

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

CIVIL ACTION NO. HBA 11 OF 2022

BETWEEN : SELVA RAJAN NAICKER of 8 Verona Street, Lautoka, Retired
APPELLANT/ ORIGINAL RESPONDENT

AND : KOKELA DEVI NAICKER of 8 Verona Street, Lautoka, Small Claims
Tribunal Referee
RESPONDENT/ ORIGINAL APPELLANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Ms. Begum for the Appellant
Mr. Nand for the Respondent

DATE OF HEARING : 28th October, 2022

DATE OF JUDGMENT : 27th January, 2023

Ruling

A. INTRODUCTION:

1. The Appellant, SELVA RAJAN NAICKER, the Respondent before the Magistrate Court of Lautoka, (herein after referred to as “the Appellant”) on 15th August, 2022, while filing his Notice of Intention of Appeal & Grounds of Appeal, to Appeal against the Judgment dated 9th August, 2022 pronounced by the Learned Magistrate of Lautoka, also filed an Ex-parte Notice of Motion, seeking for following Orders. This Notice of Motion was made *inter-partes* by this Court.
 1. *THAT this application be expedited and abridged to 5 days for hearing of this application,*
 2. *THA the application be abridged for service in one day,*
 3. *THAT the interim Domestic Violence Restraining Judgment issued on the 09th day of August,2022 under section 27 to be varied,*
 4. *THAT the non-contact order under section 29 to be implanted in the order issued on the 09th of August,2022 under section 27 to be stayed pending appeal,*
 5. *THAT the costs of this application be paid by the Respondent/ Original Appellant in the matter.*
 6. *ANY other Orders that this Honorable Court may deem just and expedient.*
2. The Appellant in his Notice of Motion claims that this Application is made pursuant to section 72 of the **Domestic Violence Decree 2009, and Inherent Jurisdiction of High Court**

Fiji. However, as per the Written Submissions filed on behalf of the Appellant, it appears that the Appellant is relying on the Order 45 Rule 10 of the High court Rules 1988 as well.

3. The Notice of Motion is supported by the Affidavit of the Appellant, SELVA RAJAN NAICKER, sworn on 12th August, 2022 and filed on 15th August 2022.

B. BACKGROUND:

4. The Respondent hereof, ,KOKELA DEVI NAICKER, as the Appellant in DVRO No: 562/20, on 06th November,2020 (hereinafter referred to as “the Respondent”) made an Application before the Family Division of the Magistrates Court of Lautoka , seeking Domestic Violence Restraining Orders, against the Appellant hereof, under section 27 of the Domestic Violence Decree 2009.
5. The matter being supported *ex-parte* before the learned Magistrate on the same date, Orders as per the Application were granted and the same were sealed and served on the Appellant on 09th November,2020 as per the Affidavit of service dated 17th November,2020 and filed of record.
6. The Appellant on 20th January,2021 filed his response in the form of written submissions , reply to which, in the form of Affidavit, was filed by the Respondent Lady on 22nd February, 2021. The Appellant thereafter filed an Affidavit on 11th March, 2021.
7. However, when the matter had come up on 17th March, 2021, with the presence of both the parties, the learned Magistrate, with the consent of them, made the interim order that had been made under section 27 of the Domestic Violence Decree 2009, as a final order, with which the matter stood terminated. It reads as follows:

17th .03.2021

Appellant present.

Respondent present.

Both parties have agreed to finalize the DVRO application.

Order

1. By consent of the parties, the interim order under 527 is hereby finalized.

2. Cost

Sgd 17/03/21.

8. Thereafter, on 23rd August,2021, Counsel for the Respondent Lady filed a Notice of Motion before the learned Magistrate , supported by an Affidavit sworn by the Respondent Lady , seeking the following reliefs:

- a. *THAT the matter be reinstated back to the Court cause list;*
- b. *THAT the final DVRO order that was made on 22nd day of March, 2021 be varied to include section 29 as a final DVRO order; (the actual date of the order is 17th March, 2021 and not 22nd March, 2022).*
- c. *Any order / orders that this Honorable Court deems just and expedient;*
- d. *Cost in this Application.*

9. The reason for the above Notice of Motion is said to be an incident that, allegedly, occurred on 26th July, 2021 at their residence, where they had, admittedly, lived separately.
10. Consequent to the aforesaid incident, the Original Respondent Man also filed a separate DVRO Application bearing No; 276 of 2021 against the lady seeking reliefs under Section 27 of the Decree.
11. The Respondent Lady, being the Appellant in the said Notice of Motion, on 10th September, 2021 tendered her Evidence in Chief by way of Affidavit sworn on 9th September, 2021, together with annexures marked as "KDN 1" to "KDN 3" of which "KDN-2" & "KDN-3" were Affidavits sworn by her Son and Daughter respectively. The Appellant Man, who was the Respondent thereof, also tendered his evidence in chief by Affidavit sworn on 27th October, 2021, together with a Statutory Declaration sworn by the Domestic Servant, who appears to be loyal to the Appellant Man.
12. The learned Magistrate, instead of calling for oral evidence, decided to dispose the said Notice of Motion by relying on the Affidavit Evidence tendered as above and eventually on 09th August, 2022, pronounced the impugned judgment in favor of the Appellant Lady granting reliefs as follows.
 - a. *The order under section 27 of the DVRO Act is hereby made final against the Respondent for the benefit of the Appellant.*
 - b. *Similarly, the order under section 27 of the DVRO Act is also made final against the Appellant for the benefit of the Respondent.*
 - c. *The Respondent is hereby ordered to vacate the subject property under section 29 of the DVRO Act within 14 days until the final determination of the property matter in the related family matter.*
 - d. *Police to assist in execution of the Vacation Order (if needed)*
 - e. *No Order as to costs.*
 - f. *Appeal within 28 days.*
13. It is against the above mentioned Orders , the Appellant Man filed before this Court the Notice of Appeal, Grounds of Appeal, together with the Notice of Motion on 15th August, 2022 and supported before me inter-partes on 23rd August , 2022 seeking reliefs, *inter-alia*, for the stay of the Order made for vacation of the premises by the Appellant.
14. This Court, having heard Counsel for both the parties , made orders , inter-alia, an interim stay Order to the effect'
 1. ***"THAT the non-contact order under section 29 to be implemented in the order issued on the 09th August 2022 under section 27 is stayed until further orders of the Court."***
15. Opposing the Notice of Motion and Stay Order before the court, the Respondent Lady filed her Affidavit in opposition on 15th September 2022 and the Appellant Man filed his Affidavit in Reply on 19th September, 2022, on which day the hearing was due. However, as the Counsel for the Respondent Lady had no opportunity to peruse the Affidavit in reply due to

belated filing, the hearing was re-fixed for 28th October, 2022. Accordingly, at the hearing the Counsel for both the parties made oral submissions. Written submission was also filed on behalf of the Respondent Lady on the same date and the written submission of the Appellant was filed on 11th November, 2022.

C. **THE ISSUE IN HAND:**

16. The only question that begs adjudication for the time being is, whether a temporary stay Order issued by this Court on 23rd August, 2022, should be extended till the Appeal is heard and finally disposed by this Court.

D. **GROUND OF APPEAL:**

17. The Appellant man has adduced 6 grounds of Appeal, which I reproduce below for the sake of easy reference’.
1. *THAT the Learned Magistrate’s decision was unjust in that its practical effect is unjustly grant section 29 of the Domestic Violence Restraining Order against the Appellant/ Original Respondent.*
 2. *THAT the Learned Magistrate erred in Law and fact that the Magistrate misconstrued that the Appellant/ original Respondent’s old age being 80 years.*
 3. *THAT the Learned Magistrate erred in Law and in fact in failing to consider independently of the Appellant’s /Original Respondent’s health issues being a diabetic patient , Hypertension patient and his evidence that there was sufficient prima facie evidence , and failed in his discretion to accept the evidence in evidence in chief of the Appellant during the hearing.*
 4. *THAT the Learned Magistrate failing to exercise his discretion properly by ignoring the crucial ingredients of the Appellant / Original Respondent’s evidence.*
 5. *THAT there has been a substantial miscarriage of justice in that Learned Magistrate misconstrued the facts put by the Appellant/original Respondent.*
 6. *THE learned Magistrate erred in Law and in fact by adjudging and pronouncing that the Appellant/Original Respondent’s evidence was unreliable and untrustworthy.*

E. **RELEVANT LAW:**

18. The Order 45 Rule 10 of the High Court Rules 1988, Section 72 of the Domestic Violence Decree 2009 come into play when an Appeal of this nature is preferred.
19. Learned Counsel for both the parties in their written submissions have drawn my attention to the well –recognized principles that govern the question of stay pending appeal decided in very often cited case of ***Natural Waters of Fiji Vs Crystal Clear Mineral Water (Fiji) Ltd Civil Appeal ABU0011..045 18th March 2005*** and to several other decisions.
20. In ***Natural Waters of Fiji Vs Crystal Clear Mineral Water (Fiji) Ltd*** (Supra) following guiding principles were laid, which shed some light in resolution of the matter in hand. They are;
- a. *Whether, if no stay is granted, the Appellant'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 bona fides of the Appellants 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.*

F. DISCUSSION & DETERMINATION:

21. Learned Counsel for the Respondent Lady, in his written submissions and during the hearing has taken up a position that the Motion filed by the Appellant is defective as it does not specify the Order under which it has been filed.

As and when such an irregularity is found to have occurred, Counsel for the Respondent lady could very well have moved the Court under Order 2(1&2) of the High Court Rules. No such a move was made. However, the Court has discretion to allow the matter to proceed, if no prejudice is caused to the Respondent by such an irregularity.

22. Despite the above irregularity, counsel for the Respondent has duly addressed the Court on the relevant laws and Rules that govern the matter in hand and this, in my view, need not necessarily nullify the proceedings. Hence, the objection in this regard is hereby overruled.
23. The Appellant Man makes this Application to this Court for a stay of execution of the non-contact order made on 09th August, 2022 under section 29 of the Domestic Violence Decree 2009, which if not stayed, according to the Counsel, has the effect of ejecting the 80 years old Appellant from his own House, who has lived with the Respondent Lady for 48 years after their Marriage in the year 1973.
24. An Appeal will not operate as a stay of execution or of proceedings under the decision of the court below, unless the court below or the Court of Appeal may otherwise direct (see the Court of Appeal Rules, Rule 34 (1)).
25. The Application need to be considered in the light of the basic rule that a litigant is entitled to enjoy the fruits of his/her success.
26. Since the Application relates to a judgment pronounced in a family matter under Domestic Violence Decree 2009, I would apply the governing principles enunciated above as are relevant to that application.

a. Whether the Appeal will be rendered nugatory if the stay is not granted:

27. The relevant question to be asked is that: If a stay is discontinued now and the Appeal succeeds at the end, and if the judgment is enforced in the meantime, what are the risks that the Appellant would face in returning to the property.
28. As observed above, the Appellant who is at the age of over 80 years, though did not produce any documents to demonstrate his various health issues, his averments with regard to his present health condition were not disputed or denied by the Respondent, who also, being at

the age of 75, complained about her poor health condition, which was not disputed by the Appellant Man.

29. Though, submissions were made on behalf of the Respondent lady that the Appellant has alternative accommodations, no evidence was adduced to substantiate it, and for the Appellant to duly respond thereto. The House in question is said to be a large one, with two floors and 5 bed rooms including 3 Master bedrooms. Parties are already divorced and said to be leading solitary life by occupying the different parts of the same house, with two non-molestation orders under section 27 obtained by each of them in their favor respectively.
30. On the evidence, I find that there is an imminent risk of further deterioration of his health condition due to his imminent eviction from the House, where he has lived the major part of his life being the owner thereof and this undoubtedly would adversely affect his mental and physical health conditions. On the other hand, there are no risks that the Respondent would face in enforcing the judgment, if a stay is granted and the Appeal fails finally.
31. Evidence before the court demonstrates that the Appellant would immediately face serious hardships, if the stay is vacated and as a result he is ejected before the Appeal is disposed.

b. Prospect of success on appeal;

32. I have had a cursory look at the grounds of Appeal. At this stage, I need not determine as to whether the ground/s of appeal will succeed, but whether there is prospect of success. In my opinion, the grounds of Appeal have some prospect of success, especially when the decision to evict the Appellant, under section 29, has been arrived at mainly relying on the Affidavit evidence of their Son and Daughter, who supported the Respondent Lady, with no opportunity for the Appellant's Counsel to cross examine them.
33. Further, the decision arrived at by the learned Magistrate in paragraph 15 of the impugned judgment to the effect that ***"This Court is duty bound to prevent the perpetuation of domestic violence by ordering one of the parties to leave the premises until the final determination of the property matter in the related family matter"*** poses a question as to why the party who should leave, according to the judgment, is the Appellant, when there are allegations and counter allegations of domestic violence allegedly committed by both of them and while two non-molestation orders section 27 are in operation for the benefit of both the parties.
34. Above all, the Court will have to carefully consider the seriousness of the incident that, admittedly, took place on 26th July, 2021 as to whether it was sufficient enough for the Magistrate to make an order under section 29 to evict the Appellant.

c. Overall balance of convenience:

35. I have found that the Appeal has some prospects of success and that the Appellant will be seriously affected, prejudiced and will have lost a long period of time as a homeless, if the stay is not extended, and Appeal succeeds, with the judgment being enforced in the meantime. On the other hand, the Respondent will still be able to enforce the judgment if a

stay is granted, the Appeal fails. The Appellant would face immense hardship, if he is compelled to leave his comfort zone at this stage of his life, with such fragile health conditions. Therefore, the balance of convenience favors the Appellant.

G. BONAFIDE OF THE APPELLANT:

36. The Appellant , soon after the judgment of the learned Magistrate on 09th August,2022 , has filed this Application , along with Notice of Appeal and grounds of Appeal on 15th August, 2022. The bona-fide of the Appellant has not been challenged by the Respondent. I am satisfied of the bona-fides of the Appellant in the institution of this Application and filing the Appeal to have the impugned judgment stayed permanently.

H. CONCLUSION:

37. When the arguments placed before this Court are carefully weighed , I am satisfied that the overall balance of convenience and other considerations favor the extension of the stay and in the event the stay is discontinued, it will seriously affect the Appellant by leaving him homeless before the Appeal is finally disposed.

38. For the reasons set out above, I am satisfied that this Court should extend the temporary stay order granted on 23rd August 2022 in favor of the Appellant, against the execution of the reliefs (C) granted in the judgment delivered by the learned Magistrate on 09th August,2022 in favor of the Respondent Lady. I would reserve the order for costs of this application to be made with the result of the Appeal.

I. THE RESULT:

- a. The temporary stay order granted by this Court on 23rd August ,2022 staying the execution of the relief (C) in the judgment dated 09th August,2022 , is hereby extended till the final determination of the Appeal.
- b. The objection raised against the extension of the Stay Order is overruled.
- c. Order for costs reserved.


A.M. Mohamed Mackie
Judge



At High Court Lautoka this 27th day of January, 2023.

SOLICITORS:

For the Appellant/ Original Respondent: Messrs Zoyab Shafi Mohammed Legal

For the Respondent/Original Appellant: Messrs S Nand Lawyers