

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 357 of 2005

BETWEEN: **AUSTRALIASIAN CONFERENCE ASSOCIATION LIMITED** having
its registered office at 357 Princess Road, Tamavua, Suva.

PLAINTIFF

A N D: **MERE SELA & ORS** all of Tamavua –i- Wai Settlement, Suva.

DEFENDANT

Counsel : Plaintiff: Ms Tikoisuva. M
: Defendant: Mr. Tuifagalele.N
Date of Hearing : 28.02.2020
Date of Judgment : 26.3.2020

JUDGMENT

INTRODUCTION

1. Plaintiff instituted action for eviction of named Defendants in terms of Section 113 of High Court Rules 1988. Plaintiff had purchased the land in issue prior to introduction of Torrens System, hence in the judgment delivered by Justice Coventry held,

“[51] Accordingly I find that despite the provisions of the Land Transfer Act, within the factual circumstances of this case, an estoppel, can and does arise which prevents the plaintiffs from gaining possession of the disputed land from the original grantees of the permission and their direct descendants.

[52] To whom does the estoppel extend?

The original grant was to those Solomon Island people who approached the Chiefs in Tamavua with their gifts. They were permitted to occupy the land in perpetuity, subject to the observance of certain custom obligations. Those people and their descendants are the persons who have occupied the land, built on it, developed it and made it their homes. These are the people whom successive legal title holders, including these plaintiffs, have known were on the land and knew were developing it and occupying it as their homes.

[53] Others arrived on the land, at later dates having applied to come in and been specifically granted permission. It cannot be said their presence stems from the original gift or grant.

[54] In these circumstances, in my judgment, the estoppel can only extend to the original grantees of the chiefly permission to occupy and their direct descendants. Writs of Possession will be available in respect of all other defendants on the land. In their case, I can see no answer to the plaintiffs' claim"

2. Justice Coventry having held, that estoppel will apply as a defence to 'original grantees of chiefly permission' further held that proper test to be applied for application of estoppel following three criteria must be present and they are
 - a. Continuity of occupation.
 - b. By the direct descendants of the original grantees and
 - c. The due performance of the custom obligations."
3. In the final orders Justice Coventry held, *inter alia* held that Plaintiffs are estopped from removing the Defendants who are the original grantees or direct descendants of the original grantees and who currently live on the land.
4. While refusing to grant possession to Plaintiff, Justice Coventry held that '*writ of possession can issue in respect of those defendants who are not the original grantees or their direct descendants one individually identified*'. So this matter did not concluded with that judgment of 31.1.2007.
5. After this matter being dealt by several judges since the pronouncement of judgment of Justice Coventry on 31.1.2007 the inquiry as to individual identification and application of criteria to determine which of the Defendants to be evicted was conducted through *viva voce* evidence and accordingly eviction of identified twenty six individuals was ordered on 7.10. 2016 after *inter partes* hearing. Defendants were represented by a counsel, at this hearing.
6. The application for execution of said order was also granted after service of the same to fifteen individuals on 18.10.2019.
7. In the affidavit in opposition Plaintiff stated that execution was carried out after much discussions with the parties and they had taken measures to minimize effect on the lives of the individuals who were ordered evicted.
8. Plaintiff in the affidavit in opposition further stated that affidavit in support of this motion seeking stay was sworn by a party who had already been evicted.

9. There was no affidavit in reply filed for the affidavit in opposition.
10. Plaintiff's counsel stated that they had already executed said judgment against all the parties but for two. She also said that those two parties could not be evicted due to logistical reasons as to the identity of the parties was not certain at that time. This indicates the responsible manner in which Plaintiff had executed orders of the court. They had self restrained execution where necessary.
11. Plaintiffs in the oral submissions said that this application for stay is not supported by parties who were already evicted, but parties who had since come in to occupation.
12. Counsel for Defendants had filed an application before Court of Appeal seeking extension of time to file notice of appeal.
13. Notice of motion of the Defendant did not state any provision of law which application relied, but in the written submission relied on Order 45 rule 10 of the High Court Rules, 1988. It reads:

Matters occurring after judgment: stay of execution, etc. (O.45.r10)

10. Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.

14. Application for Stay can be dismissed *in limine* due to following reasons
 - a. *Motion is seeking to stay my decision delivered on 7.10.2016 and also orders made for execution made on 10.10.2019. The execution of said judgment was fait accompli except for two individuals.*
 - b. *There was no appeal against individual identification and eviction of twenty six individuals, though inter partes inquiry in terms of judgment of justice Coventry.*
 - c. *Plaintiff had not shown any ground of matter that had occurred since the date of judgment to grant relief to defendants against whom already judgment was executed or voluntarily cavated the premises.*
 - d. *Affidavit in support relies on pending application for extension of time to file an application before Court of Appeal, hence this application is premature. Without an appeal before Court of Appeal a stay cannot be granted by this court.*

15. Without prejudice to what was stated above, are no grounds or matters that occurred since grant of execution and scope of Order 45 rule 10 cannot be expanded to abuse the same, in order to delay, fruits of judgment after execution.

16. The principles to be considered in grant of stay was discussed in Supreme Court decision Native Land Trust Board v Lal [2012] FJSC 1; CBV0009.11 (20 January 2012) had set out the law on stay pending appeal. His Lordship Chief Justice Gates in the said Court of Appeal case stated that a Court considering a stay should take into account the following questions:
 - (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 interests in the proceeding.
 - (g) The overall balance of convenience and the status quo.

17. The principles laid out by the Court of Appeal in the above case is used and cited in various cases for stay application.

18. The Fiji Court of Appeal in "Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd (FCA Civil Appeal No. ABU0011 of 2004S)" held thus;

"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 weight 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."

19. The granting of a stay of execution of any judgment pending an appeal is always a matter for the discretion of the Court and can be given either absolutely or for such period and subject to such conditions as the Court thinks fit. Conduct of the Plaintiff in this case was to allow parties to find alternate premises. More than three years lapsed from the grant of orders of the court for eviction of twenty six individuals, to obtain execution.

Will the appeal be rendered nugatory? [This is not determinative].

20. Already Plaintiff had discussions with the twenty six Defendants against whom order was made on 7.10.2016 and had sought execution of judgment three years after said order on 18.10.2019. Plaintiff had executed the eviction. Only two remaining parties were not evicted due to lack of proper identification at the time of execution. This shows the responsible manner in which execution was conducted. In such a situation there is no need for the court to make any orders for stay. Even these two parties who had not been evicted did not come to court seeking stay of execution that shows that they were satisfied with the manner in which Plaintiff executed eviction. Plaintiff's sympathy and altruistic qualities should not be exploited by parties who have no right to occupy in terms of judgment.. Plaintiff in this action had behaved very responsible manner in eviction. If the stay is not granted there impending application before Court of Appeal will not be made nugatory as the execution is almost completed.

21. The effect on third parties.

There is no effect on third parties.

22. The novelty and importance of questions involved.

In my view, there is no novelty in this matter. The proposed appeal states that same matter was re-litigated after judgment which is misconceived for reasons given earlier.

23. The public interest in the proceeding.

There is no public interest in the proceedings.

24. The balance of convenience

Plaintiff who had instituted this action had waited over decade in order to obtain vacant possession. Even after identification of twenty six parties for eviction Plaintiff had waited for more than three years for execution of them, giving them even more time to find alternate accommodation. At this moment all except two of the said identified individuals have either left or evicted. Only two parties remain and once their identities are established eviction of them can be executed. Plaintiff had indicated that they need the land for development and even had offered alternate site for parties who were evicted. There is no justification in granting special treatment for two parties who refuse to vacate after all what was done by the Plaintiff. Balance of convenience lied with Plaintiff in refusing this stay.

CONCLUSION

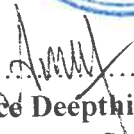
25. Application for stay without an appeal before Court of Appeal is premature. There are no grounds to grant stay of execution already ordered three years from determination of parties to evict. Considering the circumstances of case I will not award any costs.

FINAL ORDERS

- a. Motion for stay is struck out.
- b. Each party to bear their costs.

Dated at Suva this 27th day of March, 2020.




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Justice Deepthi Amaratunga
High Court, Suva