

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 149 of 2014

BETWEEN : **ATTORNEY-GENERAL OF THE REPUBLIC OF FIJI** for and
on behalf of the Director of Lands, Suvavou House, Level
4, Victoria Parade, Suva.

PLAINTIFF

A N D : **EMOSI SILIKIWAI** of Lami, P O Box 358, Lami.

DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Ms. S. Ali for the Plaintiff
Mr. K. Maisamoa for the Defendant

RULING

Introduction and Background

[1] This is an application made by the Defendant, for stay of proceedings, pending the appeal against the Judgment made by this Court on 25 April 2016.

[2] The substantive application was filed by the Plaintiff, in terms of Order 113 of the High Court Rules, 1988. The said application was made by way of Originating Summons, and sought the following Orders:

1. That the Defendant does forthwith give vacant possession of the State Land at Tiri Naqumu, Lami to the Plaintiff;
2. For an order that the costs of this application be paid by the Defendant on an indemnity basis; and
3. Such other Order and or Orders this Honourable Court deems fair and just to make in the circumstances of the case.

[3] The Originating Summons was supported by an Affidavit deposed to and filed on 3 June 2014, by Thomas Fesau, a Senior Surveyor, Ministry of Lands. On 29 July 2014, the Defendant filed his Affidavit in Response. Subsequently on 24 November 2014, the Defendant filed a Supplementary Affidavit in Response. On 4 December 2014, the Plaintiff filed an Affidavit in Reply to the said Supplementary Affidavit in Response.

[4] The substantive matter was taken up for hearing before me on 4 February 2016.

[5] On 25 April 2016, I made the following Orders:

1. The application made by the Plaintiff in terms of the Originating Summons that the Defendant does forthwith give vacant possession of the State Land at Tiri Naqumu, Lami to the Plaintiff is granted.
2. Accordingly the Defendant shall give vacant possession of the said State Land at Tiri Naqumu, Lami to the Plaintiff, within 30 days from today.
3. The Defendant shall pay the Plaintiff costs summarily assessed at \$1000, within 30 days from today.

[6] Aggrieved by my above Orders, the Defendant is said to have filed an appeal in the Court of Appeal.

[7] This application has been instituted by way of a Summons for Stay, and was filed in Court on 10 May 2016. As per the Summons for Stay, the Defendant seeks the following Order from Court:

- (i) *There be a stay of execution of the Judgment dated 25 April 2016 pending Appeal, which was filed on 4 May 2016 to the Court of Appeal.*

- [8] It is stated that the application is made pursuant to Order 55 of the High Court Rules 1988, and the inherent jurisdiction of Court.
- [9] The Summons is supported by an Affidavit sworn to by the Defendant. Therein, the Defendant deposes that this Court deliver its Judgment on 25 April 2016. The Judgment was in favour of the Plaintiff and the Defendant was ordered to give vacant possession of the land within 30 days of the judgment.
- [10] The Defendant states that the Judgment was erred and has filed Notice of Appeal in the Court of Appeal (Annexed as “ES2”). He is said to be in the process of filing the Summons for Security for Costs.
- [11] Since the process of the Court of Appeal is taking time in terms of waiting for the Court Record and also filing the copy pleadings, including other documents, the Defendant states that he has filed this application for stay for the Court to determine.
- [12] The Defendant further deposes that he feels that the appeal would be successful when it is taken up for hearing.
- [13] On 14 June 2016, Thomas Fesau, Senior Surveyor, Ministry of Lands, filed an Affidavit in Response to the Defendant’s Affidavit in Support of the Summons to Stay. He deposes that the Plaintiff asserts that having perused the Grounds of Appeal annexed as ES2 of the Defendant’s Affidavit, it is clear that the Defendant does not show any arguable case to appeal the matter. Accordingly, the Plaintiff urges that this action for stay pending appeal be struck out.
- [14] On 22 June 2016, the Defendant filed an Affidavit in Reply to the above Affidavit in Response filed by the Plaintiff.
- [15] This matter was taken up for hearing before me on 4 October 2016. Both Counsel for Defendant and Plaintiff were heard. The parties also filed written submissions, and referred to several case authorities, which I have had the benefit of perusing.

THE PROPOSED NOTICE OF APPEAL AND GROUNDS OF APPEAL

[16] In the proposed Notice of Appeal annexed to the Affidavit in Support of this Summons, the Defendant seeks the following Orders from the Court of Appeal:

1. The Judgment delivered by His Lordship Mr. Riyaz Hamza on 25th April 2016 be wholly set aside unconditionally.
2. The execution of vacant possession within 30 days from the judgment be stayed pending the determination of this appeal.
3. The costs awarded to the Respondent/Plaintiff to be on hold pending the outcome of this appeal.
4. Any other orders the court deems just and equitable.

[17] The proposed Grounds of Appeal are the following:

1. **THAT** His Lordship erred in law and fact for not taking into account that the Appellant has paid the land rent even though the Notice to terminate the Tenancy at Will was defective.
2. **THAT** His Lordship erred in law and fact for not adhering to the principles of acceptance of rent after giving notice to the tenant by the landlord laid down by the Courts in Fiji through various authorities submitted by the Appellant/Defendant.
3. **THAT** His Lordship erred in law and fact for not taking into account that it has been known to the Respondent/Plaintiff through its servant or agent the Director of Lands that the Appellant/Defendant has been in breach of the conditions of the Tenancy at Will and continue to receive the land rent since year 2004 to 2016.
4. **THAT** His Lordship erred in law and fact for not considering that it took the Respondent/Plaintiff ten (10) years or so after issuing the notice to filing an action against the Appellant/Defendant in 2014.

5. **THAT** His Lordship erred in law and fact to direct himself to the notice of termination of tenancy at will dated 6th December 2004 in which it does not denote the words “without prejudice” in the notice.
6. **THAT** His Lordship erred in law and fact for not taking into account that Order 113 of HCR is (for) trespassers therefore the Appellant/Defendant no longer a trespasser to the said land by virtue of the land rent being accepted by the Director of Lands.
7. **THAT** His Lordship erred in law and fact for not taking into account the conditions 4 TAW (Tenancy at Will) since this condition is the only condition that will subject to giving up notice to terminate.
8. **THAT** the Appellant/Defendant be given liberty to file further grounds in the course of this proceeding.

LEGAL PROVISIONS AND ANALYSIS

[18] The Defendant submits that he has filed these Summons pursuant to Order 55 of the High Court rules.

[19] I must state at the very outset, that during the hearing of this matter, it came to the attention of Court that the Notice of Appeal, the Counsel for the Defendant was referring to during the hearing, was different to the one filed along with the Affidavit supporting the Summons for Stay (Annexed as “**ES2**”). The Counsel explained that he had filed a “fresh Notice of Appeal”, as the Court of Appeal had wanted him to file same.

[20] In this “fresh Notice of Appeal” there are now 9 Grounds of Appeal. Grounds 1-6 & 8 remain the same. Ground of Appeal 8 is renumbered as Ground of Appeal 9. Ground of Appeal 7 has been deleted. However, 2 fresh Grounds of Appeal have been introduced as follows:

7. **THAT** His Lordship erred in law and fact for giving the Respondent/Plaintiff to submit further submission after the hearing in

spite of both Respondent/Plaintiff and Applicant/Defendant had submitted their respective written submission as such it amounts to biasness.

8. **THAT** His Lordship erred in law and fact for taking into account Section 36 of the Land Transfer Act in spite the action was not by way of Writ of Summon.

[21] During the course of the hearing, both Counsel for the Plaintiff and Defendant addressed Court on the principles the Court should take into account in considering applications for stay pending appeal.

[22] The principles relating to the granting of stay pending appeals was enunciated in the case of **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005); in the following form:

“The principles to be applied on an application for stay pending appeal are conveniently summarized 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."*

[23] In ***Attorney General of Fiji & Another v. Loraina Dre*** [2011] FJCA 11; Misc.13.2010 (17 February 2011); it was held, inter alia, that a mere filing of an appeal does not prove that it is an appropriate case for a stay to be granted. His Lordship Justice William Marshall, then Resident Justice of Appeal held:

"23. It is useful before explaining the matter further to set out a summary of the law of when a stay of execution pending appeal will or will not be granted. I take it from Volume 1 of Hong Kong Civil Procedure 2007 (The Hong Kong White Book) at page 910 the note being 59/13/1. Order 59 dealing with appeals to the Court of Appeal, is derived from the English Rules of Supreme Court (RSC) which were in place from 1873 to 1999 when English Civil Procedure was reformed as a result of a major report by Lord Woolf. In England the Civil Procedure Rules 1999 superceded R.S.C. For a jurisdiction such as Fiji that follows the substantive rules, the format and familiar numbering of the former R.S.C. in England this change is confusing and unfortunate. However the annually published Hong Kong White Book is an update with the R.S.C. Rules and commentary thereon in pari materia with the English White Book which ended in 1999. What is more it is updated with all relevant cases and amendments that have occurred between 1999 and the year in which it is published. Order 59 in England (before 1999) and in Hong Kong is the equivalent of in Fiji, the Court of Appeal Act and Rules. It follows that the commentary with cases cited is useful to all those involved with civil appeals in Fiji.

*24. The heading of note 59/13/1 is "**When will a stay of execution be granted.**"*

I set out only the parts of this note that are relevant to the present discussion:

*"An appeal does not operate as a stay on the order appealed against, except to the extent that the court below, or the Court of Appeal (or a single Judge of the Court of Appeal otherwise directs (O.59, r.13(1)(a); see also **World Trade Centre Group Ltd & Another v. Resourceful River Ltd & Another** [1993] H.K.L.Y.847; and *Re Schindler Lifts (H.K.) Ltd v. Dickson Construction Co. Ltd* [1993] H.K.L.R. 45). It follows that service of notice of appeal and setting down the appeal does not, by itself, have any effect on*

the right of the successful party to act on the decision in his favour and to enforce the order of the court below. If an appellant wishes to have a stay of execution, he must make an express application for one (see further para.59/13/5 (below)). The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal: **World Trade Centre Group Ltd & Another v. Resourceful River Ltd & Another**; Civ. App No.70 of 1993, May 12, 1993. That hurdle is higher than that of chances of success for considering whether leave to appeal should be granted. See also **Asha Harskishin Premisingh v. Harskishin Isarsingh Premisingh Kishinani** M.P. No.3436 of 2000, November 12, 2000, unreported. Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. Unless a stay can be justified by good reasons, one will not be ordered (*Star Play Development Ltd v. Bess Fashion Management Co. Ltd*, unreported, HCA No. 4726 of 2001, May 28, 2002; and see **Wenden Engineering Service Co. Ltd v. Lee Shing Yue Construction Co. Ltd**, unreported, HCCT No.90 of 1999, July 17, 2002, [2002] H.K.E.C. 1059). The court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled", pending an appeal (**The Annot Lyle** (1886) 11 P.114 at 116, CA; **Monk v. Bartram** [1891] 1 Q.B.346)....”

[24] In **Haroon Ali Shah v. Chief Registrar** [2012] FJCA 101; ABU50.2012 (3 December 2012); His Lordship Justice Calanchini said:

“[14]. The approach that should be adopted by a court to the exercise of its discretion whether to grant a stay pending the determination of an appeal was discussed by Gates CJ sitting as a single judge of the Supreme Court in **Stephen Patrick Ward –v- Yogesh Chandra** (unreported civil appeal CBV 10 of 2010 delivered on 20 April 2010). The starting point in any stay application is to determine whether the Appellant's circumstances are sufficiently exceptional for the grant of stay relief pending appeal. In answering that question Gates CJ in the same decision (*supra*) stated that it was necessary to consider the principles discussed by the Court of Appeal in **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd** (civil appeal ABU 11 of 2004 delivered 18 March 2005).

[15]. In general terms, in so far as appeals involving tort or contract cases where a money judgment has resulted, there will be no stay except in special or exceptional circumstances. Even then, in the rare case when a stay may be allowed, a condition of the stay is usually imposed that the judgment amount should be brought into court.

[16]. In **Dorsami Naidu –v- The Chief Registrar** (unreported civil appeal ABU 38 of 2010 delivered 2 March 2011) Marshall JA in a single judge Ruling commented on the issue of the chances of success being a factor in

*considering a stay application. The learned judge concluded that strong grounds of appeal have no impact upon a stay being granted and that such a factor does not constitute a special circumstance. In reaching that conclusion, Marshall JA made reference to **Atkins –v- Great Western Railway** (1885 – 86) 2 Times Law Reports 400 and in particular to the observation of Lord Esher MR: "strong grounds of appeal is no reason for no one ought to appeal without strong grounds for doing so."*

[17]. The best that can be said about this factor is that when it has been established that there are exceptional chances of success, that matter may become a special circumstance which when considered with the other principles may justify the grant of a stay pending appeal."

[25] These principles were further reiterated by the President of the Court of Appeal, His Lordship Justice Calanchini in **New World Ltd v Vanualevu Hardware (Fiji) Ltd** ABU0076.2015 (17 December 2015):

*"The factors that should be exercised by this Court in an application such as is presently before Court were identified in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005). Generally a successful 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."*

[26] The Counsel for the Plaintiff also referred to the case of **Bhagat v. Chandra** [1995] FJCA 14; Abu0030d.95s (26 June 1995); where the facts are similar to the present case. Therein, the Applicant sought a stay of execution of the Order for vacant possession made by the High Court. The Court of Appeal held:

"In the case before me the Applicants are the unsuccessful Defendants in the High Court having been the unsuccessful Applicants to the Agricultural Tribunal. The Respondent was the successful party in both instances. It has been said again and again that Courts do not make it a practice to deprive a successful litigant of fruits of his success. On the other hand it is now recognised that where an unsuccessful litigant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the Applicant is able to satisfy that without a stay of execution he or she will be ruined or the appeal will be rendered

totally nugatory, and that he or she has some prospect of success. (See Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887.) In my view the first question that should be asked in this case is - "What are the prospects of the appeal to the Court of Appeal or the Central Agricultural Tribunal succeeding?"

.....

The next aspect to consider is the consequence to the Applicants if they are obliged to give up possession now but succeed in their appeal(s) later. If the Applicants were to give up possession I do not think it can be said that they will be ruined if they succeed in their appeal(s). They certainly have somewhere to go. Nor will their appeals be rendered nugatory if they succeed in their appeal(s) bearing in mind that the Respondent has undertaken not to dismantle the house on the land until such time as a decision is reached by the Court of Appeal. Alternatively the Respondent has offered to allow the Applicants to remove the whole of the house for their own benefit. In all the circumstances the Respondent as the legal owner of the land will, in my view, suffer greater injustice if he were to be indefinitely estopped from gaining possession of his land. There is at present no indication when the appeals will be heard. The unsuccessful party in the Central Agricultural Tribunal will be entitled to appeal to the Fiji Court of Appeal with the potential of causing further delay."

[27] Therefore, it is clear that a stay pending appeal should only be granted in the most exceptional circumstances. Neither this Court nor the Court of Appeal will grant a stay unless satisfied that there are very good reasons for doing so. As President of the Court of Appeal, His Lordship Justice Calanchini has expressed the factors that are usually 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. Furthermore, if it is established that there are exceptional chances of success in the appeal that matter may become a special circumstance which when considered with the other principles may justify the grant of a stay pending appeal.

[28] In this case, the Defendant states that the reason he has filed this application for stay is due to the fact that the process of the Court of Appeal is taking time in terms of waiting for the Court Record and also filing the copy pleadings, including other documents. He further deposes that he feels that the appeal would be successful when it is taken up for hearing.

[29] In my Judgment, dated 25 April 2016, I have adequately addressed all matters that have been urged in the proposed grounds of appeal. The only issue not dealt with by me relates to the Ground of Appeal filed subsequently where it is alleged that “His Lordship erred in law and fact for giving the Respondent/Plaintiff to submit further submission after the hearing in spite of both Respondent/Plaintiff and Applicant/Defendant had submitted their respective written submission as such it amounts to biasness.”

[30] I categorically reject this allegation of bias. The only reason Court called for and accepted further written submissions from the State was to assist Court in duly adjudicating this matter and to arrive at a proper finding.

[31] Having examined the proposed Grounds of Appeal filed, including the two fresh Grounds of Appeal, I am of the opinion that the Defendant has failed to establish that there is a reasonable prospect that the appeal would succeed on the proposed Grounds of Appeal which he is relying upon.

[32] Therefore, it is my opinion that the Defendant has failed to establish any exceptional circumstances for the granting of a stay pending appeal.

CONCLUSION

[33] For all the aforesaid reasons, I am of the view that the Summons for Stay pending appeal is without merit and should be struck out.

[34] Accordingly, I make the following Orders:

ORDERS

1. The Summons filed by the Defendant for Stay pending the appeal of the Judgment made by this Court on 25 April 2016, is struck out and Stay pending appeal is refused.

2. The Defendant shall pay the Plaintiff costs summarily assessed at \$1500, within 30 days from this Order.

Dated this 22nd day of February 2019, at Suva.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI