

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
APPELLATE JURISDICTION

CIVIL ACTION NO. HBC 46 OF 2017

BETWEEN : **DEO SAGAYAM** of Vuda Point, Lautoka, Unemployed.

ORIGINAL DEFENDANT APPELLANT/RESPONDENT

AND : **RAJENDRA PRASAD** of Vuda Point, Lautoka, Farmer, as the sole Executor and Trustee of the **ESTATE OF NOKAIYA**, late of Vuda Point, Lautoka, Farmer, Deceased, Testate.

ORIGINAL PLAINTIFF/ RESPONDENT/ APPLICANT

Appearances : Ms S. Ravai for the plaintiff/respondent/applicant
Mr K. Maisamoa for the defendant/appellant/respondent

Date of Hearing : 24 September 2018

Date of Ruling : 24 September 2018

R U L I N G

[On stay of execution]

Introduction

- [01] This is an application for a stay of execution pending appeal. The application is supported by an affidavit of Rajendra Prasad, the plaintiff/respondent/applicant (*'the applicant'*) sworn on 24 August 2018.
- [02] The defendant/appellant/respondent (*'the respondent'*) is opposing the application. He filed an affidavit in opposition sworn on 13 September 2018.
- [03] It will be noted that the applicant did not file any affidavit in reply to the affidavit in opposition filed by the respondent.
- [04] The application is made pursuant to the Court of Appeal Rules (*'CAR'*), R 26 (3), which provides:

“(3) Wherever under these Rules an application may be made either to the court below or to the Court of Appeal it shall be made in the first instance to the court below.”

[05] The relevant law that deals with stay of execution pending appeal is Rule 34 (1) (a), CAR which says:

“(1) Except so far as the court below or the Court of Appeal may otherwise directs-

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

Background

- [06] The applicant brought summary eviction proceedings under O 113 of the High Court Rules against the respondent on the basis that the respondent was a trespasser to the land. The Master granted the eviction order. The respondent, according to the applicant, voluntarily left the house after the Master’s order. The respondent appealed the Master’s order to the judge. On appeal, the Master’s order was set aside and the judge [I] ordered that the respondent is entitled to be put back into possession.
- [07] The High Court order is under appeal. The applicant applies for a stay of execution pending appeal on the ground that: 1. The applicant has sold the subject property to a third party and the same is under process with the Lands Department, 2. The third party has a substantial foundation on the subject land and 3. The respondent is living in Korotale, Rakiraki with his wife and children and has so done for many years in the past.
- [08] The respondent opposes the application on the grounds that: 1. the applicant has no right to sell the property since he has no legal standing over the land. 2. There is no evidence that the sale was effected with the consent of the Director of Lands as it is a State Land. 3. There are no merits in the grounds of appeal.

Discussion

- [09] Initiating of an appeal does not operate as a stay of execution unless the court otherwise orders. The basic principle is that a litigant is entitled to enjoy the fruits of its success.
- [10] The principles that may be applied in an application for stay pending appeal include: (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory, (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 (see *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (18 March 2005).
- [11] The applicant's submission on the stay was around the effect on the third party. The applicant states that he has executed a sale and purchase agreement with a third party, Krishna Sami Goundar to sell the property.
- [12] It will be noted that the sale and purchase agreement has been entered into on 4 April 2018. On 13 April 2018, the respondent filed an application seeking extension of time to appeal the Master's order granting possession of the land to the applicant after the court announced his appeal has been deemed abandoned. If the sale and purchase executed before the respondent filed his application for extension of time to appeal out of time, the applicant had the opportunity to bring such agreement to the notice of the court and argue on the point of the effect on the third party. Interestingly, the sale and purchase agreement has been witnessed by the same solicitor (Ms Ravai) who appeared for the applicant in the leave to appeal proceedings. At the leave stage, the applicant did not mention anything about the sale and purchase agreement. It is only brought in the stay of execution proceedings. Therefore, the sale and purchase agreement is made with a view to obtain a stay pending appeal. I would, therefore, reject the argument that the third party will be affected if a stay is not granted.
- [13] I would hold that the sale and purchase agreement has been executed to frustrate the judgment of the court delivered in appeal. On appeal, the court set aside the Master's decision granting possession of the property to the applicant. The

resultant position of the appeal decision is that the respondent can continue to occupy the property or he can be placed in possession of the property if had been ejected from the property until the Court of Appeal orders otherwise.

- [14] The stay is sought on the ground that the applicant will be prejudiced and the appeal will be rendered nugatory if a stay of execution of the judgment of this court is not granted. I disagree with this argument. The prejudice has already been caused to the respondent by the applicant entering into a sale and purchase agreement with the third party. The judgment of this court delivered on appeal will be rendered nugatory if a stay is granted as the applicant seeks. The third party has already started the construction. The house the respondent was occupying might be demolished and there will be nothing for the respondent to occupy if a stay is granted and the appeal fails.
- [15] Another argument put forward by the applicant was that the respondent was not staying on the property with his wife and that he was staying in Rakiraki with his wife and children. However, he obtained an eviction order on the basis that the respondent was occupying the property without the consent or licence of the applicant or his predecessor in title. This demonstrates that the applicant changes his position as the case goes on.
- [16] On appeal, the respondent has been granted possession only. He will have no disposition right over the property in dispute. Even if the respondent was placed back into possession, the appeal will not be rendered nugatory. The applicant could recover possession of the property from the respondent. The applicant had already caused prejudice to the respondent by entering into a sale and purchase agreement with a third party in respect of the property in dispute.
- [17] The evidence placed before me points to the conclusion that if a stay is granted and the appeal fails, there is a risk that the respondent will be unable to enforce the appeal judgment.
- [18] For all these reasons, I would refuse to grant a stay pending appeal. The respondent is entitled to costs incurred in these proceedings. I order the applicant to pay the costs to the respondent which I summarily assessed at \$500.00, to be paid within 21 days.

The outcome

1. Stay of execution pending appeal refused.
2. Applicant shall pay the summarily assessed costs of \$500.00 to the respondent within 21 days.

Haffizy
24/9/18

.....
M.H. Mohamed Ajmeer
JUDGE



At Lautoka
24 September 2018

Solicitors:

For the applicant: M/s Fazilat Shah Legal, Barristers & Solicitors

For the respondent: M/s Maisamoa & Associates, Barristers & Solicitors