the same day and the son has acknowledged this on 19<sup>th</sup> July*

2011. Exhibited hereto is marked "MP-6" a copy of the said acknowledgement together with the receipt referred to therein.

10. The Plaintiff is not resident in Fiji and has been living away in the USA for more than 20 years.
11. I moved onto this land because the Plaintiff had promised me the house site. Prior to this, I lived in another house in Matalevu, Tavua which I sold. The proceeds I received from the sale was the money I gave to the Plaintiff's son.
12. I only did this based on the promise by the Plaintiff and his son that the house site will be transferred to me and that neither r my family nor I will not be removed from the house.
13. If I am removed from the house, I would have nowhere to live and will together with my family, become homeless.
14. The lease, upon which the house site was and which the Plaintiff sold to me, expired.
15. The Plaintiff and his son had moved away from Fiji and as such, I was advised by the iTaukei Land Trust Board to make an application for a new lease.
16. On or about 14<sup>th</sup> January 2011, I lodged an application for a residential lease. The area I had applied for was about 800m<sup>2</sup> which was approximately the area which the Plaintiff had sold to me. Exhibited thereto and marked with the letter "MP-7" is a copy of the application".

[17] The plaintiff in para 18 of his affidavit sworn by his attorney states:

*"18. I verily believe and have been advised by the Respondent that the Appellant had moved into the house situated on the property on or about 2008 after he requested the respondent's permission to do so. However, at no point in time did the Respondent nor I promise, assure and/or indicate to the Appellant that the said property would be sold to him".*

[18] The plaintiff is not disputing the fact that the defendant has been in possession of the property since January 2008. If he is ejected, there are risks the appeal would be stifled. If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, there are risks of the defendant being able to recover possession from the

plaintiff. The plaintiff might, after regaining possession from the defendant, sell and transfer the property to a third party. This would frustrate the defendant's appeal. On the other hand, if a stay is granted and the appeal fails, there would be no risks that the defendant will be unable to enforce the judgment and recover possession from the defendant, for he has no right to deal with the property.

#### Novelty and important question

- [19] The grounds of appeal invite the Court of Appeal to interpret section 12 of the iTaukei Land Trust Act and to decide the applicability of the Privy Council Decision of **Maharaj v Chand** [1986] 3 All ER 107 and **Chalmers v Pardoe** [1963] 3 ALL ER 552 to the defendant's case. I am satisfied that the grounds of appeal raise some arguable questions for the determination by the Fiji Court of Appeal.

#### Other aspects

- [20] There is no third party involved in this case and, therefore, the question of effect on the third parties will not arise.
- [21] The question of public interest does not arise in these proceedings.
- [22] The defendant has been in possession of the property since 2008. The plaintiff resides in the USA. If the appeal fails, the plaintiff could enforce the judgment without any problem. In my opinion, the balance of convenience favours the defendant.

#### The discretion of the court

- [23] The court has discretion to suspend an order for possession pending appeal. In *Admiral Taverns (Cygnet) Ltd v Daniel* [2008] EWHR 1688 (QB), the court held:

*"The appeal court also has a discretion to suspend an order for possession pending the appeal."*

[24] I find this an appropriate case to exercise the discretion to suspend the execution of the judgment, which orders the defendant to deliver up possession to the plaintiff, pending appeal.

### **Conclusion**

[25] For all these reasons, I have reached the conclusion that there should a stay of execution of the judgment pending the determination of the appeal. It follows that the Defendant's application for a stay of execution of the judgment (order for possession) must succeed and that the execution of the order for possession made on 27 April 2016 be stayed pending the determination of the appeal. I would make no order as to costs.

### **The Result**

1. There will be a stay of execution of the orders made on 27 April 2016 pending determination of the appeal.
2. No order as to costs.

*M H Mohamed Ajmeer*  
21/4/17

**M H Mohamed Ajmeer**

**JUDGE**

**At Lautoka**

**21 April 2017**



Solicitors:

M/s Samuel K Ram, Barristers & Solicitors for the defendant/appellant/applicant

M/s Young & Associates for the plaintiff/respondent/respondent