

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 204 OF 2019

BETWEEN : **EDWARD RAJENDRA NAGAIYA aka EDWARD NAGAIYA**
APPELLANT
(ORIGINAL DEFENDANT)

AND : **TRUSTEES FOR THE COLONY OF FIJI OF THE CHURCH OF ENGLAND**
RESPONDENT
(ORIGINAL PLAINTIFF)

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. E. Sailo, for the Plaintiff- Respondent.
Ms. S.Ravai for the Defendant- Appellant.

DATE OF HEARING : 29th June, 2022

DATE OF DECISION : 2nd August, 2022

RULING

A. INTRODUCTION:

1. This ruling pertains to the Inter parte Summons filed on 23rd May 2022, supported by the Affidavit of EDWARD RAJENDRA NAGAIYA aka EDWAR NAGAIYA, the original Defendant- Appellant (the Appellant) seeking Orders, *inter- alia* ;
 - 1) *That a stay of the decision of the Master of the High Court of Lautoka dated 19th March 2021 and any execution thereof in relation to the eviction of the Appellant pending the determination of the Appeal , being Appeal No:204/2019.*
 - 2) *An interim stay pending the determination of this application,*
 - 3) *Costs of this Application.*
2. After filing of the Affidavit in Response by the Plaintiff-Respondent (the Respondent) and the Affidavit in reply by the Appellant , when the matter came up for hearing limited to the question stay, counsel for both the parties agreed to have the matter disposed by way of written submissions. Accordingly, this ruling on stay is hereby made.

B. BACKGROUND:

3. The Respondent , namely, THE TRUSTEES FOR THE COLONY OF FIJI OF THE CHURCH OF ENGLAND, on 08th August 2019 filed the Summons for Ejectment , pursuant to Section 169 of part XXXIV of the Land Transfer Act, requiring the Appellant to show cause why

he should not give up immediate vacant possession to the Respondent of all the land comprised in Certificate of Title No- 13102, Lot 47 & 48 on DP No. 2678 known as "Waqadra" containing an area of two roods in the district of Nadi situated at Kennedy Avenue , Nadi.

4. The Summons was supported by the Affidavit of RIGHT REVEREND GABRIEL MAHESH PRASAD SHARMA and the exhibits marked and annexed thereto as "GS-1" to "GS-4", which included the Authority given by the Respondent to the deponent to swear the Affidavits in support and reply.
5. After filing of the Affidavit in opposition by the Appellant, along with exhibits marked as "ERN-1" to "ERN-5" and filing of the Affidavit in reply by the Respondent, the Learned Master, having entertained a supplementary Affidavit by the Appellant and written submissions from both the parties and heard the Appellant and the counsel for the Respondent, delivered the impugned Judgment on 19th March 2021 ordering the Appellant to immediately deliver the vacant possession of the subject property unto the Respondent and to pay a sum of \$1,000.00 , being the summarily assessed costs.
6. Being aggrieved of the aforesaid judgment of the Master, the Appellant filed his Notice of Appeal on 09th April 2021 averring 07, grounds of Appeal and thereafter on 11th June 2021 filed Summons for Direction as well. The Appellant also filed 06 Supplementary grounds of Appeal on 05th April 2022.
7. Subsequently, on 10th May 2022, the Respondent filed Summons for leave to issue writ of possession and when the matter was supported on 20th May 2022, before Master by the Counsel for the Respondent for orders in terms of the Summons, despite the Appellant had orally sought for stay of the writ of possession, the Master granted orders in terms of the Summons. It is to be observed that the Appellant had not formally moved for any stay in his Notice of Appeal, except for in the Summons for direction filed by him on 11th June 2021.
8. Thereafter, the Appellant, who was appearing in person throughout the proceedings, at this stage filed ex-parte Summons through Messrs. Vijay Naidu Associates for the stay of execution, which was made inter-parte by Court, subsequent to which the Respondent filed papers for the execution of the writ of possession.
9. It is on the above Summons for stay, preferred on behalf of the Appellant; this ruling is made, after considering the contents of the written submissions filed and other materials in the record, as invited by both the counsel, instead of an oral hearing.

C. GROUND OF APPEAL:
As per the Notice of Appeal.

- 1) *That the learned Master erred in law and in facts in failing to consider there is no evidence from the Respondent authorizing the eviction of the Appellant when in fact the only authorization had come from the Dioceses of Polynesia Anglican Church Trust Office , who are not the last registered proprietors; and*

- 2) *That the learned Master erred in Law and in fact by assuming that Arthur Smith was the authorized officer of the Plaintiff by virtue of giving necessary authority to Right Reverend Gabriel Mahesh Prasad to institute the eviction proceedings ; there being lack of evidence to confirm Arthur Smith's appointment as the Acting Trust Manager and/ or lack of evidence thereof to confirm the persons appointed as Trustees for the Colony of Fiji the Church of England; and*
- 3) *The Learned Master erred in law and in fact in failing to consider the minuetts of Vestry Meetings dated 6th November 2016, 20th August ,2017 and 27th August, 2017 as arguable evidence by the Appellant in showing the cause pursuant to Section 172 of the Land Transfer act ; there being evidence to confirm the appellant was allowed to occupy the property and that rent would be offset from monies owed to him by St Christopher's Anglican Church , Nadi, giving rise to an arguable defence of promissory estoppel; and*
- 4) *That the learned Master erred in fact and law in failing to consider the arbitrary actions of the Respondent in disconnecting Electricity and Water from the subject property , causing great inconvenience and/ or emotional distress on the Appellant, and thus requiring the Summary eviction proceeding to be converted into a writ action; and*
- 5) *That the Learned Master erred in fact and law by failing to recognize that there were enough facts and evidence submitted by the Appellant for the Summary eviction proceeding to converted into a writ action; and*
- 6) *That the judgment is wrong in fact and in Law having regard to the facts and circumstances; and*
- 7) *That the Learned Master erred in fact and in Law in awarding costs of \$1,000.00 to the Respondent. In all regards, the Cost awarded was too high.*

Supplementary Grounds of Appeal:

- 8) *That the Learned Master failed to give me the opportunity to have sufficient space where I could place my document folders so as to easily peruse through to argue my case, hence I was completely baffled and taken aback.*
- 9) *That the learned Master erred in law and in fact not to allow the trustees search which is a public document and very crucial evidence in this action in accordance with the public documents Act 1884 and last updated on 28th November 1974 (PD2) and this caught me off-guard. And I intend to make an application to this honorable court for introduction of new evidence and/ or annex the trustees search in my submission whenever I am ordered to submit the same by this honorable court that the entire discretion of the honorable judge.*
- 10) *That the Learned Master erred in Law and in fact in not taking into account that the Fiji Competition and Commerce Commission had grossly misrepresented me and this was mentioned as an observation in the ruling and judgment of the Magistrate's Court at Nadi and the High court appeal at Lautoka respectively whereby I was victimized due to FCCC's incompetence/ misjudgment.*
- 11) *That the Learned Master erred in law and in fact in not taking into account the email sent by the Chairman of the Trustee, the most Reverend Ifireimi Cama had mentioned that the case is between vestry and myself which clearly indicated the vestry is the controlling authority of the church in its vicinity of the parochial District.*
- 12) *That the Learned Master erred in law and in fact in not taking into account that deponent whilst taking out the eviction action had not respected the rule of law to await the decision of the honorable court and chose to cut off my electricity and water, causing great inconvenience to my wife and myself and acted in absolute disregard towards my constitutional rights.*
- 13) *That the Learned Master failed to recognize the fact that the standing committee of the church acted illegally and unconstitutionally by not giving me that opportunity to put my*

side of the case and penalized me in passing a resolution for eviction proceeding further to this my wife being an ordained I priest of the church was suspended without any fault of hers causing the greatest pain and suffering which is totally unjustified, unwarranted and unacceptable.

D. RELEVANT LAW & DISCUSSION.

10. The law on stay pending appeal was stated by His Lordship Chief Justice Gates in ***Native Land Trust Board v Shanti Lal, (2012) FJSC 1; CBV0009.11 (20 January, 2012)*** as follows:

The court considering a stay should take into account the following questions. They were the principles set out by the Court of Appeal and approved subsequently and applied frequently in this court. They were summarized in ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd, Civil Appeal ABU0011.04S 18th March 2005.*** They are:

- (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See ***Phillip 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 bond 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.

In ***Chandrika Prasad v Republic of Fiji, (No 5), (2000) 2 FLR 115, Gates J*** (as he then was) referred to the following cases:

"It is well known that the litigant once successful should not lightly be deprived of the fruits of his successful litigation: ***The Annot Lyle (1886) 11 P D 114 at 116CA; Monk v. Bartram, (1891) 1 OB 346.*** The power of the Court to grant a stay is discretionary: ***The Attorney-General v. Emerson & Others (1890) 24 OBD 56;*** and it is all unfettered discretion ***Winchester Cigarette Machinery Ltd. v. Payne and Anor. (No. 2) (1993) TLR-64-at648.***

The phrase "nugatory" was used by the Court of Appeal in ***Wilson v. Church [1879] 12 Ch. D 454.*** The head note summarizes the position taken by Cotton and Brett LJs:

"Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the Court will not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances".

The Court of Appeal in *Attorney-General of Fiji and Minister of Health v Loraine Die (unreported Misc. No 13 of 2010* delivered on 17 February, 2011) stated:

"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: That hurdle is higher than that of chances of success for considering whether leave to appeal should be granted."

(a). Whether, if no stay is granted, the Appellant's right of appeal will be rendered nugatory

11. The 1st and the 2nd, purported, grounds of Appeal revolve around the authority marked as "GS-1", which has been given by none other than the very Trustees of the subject matter Land & Church, namely, THE COLONY OF FIJI OF THE CHURCH OF ENGLAND, unto the Deponent RIGHT REVEREND GABRIEL MAHESH PRASAD SHARMA, who is the Vicar of the Plaintiff's Church.

The Appellant seems to be in a nit-picking exercise of finding fault with the name "DIOCESE OF POLYNESIA ANGLICAN CHURCH TRUST" that appears on the letter-head, on which the "GS-1" letter of authority is given. As long as the "GS-1" authority has come from the very Trustees of the Plaintiff church, who are the last registered proprietors, this Court does not see any arguable point that could be considered in favor of the Appellant at the hearing of the Appeal.

Further, the contention of the Appellant in paragraph 4 of his Affidavit in Response was that the Authority in question should have been given only to the **Warden of the Church and not to the Vicar** of the Church. But, in his Affidavit in response he has condoned and not disputed the acts of Diocese in giving such authority. All of a sudden the Appellant for the first time at this stage raises issue on the act of Diocese in giving the authority, which in fact has been signed by the Assistant Secretary of the Diocese on behalf of the Trustees, who are, admittedly, the last registered proprietors. This ground of Appeal should necessarily fail.

12. By the, purported, ground 3, the Appellant alleges that the Master has disregarded the minutes of the Vestry meeting dated 6th November, 2016, 20th August, 2017 and 27th August 2017, on which he claims that he was allowed to continue to occupy the subject matter until the alleged sum of \$16,793.35 owed to him by the Christopher's Anglican Church is setoff for the rent payable by him.

In his Affidavit in Response, the Appellant had not averred any specific plea about such an Agreement or arrangement by which he claims that he was allowed to continue in possession until the amount claimed by him is setoff against the rent payable at the rate of \$400.00 per month.

This was not a sufficient ground for the Appellant, who admittedly, stays in the premises as a caretaker to resist an Application under Section 169. However, for the sake of argument, even if it is assumed that the Master was to consider the contents of those documents, any arrangement or agreement they supposed to have had in the year 2017 for the Appellant to stay in the premises would have come to an end long time back.

The, purported, amount claimed by the Appellant, in terms of exhibit marked as "ERN-9" as at 27th August 2017 was \$16,793.35, which according to him was to be offset as rental for Appellant's continued occupation. This need not necessarily have stopped the Respondent from instituting the action for possession against the Appellant, who failed to quit in response to Quit Notice, and had become a trespasser.

This proposed ground of Appeal, undoubtedly, is devoid of any merit to warrant consideration at the hearing of the Appeal.

13. The grounds of Appeal with regard to the disconnection of the Electricity and water supply and about the proceedings before the Magistrate of Nadi on the propriety of that disconnection do not warrant consideration by this court, as the Master had not adjudicated on those matters.

(b) Whether the successful party will be injuriously affected by the stay.

14. The Respondent, who at the end has become victorious in its laborious, costly and time consuming litigation, should be able to taste the fruit of the judgment as observed above. If the stay is granted as prayed for, undoubtedly, it would deprive the Respondent of its right to occupy and make use of the premises for its own advantage. The Appellant is said to be currently holding to the premises in suit only by keeping some of his belongings in the premises while, admittedly, residing elsewhere as per paragraph 5 of his Affidavit in reply filed before this Court on 28th June 2022. The Respondent is said to be spending money on renting another premises for the occupation of the assistant priest. This state of affairs shows that if the stay is granted, it will injuriously affect the Respondent, who is the judgment creditor.

(c) The bona-fides of the Appellant as to the prosecution of the Appeal.

15. The propriety of the purported grounds of Appeal, are so flimsy. The manner in which the Appellant is said to be still holding to the premises owned by a Religious institution, while there is no power or water connection, by keeping some of his belongings, and residing elsewhere, is reprehensible and do not warrant any favorable consideration. His *bona-fide* is questionable.

16. I don't find any effect on third parties, novelty and importance of questions involved or public interest in the proceeding hereof in determining the granting or refusal of the stay.

(g) The overall balance of convenience and the status quo.

17. Finally, I consider the balance of convenience test. This test requires a determination of which of the two parties will suffer greater harm from a refusal of a stay pending the determination of the Appeal. The plaintiff will be denied the fruits of its litigation, if a stay is granted.

I have reached a finding that the Appeal will not be rendered nugatory, in view of the fact that the only right what the Appellant had asked for was to occupy the premises until the balance money due to him in a sum of \$ 7,593.35, as per paragraph 9 of his Supplementary Affidavit, was fully setoff against the rent payable by him from September 2019 and thus nothing remains for him to claim in terms of money or time to occupy.

E. Final Orders

- a. For the aforesaid reasons, after considering the submissions advanced by counsel and the governing principles on an application for stay and in the exercise of my discretion, I do not consider this to be a proper case to grant the stay sought, pending the hearing and determination of the proposed appeal.
- b. The Appellant's application for stay is hereby dismissed.
- c. Order for Costs reserved.
- d. The Respondent shall be at liberty to have the writ of possession executed forthwith.




A.M. Mohammed Mackie
Judge

At High Court Lautoka this 2nd day of August, 2022.

SOLICITORS:

For the Appellant: K Law Chambers & Partners

For the Respondent: Vijay Naidu & Associates