

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBC 362 of 2018**

IN THE MATTER of an application for a stay of execution of the judgment of Honorable David Alfred in the High Court of Fiji at Suva dated 15 March 2019 in Civil Action No 362 of 2018

BETWEEN : **FIJI REVENUE & CUSTOMS SERVICES**

PLAINTIFF/ RESPONDENT

AND : **YVETTE NIKOLIC & JOHN NIKOLIC**

DEFENDANTS/ APPLICANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. O. Verebalavu for the plaintiff/respondent

: Mr. F. Vosarogo for the defendant/applicant

Date of Decision : 4 August 2022

DECISION

1. Yvette Nikolic, the defendant–applicant (“applicant”), is the registered proprietor of the vessel, “Shenanigans”. On 22 June 2018, officials of the Fiji Revenue and Customs Services (FRCS) discovered illicit drugs and foreign currency in the vessel. In addition to criminal proceedings, the defendant–respondent (“respondent”) filed civil proceedings seeking forfeiture of the vessel. By judgment of the High Court dated 15 March 2019, Alfred, J made an order for forfeiture of the vessel in civil action 362 of 2018. Thereupon, the applicant filed a notice of motion on 22 May 2019 to restrain the respondent from executing that judgment. The application was supported by an affidavit given by Ms. Yvette Nikolic. The other defendant, John Nikolic, is not a party to these proceedings.
2. The applicant averred that her husband, John Nikolic, was the master of the vessel, Shenanigans. Thereafter, following an investigation, she and her husband, John Nikolic, were prosecuted by the authorities. On 28 February 2019, Mr. John Nikolic was found guilty by the Suva High Court, and was sentenced to 23 years imprisonment on 8 March 2019. Ms. Nikolic averred that following an application for no case to answer, she was acquitted of all charges on 18 February 2019.
3. The applicant says that she was not in Fiji when civil action 362 of 2018 was heard by the High Court on 1 March 2019. Alfred, J made the following orders:
 - 1) That as the vessel the Shenanigans was used to conceal and carry goods liable to forfeiture it is hereby forfeited to the state
 - 2) The USD 15,000.00 is also forfeited to the State
 - 3) The vessel and the currency are to be disposed of as determined by the Comptroller of Customs who is authorized to sign documents
 - 4) Each party shall bear their own costs of these proceedings”.
4. In her affidavit, the applicant says that she left for Australia on 19 February 2019 soon after her acquittal, and that she was not in Fiji when the civil action for

forfeiture of the vessel was heard. She averred that her lawyer had not obtained instructions from her in regards to the civil action, and had failed to file an affidavit opposing the respondent's application for forfeiture of the vessel. She gave details of her attempts to communicate instructions to her solicitors, and also stated her difficulty in finding another lawyer to appear for her.

5. The applicant averred that the vessel was bought with her money, after having sold her house in Queensland, Australia for AUD 860,000.00, which she received around 18 September 2017. She purchased the vessel on or about 20 October 2017 for USD 305,000.00 from the Florida based, Yachts International. The applicant said she had no knowledge of what the master of the vessel had on board, and that she could lose more than half a million Fijian dollars as a result of the forfeiture.
6. Ms. Nikolic said that the judgment of Alfred, J has been appealed (bearing number 32.2019), and the appeal is pending. She said that the case is of public interest, that as the overall balance of the case is in her favour and having a meritorious appeal, the grant of a stay of judgment would be proper. If the stay is not granted, she said, she would be at a disadvantage, even if she did win the appeal, as FRCS would have disposed the vessel to her detriment and loss.
7. The respondent opposed the application. Vasiti Toga, a customs officer, deposed on behalf of the respondent that Mr. John Nikolic was the master of the vessel. She averred that the vessel was forfeited under customs laws as it was used to convey and conceal prohibited goods. The officer averred that the state was incurring costs on the storage, maintenance, valuation and investigation of the vessel.
8. At the hearing on 17 September 2019, the applicant submitted that FRCS would not be affected by the grant of a stay, and that there are no third party considerations before court. In addition, it was submitted, the question as to whether the plaintiff should have instituted criminal proceedings to seek the vessel's forfeiture needed to be addressed by court. The applicant was of the view that it was not necessary for her to give an undertaking of damages in order to obtain a stay of the judgment.

9. In response, the respondent submitted that the master of the ship was aware that the vessel was being used to conceal and transport prohibited items into Fiji waters in breach of the country's laws. The respondent submitted that they found prohibited goods including cocaine, a shot gun, ammunition, a fully loaded revolver and undeclared foreign currency aboard the vessel. In those circumstances, the Customs Act, it was submitted, vested powers in the Comptroller to make a quick disposal of goods.
10. The respondent submitted that the yacht is stored at the Vuda Marina with storage fees accumulating every day at the expense of taxpayers, and that if a stay is granted the yacht would continue to depreciate in value. The respondent submitted that the applicant has a weak case in appeal as the procedures undertaken by the Comptroller to seize and forfeit the yacht are clearly articulated under the Customs Act 1986. This power was not affected, the respondent submitted, by the vessel owner's lack of knowledge about the transport of prohibited goods. Counsel for the respondent submitted that the wordings of section 130, 157 & 158 of the Customs Act 1986 clearly spell out the powers of the Comptroller concerning a vessel that transports prohibited goods.
11. Much after the hearing, the applicant filed supplementary written submissions on 6 February 2020. In these submissions, the applicant raised the following two matters:
 - “(a) Whether the proceedings by originating summons instituted by the plaintiff was the correct course of action to seek relief of forfeiture; or
 - (b) Is the criminal court the right court to institute proceedings and on conviction, seek for a forfeiture order as a form of penalty?”
12. The applicant submitted that forfeiture under section 130 of the Customs Act could not have been exercised without instituting criminal proceedings, and that the customs law did not permit forfeiture of the applicant's vessel through civil action.

13. The burden is upon the applicant to satisfy court that there are very cogent grounds upon which the court should exercise its discretion to delay enforcement of Alfred, J's judgment until the appeal is heard. The applicant's explanation in her supporting affidavit that she was unable to file an affidavit in opposition in the civil action before Alfred, J is not a good enough reason for the court to exercise its discretion and stay execution of the judgment. The matters raised in the supplementary written submissions are not even canvassed in the grounds of appeal. In those circumstances, it is difficult to accept that the applicant will ultimately succeed in the appeal.
14. The positions taken by the applicant in the supplementary written submissions and the applicant's original submissions have not satisfied court that there are grounds upon which to stay enforcement of the judgment of the High Court. The court is also unable to accept that a stay of the judgment's enforcement will not result in adverse consequences, as the prejudice caused by the delay in disposing the vessel will have to be borne by the public.
15. Therefore, the applicant's notice of motion seeking a stay of Alfred, J's judgment of 15 March 2019 is declined. The court is unaware of the status of the applicant's appeal to the Court of Appeal. However, the court is regrettably mindful that the applicant's notice of motion should have been disposed much earlier.

ORDER

A. The applicant's notice of motion filed on 22 May 2019 is declined.

Delivered at **Suva** on this 4th day of **August, 2022**.



M. Javed Mansoor
Judge