

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 201 of 2017

BETWEEN: **ORIX HOLDINGS LIMITED** a limited liability company having its registered office at Suva, Fiji.

PLAINTIFF

A N D: **LUPING ZOU** of 26 Kanavi Road, Samabula, Suva, Businessman.

DEFENDANT

Counsel : **Plaintiff: Mr Singh. S**
: **Defendant: Miss Naidu. S**
Date of Hearing : **2.3.2020**
Date of Judgment : **20.3.2020**

JUDGMENT

INTRODUCTION

1. Defendant filed its application seeking leave to appeal the interlocutory decision of the Master handed down on 6.12.2019. Master had set aside default judgment entered against Defendant, but in the said interlocutory ruling had imposed a condition that entire liquidated sum ordered in default judgment to be deposited in court within fourteen days. There is no reason given in the Master's decision for imposing such a condition but had included those conditions in the final orders. Defendant is seeking leave to appeal against said condition. Defendant had filed summons seeking leave to appeal but failed to serve within time period allocated.

ANALYSIS

2. The Defendant filed this application by way of a summons 20.12.2019. The Defendant also seeks that time for service of the application herein be enlarged.
3. Leave to Appeal against Master's decision was made in terms of Order 59 Rule 8(2) of High Court Rules 1988, leave is required against an interlocutory decision. There is no dispute as to the decision of Master was interlocutory in terms of Court of Appeal

decision of Goundar -v- Minister for Health (unreported ABU 75 of 2006; 9 July 2008)

4. In terms of Order 59 rule 11 of the High Court Rules 1988 such application needs to be filed and served within 14 days. There is no issue as to filing of the application within the time period but this was not served within fourteen days as required, and Defendant is seeking enlargement of time for that.
5. Defendant is also seeking stay of the proceedings before Master in terms of Order 59 rule 16 of High Court Rules 1988. The Master's Interlocutory Ruling contained the following Orders:
 - i. *The Defendant on or before 20 December 2019, 12 noon pay into court the judgment sum being \$115,335;*
 - ii. *The Defendant before 20 December 2019, 12 noon to file and serve its statement of defence;*
 - iii. *Defendant to pay Plaintiff cost of this application summarily assessed \$1 000.
Said cost to be paid before 20 December 2019, 12 noon.*
- a. *Should the Defendant fail to abide by the above orders, the default judgment so entered on 6 October 2017 shall remain.*
- b. *Should the Defendant abide by the orders, the Plaintiff is to file and serve a reply to the statement of defence on or before 10 January 2020 followed by a summons for direction." (emphasis added)*
6. Defendant had neither paid the said amount of \$115,335 to the court nor filed statement of defence, on or before 20.12.2019 but filed this application for leave to appeal on 20.12.2019. So failure to pay said sum nullifies the setting aside of default judgment, hence default judgment remains on record after 20.12.2019 if \$115,335 not paid to court.
7. The nature of the condition attached to the setting aside of default judgment is such that if leave to appeal is granted it is imperative to grant a stay of condition precedent of Master delivered on 6,12.2019. If not Plaintiff can execute default judgment.
8. Defendant had waited till last day to file an application seeking leave knowing that the obligation rested on them was not only to file summons if they prefer leave to appeal, but to serve the same within fourteen days from the order of Master.
9. Defendant had failed to do both requirements contained in Order 59 rule 11 of High Court Rules 1988, but only filed the summons within time. When an application seeking leave to appeal is filed, court can validate service done outside fourteen day

time non pro tunc. This doctrine is not applied every time there was a non-compliance but it can be applied depending on the merits of the application seeking leave. In my judgment non service of summons within fourteen days cannot be the sole reason to strike out an application seeking leave to appeal, when in every other manner it is proper to grant leave to appeal.

10. The law on leave to appeal an interlocutory order was set out in *Bank of Hawaii v Reynolds* [1998] FJHC 226 by Pathik, J (as he was then). Referring to the case of *Ex Parte Bucknell* [1936] his lordship stated in the judgment that:

"At the same time, it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for Leave to Appeal under s5 (1) (a) should not be granted as of course without consideration of the nature and its circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a jurisdiction for granting Leave to Appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment".

11. The Court in *Bucknell* went on to state at page 225:

"But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The Court will examine each case and, unless the circumstances are exceptional it will not grant leave if it forms a clear opinion adverse to the success to the proposed appeal."

On leave to appeal the following extract from the decision of the President, Fiji Court of Appeal in Kelton Investments Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr. (Civ. App. 51/95) is also relevant and I adopt the same view to the facts and circumstances of this case:

"... In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted."

12. Court of Appeal in *Shankar -v- FNPF Investments Ltd and Anr.* [2017] FJCA 26; ABU 32 of 2016, 24 February 2017 at paragraph 16:

"The principles to be applied for granting leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either

directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong it must also be shown that an injustice would flow if the impugned decision was allowed to stand. (Nieman -v- Electronic Industries Ltd [1978] V.R. 431 and Hussein -v- National Bank of Fiji (1995) 41 Fiji L.R. 130)."

13. So Defendant should demonstrate injustice if the interlocutory order remained. There should be some injustice that is continuing and could not be cured in the appeal after final decision is made. So it should be an immediate injustice or a loss that cannot be cured later.
14. In this case Master had imposed a condition of payment of the entire liquidated sum to court as a precondition to allow Defendant to proceed in this action. This affected right of Defendant to access to court, which he is entitled to have when he comes to court prior to entering of default judgment.
15. Plaintiff's elected to serve the writ of summons through an advertisement and Defendant states that he was unaware of this action, and Master had decided to set aside default judgment. That setting aside has no meaning if liquidated sum is not paid within fourteen days, as the default judgment will "remain" (sic) in such an instance.
16. Since Master had already decided to set aside default judgment only way it can remain is to consider payment as condition precedent.
17. Master's decision had not indicated why such condition was imposed, which virtually precludes Defendant from presenting his side to court. Master had in the decision handed down on 6.12.2020 held that since fraud was alleged, and such a matter cannot be decided without hearing. Master had held there were merits in the defence.
18. Defendant in the affidavit in support states that their financial status is affected if that amount is paid to court as a condition to defend.
19. Leave to appeal question Master's discretion in imposing a condition having concluded that default judgment needs to be set aside as fraud is alleged. In Supreme Court of Victoria - Court of Appeal decision in Lau V Citic Australia Commodity Trading Pty Ltd [1999] VSCA 34(26.3.1999) held;

"Having decided that the appellant has shown that he ought to be allowed to come in and defend the action we should not, in my opinion, impose any condition of the kind for which counsel for the respondent alternatively contended."

20. In terms of Order 13 rule 10 of High Court Rules 1988, Master can impose terms when setting aside default judgment. Master's discretion can be varied in an appeal

before a judge(See *Evans v Bartlam* [1937] A.C 473 p 478, *Cooper v Cooper* [1936]W.N 205 and *Cremin v Barjak Properties Ltd* 91985) 273 Est. Gaz .299 C.A)¹

21. Master in her interlocutory decision stated that default judgment needs to be set aside as the cause of action had pleaded fraud that can only prove through a hearing. Master held such a matter cannot be dealt in summary manner through default judgment.
22. Having decided that default judgment needs to be set aside, had imposed a condition to deposit liquidated sum stated in the default judgment in court within fourteen days and if not default judgment 'reinstated'. Master had not stated that the defence was shadowy.
23. Master's reasons for such condition being imposed, not included. Without that one can only speculate.
24. Defendant is a foreigner and his status in Fiji is not clear, but he has substantial investment in the country. Parties had entered in to an agreement for the sale without any security for future contingencies.
25. The Defendant proposes three grounds of appeal:
 1. *The Learned Master of the High Court erred in fact and in law by placing the first condition precedent to the setting aside of the Default Judgment sealed on 6 October 2017, that is, payment of the entire judgment sum of \$115, 335 into court on or before 12 noon of 20 December 2019, in a single payment, being 14 days after the delivery of the Interlocutory Ruling, being practically unfair, and unreasonable to the Appellant, causing the Appellant substantial financial instability, prejudicing his financial standing.*
 2. *The Learned Master of the High Court erred in fact and in law, in that by placing the first condition precedent to the setting aside of the Default Judgment sealed on 6 October 2017, that is, payment of the entire judgment sum of \$115, 335 into court on or before 12 noon of 20 December 2019, in a single payment, being 14 days after the delivery of the Interlocutory Ruling impinges on the right to fair trial for the Appellant, in that the Appellant is financially restricted from litigating his Defence in Civil Action No. HBC 201 of 2017.*
 3. *The Learned Master of the High Court erred in law in requiring there to be a condition precedent, that is, payment of the entire judgment sum of \$115,335 into court on or before 12 noon of 20 December 2019, given that the action is currently at pleadings stage and is yet to be determined after the hearing of both parties' evidence, and that are sufficient assets to recover the judgment sum in*

¹ Supreme Court Practice (White Book) 1988 p 834

the event that the Final Judgment is against the Appellant, to secure the interests of the Plaintiff in this event.

26. In Niemann v. Electronic Industries Ltd [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation."

27. Master's decision was an interlocutory decision hence granting leave to appeal will temporarily affect the progress of the action. Court of Appeal in Kelton Investment Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr [1995] FJCA 15; Abu0034d.95s (18 July 1995) it was held:

"The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted."(emphasis added)

28. Defendant's position is that if stay is not granted no statement of defence can be filed, and Plaintiff could proceed to recover sum stated in the default judgment from a property of substantial value hence it is not proportionate.
29. Master had not stated reasons for imposing condition to deposit entire liquidated sum in the statement of claim in court.
30. Apart from that it is a condition precedent to defend the case. This makes setting aside of default judgment worthless if condition cannot be fulfilled within fourteen days. This is the time given for a party to seek leave to appeal.
31. Defendant is granted extension of time for service of this application, considering that filing and service of the same was during court vacation.
32. In the circumstances I grant leave to appeal against Master's decision of 6.12.2020 and also grant extension of time for the service of summons that was done during court vacation. Leave to appeal is granted against Master's decision of 6.12.2019.

33. Pathik J. in *Tappoo Holdings Ltd v Stuchbery* [2004] FJHC 301(27 July 2004) described the principles of stay in an application for the same, coupled with that of interim payments.

The principles governing a stay has been stated thus in Halsbury's Laws of England (4th Ed Vol 37 para 699):

"Two principles have to be balanced against each other as to whether a stay of execution pending the appeal should be granted: first, that a successful litigant should not be deprived of the fruits of his litigation, and secondly, that an appellam should not be deprived of the fruits of a successful appeal."

The principles relating to stay are fully set out in the Notes to Or. 59 r. 13/1 (The Supreme Court Practice 1979 p.909). It states, inter alia, that 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.D. at p.116, C.A.; Monk v Bartram (1891) 1 Q.B. 346). The White Book states that "this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from ...". However, it also has to be considered that "when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory" (Wilson v Church (No.2) (1879), 12 Ch. D at pp 458, 459 CA.). Here there is a risk that the appeal will prove abortive if it is successful and a stay is not granted, in that case the Court will normally exercise its discretion in favour of granting a stay [Scarborough v Lew's Junction Stores Pty., Ltd (1963) VR 129 at 130]. Therefore, where it is apparent that unless a stay is granted an appeal will be rendered nugatory, this will be a substantial factor in favour of the grant of a stay (Wilson v Church (No. 2) (1879) 12 Ch.D.454).

The grant or refusal of a stay is a discretionary matter for the Court [AG v Emberson (1889), 24 Q. B.D., pp 58, 59]. It will be granted where the special circumstances of the case so require. In exercising its discretion the Court will weigh considerations such as balance of convenience and the competing rights of the parties before it[Emberson (supra)]. Also where there is a risk that if 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.

Furthermore, it was stated in Atkins v G. W. Ry (1886). 2 T. L.R. 400 that:

"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 no reasonable probability of getting them back if the appeal succeeds.

It was held in Linotype-Hell Finance Ltd v Baker (1992), 4 All ER p.887 that:

"Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success."

34. The prejudice to Defendant if stay is not granted is substantial. It is futile to grant leave to appeal without a stay of decision regarding imposition of condition precedent when Master had already decided to set aside default judgment entered on 6.10.2017.
35. Hence decision of 6.12.2019 that required deposit of money in court as condition precedent is stayed.
36. Since the appeal is only regarding imposition of condition the decision to set aside default judgment remain in force. Stay order is granted only against imposition of condition precedent So Defendant is directed to file and serve statement of defence within 7 days from today. There is urgency in this matter as this is collection of VAT and Plaintiff had already paid it with penalt :

FINAL ORDERS

- a. Leave to Appeal is granted against interlocutory decision of Master handed down on 6.12.2019 which imposed condition precedent to setting aside of default judgment.
- b. Stay of said interlocutory decision until final determination of this leave to appeal.
- c. Defendant is directed to file and serve statement of defence within 7 days from today.
- d. Each party to bear their own costs.

Dated at Suva this 20th day of March, 2020.



Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva