

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 543 of 2004

BETWEEN: **NBF ASSET MANAGEMENT BANK**

PLAINTIFF

AND: **TAVEUNI MANAGEMENT SERVICES LIMITED**

FIRST DEFENDANT

THE REGISTRAR OF TITLES

SECOND DEFENDANT

THE ATTORNEY-GENERAL OF FIJI

THIRD DEFENDANT

Before: **Hon. Justice Kamal Kumar**

Counsel: **Mr J. Oswald for the Plaintiff/Respondent**
Mr P. Knight for the First Defendant/Applicant
Ms A. Prakash for Second/Third Defendants

Date of Hearing: **3 August 2018**

Date of Ruling: **28 September 2018**

RULING
(Application for Stay of Execution)

1.0 INTRODUCTION

- 1.1 On 7 June 2018, Applicant (First Defendant) filed Summons for Stay of Execution of Judgment delivered on 27 March 2015, pending determination of Civil Appeal No. ABU0045 of 2018 (“**the Application**”) together with Affidavit of Caroll Selai sworn on 5 June 2018, in Support of the Application.
- 1.2 The Application was called on 26 June 2018, when Counsel for the Respondent (Plaintiff) stated that Respondent will not file any Affidavit and as such parties were directed to file Submissions and the Application was adjourned to 3 August 2018, at 10.30am for hearing.
- 1.3 Applicant and Respondent filed Submissions as directed by Court.

2.0 APPLICATION FOR STAY OF EXECUTION

- 2.1 It is not disputed that this Court has unfettered discretion as to whether to stay execution of the Judgment or not, which discretion however is to be exercised judicially and in the interest of justice depending on circumstances of each case.
- 2.2 In **Chand v. Lata** [2008] FJHC; Civil Action No. 38 of 2011 (18 July 2008) the Court identified the principles governing stay of execution as follows:-

- “1. *The grant or refusal of a stay is a discretionary matter for the Court: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **AG v. Emberson** (1889) 24 QBVC, at 58, 59;*
2. *The Court does not make a practice of depriving a successful litigant of the fruits of litigation by locking up funds to which prima facie the litigant is entitled, pending an appeal: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing Supreme Court Practice 1979, p.909; **The Annot Lyle** (1886) 11 PD, at 116(CA); **Monk v. Bartram** (1891) 1 QBV346;*
3. *When a party is appealing, exercising an undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory: **Fiji Sugar***

Corporation Limited v. Fiji Sugar & General Workers' Union, citing **Wilson v. Church** (No. 2)(1879) 12 ChD, at 456, 459 (CA);

4. *If there is a risk that the appeal will prove abortive if successful and a stay is not granted the Court will ordinarily exercise its discretion in favour of granting a stay: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **Scarborough v. Lew's Junction Stores Pty Ltd** (1963) VR 129, at 130;*
5. *In exercising its discretion the Court will weigh consideration such as balance of convenience and the competing rights of the parties before it: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **AG v. Emberson**;*
6. *A stay will be granted where the special circumstances of the case so require, that is, they justify departure from the ordinary rule that a successful litigant is entitled to the fruits of the litigation pending the determination of any appeal: **Prasad v. Prasad** [1997] FJHC 30; HBC0307d.96s (6 March 1997), citing **Annot Lyle** (1886) 11 PD 114, at 116; **Scarborough v. Lew's Junction Stores Pty Ltd** (1963) VR 129, at 130; and see also **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**;*
7. *As a general rule, the only ground for a stay of execution is an Affidavit showing that if the damages and the costs were paid there is not reasonable probability of getting them back if the appeal succeeds: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **Atkins v. GW Ry** (1886) 2 TLW 400;*
8. *Where there is a risk that is a stay is granted and the assets of the Applicant will be disposed of, the Court may, in the exercise of its discretion, refuse the application: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**”*

2.3 In **Natural Water of Fiji Limited v. Crystal Clear Mineral Water (Fiji) Limited** [2005] FJCA 13 ABU0011.2004S (18 March 2005) Fiji Court of Appeal stated as follows:-

“The following non-comprehensive list of factors conventionally taken into account by a court in considering a stay emerge from Dymocks Franchise Systems (SW) Pty Ltd v. Bilgola Enterprises Ltd (1999) 13PRNZ 48, at p.50 and Area One Consortium Ltd v. Treaty of Waitangi Fisheries Commission (1993) 7PRNZ 2000:

- (a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). Phillip Morris (NZ) Ltd v. Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2NZLR 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.*

2.4 In **Murthi v. Patel** [2000] FJCA 17; ABU0014.2000S (5 May 2000) his Lordship Justice Ian Thomson JA (as he then was) stated as follows:-

“A number of considerations have to be taken into account by a judge exercising his discretion whether or not to grant a stay of execution. Prima facie the party succeeding in the High Court is entitled to enjoy immediately the fruits of his success. However, if any appellant shows that he has a good arguable case to present on the hearing of the appeal and if refusal of the stay will cause detriment to the appellant which cannot be effectively remedied if his appeal succeeds, so that the appeal will be rendered

nugatory, it may be appropriate for the discretion to grant a stay to be exercised in his favor.”

- 2.5 In **New World Ltd v. Vanualevu Hardware (Fiji) Ltd** [2015] FJCA172; ABU 076.2015 (17 December 2017), Court of Appeal stated as follows:-

“[14] The factors that should be exercised by this Court in an application such as is presently before the Court were identified in Natural Waters of Viti Ltd v. Crystal Clear Mineral Water (Fiji) Ltd (ABU 11 of 2004 delivered on 18 March 2005. Generally, a successfully party is entitled to the fruits of the judgment which has been obtained in the court below. For this Court to interfere with that right the onus is on the Appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are taken into account by a court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay.”

Whether Applicant’s Right of Appeal will be rendered nugatory if Stay is not granted

- 2.6 This is one of the main consideration in determining whether to stay execution of judgment or not.
- 2.7 It is undisputed fact that which appears from Applicant and Respondent’s Submission that Respondent has entered into contract with Kawakawadawa (Fiji) Ltd (“**KFL**”) for sale of certain lots in Taveuni Estate which includes water lots and rubbish dump lots.
- 2.8 This Court accepts that Applicant’s Submission that if stay will not be granted then there will be nothing stopping Respondent from transferring the water lot and rubbish dump lot to a third party whether it be KFL or some other entity or person.

2.9 If that happens and if Applicant is successful in its Appeal in respect to Order for transfer of those lots then the Applicant's appeal of course will be rendered nugatory.

Bona fides of Applicant as to Prosecution of Appeal

2.10 Appeal has been filed diligently.

Effect on Third Parties

2.11 There is no evidence that if Stay is not granted any third parties will be affected.

Novelty and Importance of Question Involved

2.12 Even though the question to determine by the Court of Appeal is not novel it has some importance.

3.0 Public Interest

3.1 This matter is between private institutions which is personal to them and as such there is no public interest.

4.0 Balance of Convenience and Status Quo

4.1 This Court takes into consideration that:-

- (i) Respondent has been waiting for this matter to be finalised from 2004 and needs to have benefit of the Judgment;
- (ii) Applicant filed that Notice of Appeal within seven (7) days of Judgment being delivered;
- (iii) The Appeal deals with question of law in respect to construction of certain provisions in the Deed of Conveyance dated 2 June 1995, between Applicant and Respondent.

5.0 Good Arguable Case

- 5.1 Respondent relying upon the Statement in Murthi's case (Supra) quoted at paragraph 2.5 of this Ruling submits that the Applicant needs to show that it has good arguable case.
- 5.2 The case authorities subsequent to Murthi's (Supra) does not require Applicant to show good arguable case.
- 5.3 This Court is of the view in determining the Stay Application, Court should follow the test laid down in Natural Water (Supra) and New World (Supra) case.
- 5.4 It must be borne in mind that Trial Judge has already decided the issue on appeal and it will not make sense if the Trial Judge is asked to decide if the Applicant has good arguable case against his/her decision on appeal.
- 5.5 This does not mean to say that the Applicant does not need to show that the Appeal has some prospect of success and it is not frivolous or vexatious or an abuse of process and is simply to delay the inevitable. These factors Court can considered when assessing balance of convenience.

Other Matters

- 5.6 Respondent by its Counsel submit the Application should be dismissed because of failure by Applicant to file Application prior to expiry of seven (7) day period at paragraph 296 (v) of the Judgment which provides as follows:-

“First Defendant within seven (7) days from date of this Judgment deliver Duplicate Certificate of Title Nos. 28820 and 31921 to Plaintiff's Solicitors for onforwarding to the Plaintiff.”

- 5.7 The Judgment was delivered on 25 May 2018, which meant the Applicant as First Defendant was to deliver Certificate of Title Nos. 28820 and 31921 to Respondent's Solicitors by 1 June 2018, which it failed to do.
- 5.8 Applicant at paragraph 3 of its Submission in Reply filed on 17 July 2018, submitted as follows:-

“3. This factor is in any event “not determinative” in respect of any application for stay of execution of judgment.”

5.9 It seems Counsel for Applicant failed to fully understand and appreciate the well established principle that filing Notice of Appeal and Grounds of Appeal does not operate as Stay of execution of the Judgment.

5.10 By failing to provide the Duplicate Certificate of Title Nos. 28820 and 31921 as assessed by this Court, and in the absence of Stay of that Order or any application to Stay that Order, Applicant has breached that Order.

5.11 This Court also rejects Applicant’s submission that the Respondent by failing to provide Transfer for properties comprised in Certificate of Title Nos. 28820 and 31921 within fourteen (14) days had breached the Order at paragraph 296(vi) of the Judgment which provides as follows:-

“Upon receipt of Duplicate Certificate of Title Nos. 28820 and 31921, Plaintiff through its Solicitors prepare and forward Transfer in respect to property comprised and described in CT Nos. 28820 and 31921 to First Defendant’s Solicitors for execution by First Defendant.”

5.12 It is very clear that Respondent was to provide Transfer for execution within fourteen (14) days of delivery of Duplicate CT Nos. 28820 and 31921 by Applicant which did not take place.

5.13 This Court also notes that Order at paragraph 296(v) of the Judgment would not make the appeal nugatory if Applicant is successful in its Appeal.

6.0 Conclusion

6.1 This Court after due consideration of the submissions of the parties is of the view that there be conditional Stay of the judgment.

7.0 Costs

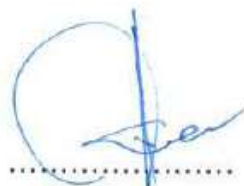
7.1 This Court takes into consideration that parties filed Submissions and made Oral Submissions which was not that comprehensive since the Appeal is already filed by the Applicant and Applicant seeks Stay of execution of the Judgment it is only fair that Applicant do pay Respondent's cost of the Application.

8.0 Orders

8.1 This Court makes following Orders:-

- (i) Judgment delivered by this Court on 25 May 2018, be stayed until final determination of Civil Appeal No. 45 of 2018 by Court of Appeal or until Appeal is dismissed or struck out for any reason or the appeal is abandoned, on the condition that Applicant deliver Duplicate Certificate of Title Nos. 28820 and 31921 to Plaintiff's Solicitors for onforwarding to Plaintiff within five (5) days from date of this Ruling;
- (ii) Applicant do pay Respondent's cost of the Application assessed in the sum of \$800.00 within fourteen (14) days from date of this Ruling.




K. Kumar
JUDGE

At Suva

28 September 2018

KS LAW for the Plaintiff/Respondent

CROMPTONS for the First Defendant/Applicant

OFFICE OF THE SOLICITOR-GENERAL for the Second/Third Defendants