

IN THE HIGH COURT OF FIJI  
AT SUVA  
CENTRAL DIVISION  
CIVIL JURISDICTION

Civil Appeal 55 of 2023  
(Civil Action No. HBC 171 of 2019)

BETWEEN:

RAAJESHWARAN NAIR

DEFENDANT/APPLICANT

AND:

RAMESHWARAN NAIR

PLAINTIFF/RESPONDENT

Date of Hearing : 9<sup>th</sup> October 2023  
For the Plaintiff : Mr Chand A.  
For the Defendant : Ms Maharaj K.  
Date of Decision : 20 December 2023  
Before : Levaci, SLTTW Acting Puisne Judge

INTERLOCUTORY JUDGMENT

(APPLICATION FOR STAY PENDING APPEAL)

PART A - BACKGROUND

1. This application stems from a decision of the Court, after a full hearing, for the following Orders:

- (i) The defendant shall provide the plaintiff with accounts of the rental monies obtained from 2009 to-date on or before 23<sup>rd</sup> June 2023;
- (ii) The defendant shall permit the plaintiff or its solicitors to inspect the property,
- (iii) The property, CT 10153, Lot 4 on DP 2337 at 105 Laucala Bay Road, Suva shall be sold.
- (iv) The plaintiff shall appoint a Valuer to carry out valuation of the property on or before 30<sup>th</sup> June 2023. The Valuer shall be acceptable to the defendant.
- (v) Either party may make an order to purchase the other's share. I give the parties time in that regard, till 30<sup>th</sup> September 2023.
- (vi) If neither party is in a position to purchase the property, the plaintiff shall advertise the property for sale by public auction in two issues of a local newspaper on weekends. The tender shall be opened in the presence of the defendant or his solicitor. The sale shall be to the highest tenderer.
- (vii) On the tender being accepted, all necessary documents including the transfer shall forthwith be prepared by the plaintiff's solicitors, who shall forward the same to the defendant for his execution and hold same until the purchaser is in a position to settle.
- (viii) Parties are free to engage an independent real estate agent to conduct the sale.
- (ix) The deputy register shall execute the transfer if any of the parties fail to do so.
- (x) Forthwith on settlement, the plaintiff's solicitors shall pay into Court the settlement monies and furnish an account of disbursements and all costs incurred in the sale with documentary evidence.
- (xi) The proceeds remaining shall be distributed equally between the parties.
- (xii) Liberty to parties to apply generally.

(xiii) I make no orders as to costs.”

2. On 22 June 2023 an application seeking for Stay pending Appeal was filed into Court by the Defendant/Applicant together with an Affidavit in support.

**PART B: AFFIDAVITS**

3. In his Affidavit, The Defendant/Applicant deposed as follows –

4. That the subject property is where I reside in and the same is an inherited property which I hold immense sentimental value. Based on this, I have made substantial financial contributions towards maintenance and upkeep of the same for eighteen (18) years and have further secured the same from a Mortgagee Sale Proceedings between the years 2010 to 2017 (Civil High Court Action No: 200 of 2010). I annex hereto and mark the letter “B” a copy of the Term of Settlement dated 10/08/17 in relation to the afore-mentioned matter, wherein I made substantial payment towards the compliance of the Terms of Settlement with no assistance from the Respondent whatsoever towards legal fees or towards payment to the Bank and therefore it is highly prejudicial/injurious/unfair to me that my direct contributions to retain and protect the subject property was not accounted for by the Learned Trial Judge in arriving at a decision for proceeds to be equally shared between the parties. That by virtue of the said judgment, the Respondent benefits to the detriment of the Appellant and therein lies the special circumstances in this matter.

5. That based on the above commitment and my efforts highlighted, I wished to retain my inherited family property and therefore sale of the same to third parties would be an irreversible prejudice. There were no grounds for urgency for sale to third parties indicated by either party during trial.

6. I was unrepresented during trial as my Counsel Mr. Annand. Singh of Messrs. Singh & Singh was deceased overseas and his law firm was in receivership. Therefore, I had difficulty obtaining my files appointing new Counsel on time to represent me for the trial. Furthermore, the Respondent failed to appear during trial day and despite this, matter still proceeded for hearing and judgment was delivered. Counsel for the Respondent did seek vacation of hearing however the said request was not granted.

8. I am advised by my solicitors and verily believe that the main grounds upon which a stay pending Appeal is sought are as follows:

- (a) The chances of Appeal succeeding is high and based on meritorious grounds.
- (b) The Respondent will not be injuriously affected should stay be granted as he had left the Country in early 2009 and since then has shown zero interest towards management of property and its related debt obligations to the Bank (Mortgagee). Furthermore in the event stay is granted, both parties who are biological brothers have the opportunity to mediate and come to a resolution which option will not remain if stay is refused and matter proceeds to sale to third parties.
- (c) The Appeal will render nugatory if stay is not granted as the subject property would be sold to third parties and the Appellant would not be able to recover the monies he had contributed towards the property over the years.
- (d) There are important questions to be tried, that is whether the Respondent is entitled to 50% from sale proceeds based on his complete lack of involvement in the management of property and failing to adhere to bank repayment obligations etc since he left the property in October 2008.
- (e) The Appellant will suffer serious prejudice and irreversible harm should stay not be granted for instance pursuant to Order (vi) in the said judgment, if neither party is in a position to purchase the property, the subject property would proceed to be sold by way of public auction and the property would be awarded to the highest tenderer and in this situation, the bank (Mortgagee) could then take legal proceedings against the Appellant for the balance of monies owed to it should the sale be for a value lower than the balance debt figure.”

4. The Plaintiff/Respondent has filed an Affidavit in Response to the Affidavit of the Defendant/Applicant as follows:

5. That the Defendant in this action is my biological brother. I and the Defendant, we are registered proprietors of the said subject property as to one undivided half share each.

6. That in response to paragraph 3 of the said Affidavit, I do not deny the said paragraph and say that apart from the sale of property orders, there are many other orders that Court has granted to be abided with Sale of the property order is just one part, however, prior to that there are orders given to both registered properties to purchase the property in full.

7. That in response to paragraph 4 of the said Affidavit, I make response as follows –

i. The subject property is currently occupied by the Defendant for his best absolute use and benefit, where he is taking full advantage of my share as well leaving me being deprived and prejudiced on my share of the said property.

ii. I and Defendant both share equal sentimental values in the said property.

iii. Since, Defendant was occupying the said property, the Defendant has been taking all the rental income generated from the said property, the Defendant had not been allowing me to reside and contribute towards the said subject property, hence Defendant had no choice but to carry out renovation n upkeep the property and pay Mortgage from the rental income that are generated in total. However, Defendant has not been forking money out from his pocket. Defendant was using and utilizing the rental income that is generated from the said subject property, for which I also had half shares on the rental income.

iv. The terms of settlement and the case which the Defendant is referring to, the Defendant had used the rental monies to pay some Mortgage. However, it has been brought to my attention that the Defendant had infact failed to honor the Agreement to pay in full as agreed. The Defendant had been very rude and refusing to share the outcomes and discuss with me regarding cases and about the subject property, however, the Defendant had failed to do so. The Defendant had been very rude and refusing to share the outcomes and discuss with me regarding cases and about the subject property, hence, all times I had been left out without knowing, as to what is transpiring in regards to the said property,

v. I further say that the Learned Trial Judge had considered each and every factors of the said case before getting into the conclusion of this matter. By law I have full right for equal shares. The Defendant is feeling that he has upper hand then me at the moment regarding the said subject property, is due to the sole reason, the Defendant is currently occupying and has control over the said property, which gives him an advantage to take care of all errands regarding the property and then use it as his tram – card to show his emotions and gain sympathy. Defendant forget the fact that since, he has taken such responsibility on his shoulders on his own willingness,

then it does not mean that I shall be deprived from my own rights and equal shares. I can also carry out and do all those duties, take responsibilities which Defendant is doing, at the moment provided I have given the chance to do so.

8. That in response to paragraph 5 of the said Affidavit, the Defendant has shown his willingness to purchase the said property and has admitted the same by way of his Affidavit, the Learned Judge has in his orders paragraph (v) of its judgment has given an option to either of us to purchase the said property. Hence, I do not see any reasons as to why there should be a stay order granted since there is already an order for either party to purchase. Further, the Defendant agrees to purchase my share. However, I want a proper and independent valuation be carried out and the distribution be carried out as per the said court order.

9. That in response to paragraph 6 of the Affidavit, the Defendant had all the opportunity to engage another solicitors to proceed with this matter however the defendant chose not to do so. The Defendant had all the opportunity available here with him, In Civil Action No HBC 54/2018, in which, the Defendant himself is the Plaintiff had engaged the services of Lal Patel Bale Lawyers to represent him, hence, the Defendant had all opportunities to engage the services of lawyers who could have represented him. The Defendant should not now be raising unreasonable excuse that I failed to appear during trial. I was not present in Court, the Court proceeded with the hearing of the matter. My counsel on behalf of me, submitted what I had instructed on and what was available to him. The same opportunity the Defendant had. I was advised that Defendant presented his case very well and covered all aspects of the gist of the matter. Hence I do not see any reasons the Defendant should be raising such issues. The Court proceeded with hearing and delivered its judgment based on the merits of the application.

10. That in response to paragraph 7 of the said Affidavit, I deny the said paragraph and say that when the Defendant filed the Notice and Grounds of Appeal and tried to serve on Amrit Chand Lawyers, who had no instructions to accept service of the Appeal documents as the appeal document's needs to be served personally on me to decide which solicitors shall I be engaging to represent me, Amrit Chand lawyers respected by instructions and followed it by not accepting it. Defendant tried to serve on Amrit Chand lawyers however, the service was not accepted and the



Defendant through its agent, threw the documents on the floor of Amrit Chand lawyers and fled the office. The Affidavit of Service filed is wrong and is misleading for which I an Amrit Chand lawyers will now lodged with police complaint against the Defendant as well as the registered bailiff namely Jope Tikoisuva. The said Affidavit of service is totally wrong. Amrit Chand lawyers had then written to the Fiji Court of Appeal and also Chief Registrar advising of their difficulties and they have no instructions for service. *(I annex hereto and marked as "Annexure 1" are the copies of emails and letter sent by Amrit Chand Lawyers to Fiji Court of Appeal and the Chief Registrars' office).*

13. There is no need for the stay to be granted as this stay will prejudice me a lot. The Court has awarded the judgment which I need to enforce and have it resolved. Based on the attached property valuation dated 2011 the monthly rental income from the property is \$8, 500. The defendant has been occupying the top floor flat with estimated rental income of \$1,800 per month. Over the last 14 years this equates to \$303,400. Estimate rental income from the remaining 5 flats equate to \$6,700 per month. Over the last 14 years this equates to \$1,125,600. Assuming 90% occupancy rate this rental income would be \$1,103,040. I annex hereto and mark as Annexure 6 Property valuation 2011).

14. The orders granted by the learned judge is very simple. There should not be any issue for defendants to prove me with the accounts for rental income. The records must be kept by the defendant as the defendant had all these time knowledge that since the said property is under both of our names, these records will be required to be produced once day. Hence, these order granted by the court is very basic which does not require to be stayed.

15. Inspection of the property order is also very simple and basic order. I am the registered proprietor as to one undivided half share hence I have full authority and opportunity shall be given to me for property inspection. I do not see there shall be any issue for not allowing me to inspect.

16. Selling the property. The Court has followed the law and has given the order as to what the law states. The defendant had not at any time shown his genuine interest to purchase the said property for a fair value and neither willing to sell his share. Hence, based on what the law stated for

this type of application, the Court has awarded the orders accordingly. I do not see any reason for it to be stayed.

17. The Valuer shall be appointed. Since, in his affidavit, Defendant has stated that he is willing to purchase the said property, through valuation, we can ascertain at least the current valuation of the property hence, valuation is needed to ascertain the value and for further settlement talk."

5. In Response the Defendant/Applicant filed their Affidavit as follows:

6. That I deny the contents of paragraph 7 of the Respondents Affidavit and repeat paragraph 4 of my Affidavit in Support of the Stay application and further state as follows:

a) That the property consists of a family residence and 5 incomplete executive flats. The family residence used to be occupied by the Plaintiff/Respondent and the Defendant/Applicant's family. Prior to migration, the Plaintiff/Respondent and Defendant/Applicant had mutually agreed and moved to the newly built flats and occupied each flat with their family. This was decided after they were not able to secure executive tenants as planned. It was mutually agreed that they would occupy a flat each and the family residence would be given on rent to students and neither party were to pay any rent.

b) The Plaintiff/Respondent was never restrained from occupying or maintain the property however he chose to move out of the property in 2008 and thereafter migrate to Australia and did not communicate or show any interest in the upkeep and maintenance of the property and its mortgage. The property at that time was still under construction and far from full completion. The Plaintiff/Respondent refused to show any interest and/or efforts to sustain the property when it went on Mortgagee Sale in 2009 instead he directed the bank to push for Mortgagee Sale. I had solely initiated a Civil Action in High Court for Injunction to stop the Mortgagee Sale and thereafter entered into new settlement with ANZ Bank to pay for all the arrears. The Plaintiff/Respondent claims to have sentimental values for this property however he has not made any efforts till to date to assist in maintaining and dealing with the Mortgage of the property

c) I have approached and requested the Plaintiff/Respondent many times to assist in making appropriate applications with the ANZ Bank to



restructure the Mortgage Loan with better and/or lower interest rates, however, the Plaintiff/Respondent has refused to do the same. The restructure of Mortgage was prepared by ANZ Bank on his terms in 2009 however he did not cooperate to sign it. This is one of the major reasons why the Mortgage debt is substantial and increasing due to the high interest rate.

d) I further state that the property has never generated the full forecasted rental income since it was built. Most of the tenants are university students who has short tenure of tenancy. The flats were planned to be executive flats which were to be rented to ANZ Quest Management executives however did not happen. The property was beyond full completion when Plaintiff/Respondent left the property and thereafter the country. I have at many times taken loans from family and used my personal funds to cater for renovation, Mortgage repayments and other ancillary expenses in which the Plaintiff/Respondent did not assist. The property till today remains incomplete.

e) As to paragraph 9 (iv), I strongly disagree with the contents of the Plaintiff/Respondents claim and put him to strict proof. I do not own property in Pacific Harbour. The property that the Plaintiff/Respondent claims of its owned by my wife, Salesni. S Prasad and was solely acquired and built by her through ha l loan with her bank. *Annexed hereto and marked with "RN2" are copies of Certificate of Title No. 15591 and 15141.*

7. That I deny the contents of paragraph 9 of the Plaintiff/Respondent's Affidavit state that I was unrepresented on the date of trial due ot the demise of my counsel, Mr Anand Singh. In the given short time in obtaining all documents and file from the late Mr Anand Singh's office, I was not able to engage another counsel. I agree that I had engaged Lal Patel Bale Lawyers for another civil matter however they were not available to take my instructions on this trial due to non-availability of lawyers. I also state that when the trial of this matter was fixed some 4 months prior, my counsel shad made applications in Court to have the Plaintiff/Respondent available at trial for cross-examination and the same was directed by the Court due to the serious allegations made by the Plainriff/Respondent however he failed to appear personally for trial. I believe that this was deliberately done to evade being cross-examined.

8. That I deny paragraphs 10 and 11 of the Plaintiff/Respondents Affidavit and state that the said Notice and Grounds of Appeal was served at the Plaintiff/Respondents lawyers office being Amrit Chand Lawyers who represented him at the High Court proceedings. This was done due to the difficulties in obtaining his personal address for personal service. The registered bailiff, Mr Jope Tikoisuva attempted service an upon refusal to accept the service, Notice of Grounds of Appeal was left at the counter of Amrit Chand Lawyrs and the same has been endorsed and annexed to the Affidavit of Service. Amrit Chand Lawyers appeared as friend of Court when the Summons for security of costs was called before the Chief Registrar and they were directed by the Chief Registrar to advise the address of the Respondent which to this date has not been done. The Plaintiff/Respondent has at many occasions evaded service of documents and correspondences by withholding his address and contact details. I have recently come to know the Plaintiff/Respondent had changed his name to Romesh Warran in his attempt to evade proceedings and financial liability.

9. That I strongly deny the contents of paragraph 12 of the Plaintiff/Respondents Affidavit and stated that I believe I have merits of success in the Grounds of Appeal that I have filed at the Fiji Court of Appeal and if the Plaintiff/Respondent wishes to defend the Appeal then he may file the appropriate documents in Court of Appeal.

10. That I deny the contents of paragraph 13 to 20 of the Plaintiff/Respondent's Affidavit and say as follows:

a) That there will not be any prejudice to the Plaintiff/Respondent if a stay pending appeal is granted whereas I will be prejudiced if the Court does not allow a stay, in the event if the property is sold to a third party and I succeed in Appeal before the Fiji Court of Appeal. The Plaintiff/Respondent had not shown any efforts or interest in the past 18 years in maintaining and securing the property and has not taken any responsibility with the Mortgage therefore I do not see how the grant of Stay Orders will prejudice him. I strongly believe that I have a right to Appeal and until the Appeal is heard, the judgment of the High Court should be stayed to protect my interest in the property and I have a lot of sentimental value towards this property and have directed all my efforts towards retaining it.

- b) That I have been making repayments into the joint Mortgage account as per the arrangements that I have made with ANZ Bank. I refer to Annexure 5 – page 8 of the ANZ statement in Affidavit in Response filed by the Plaintiff/Respondent on 12<sup>th</sup> September 2023, which clearly shows that I had made all repayments of arrears as per the settlement that was done by ANZ Bank.
- c) That the repayment of Mortgage is being honored and arrangements have been made with ANZ Bank. The Demand Notice which has been annexed as Annexure 5 of the ANZ Statement in Affidavit in Response filed by the Plaintiff/Respondent on 12<sup>th</sup> September 2023 is dated 12<sup>th</sup> February 2019 and thereafter arrangements have been made with ANZ Bank.”

### PART C: LAW ON APPLICATION FOR STAY PENDING AN APPEAL

#### *Stay application*

- 6. In section 20 (1) (e) of the Fiji Court of Appeal Act empowers the single judge of the Court of Appeal powers to stay execution of orders or to make interim orders for payments preventing prejudice pending appeals.
- 7. Under the Court of Appeal Rules, Rule 26 (3) requires that any application made to the Court of Appeal or High Court must be firstly made to the High Court.
- 8. In Order 45 Rule (1) of the High Court Rules requires that a party against whom a judgment has been given may apply for stay of execution of the judgment or order or other relief on matters occurred since the date of the judgment or order and the Court may by order grant such reliefs on terms as it thinks just.
- 9. In the case of Osea Veitala -v- Home Finance Company Ltd ABU 012 of 23 the President of the Court of Appeal, Justice Jitoko had this to say about parallel applications for Stay both in the Court of Appeal and in the High Court:

“15. I agree with this Court’s decision in **Rajendra Chaudhary v Registrar of Titles** (supra) and more so in this instance where the Appellant have already filed their stay application in the High Court and is awaiting a decision. In the **Aman Singh** case, there had been no filing of such summons in the High Court and given the extraordinary

circumstances of the case, the Court of Appeal intervened in the exercise of its discretionary powers.

16. This Court will not entertain a parallel proceedings seeking the same relief as that of the court below. At the very least, it tantamount to abuse of process" (underlining my emphasis)

10. The principles of Stay of Execution were succinctly summarized by Scutt J in the case of Chand -v- Lata [2008] FJHC, Civil Action No. 38 of 2011 (19 July 2008) and the Court will take into consideration these features when determining the matter. They are as follows-

1. "The grant or refusal of a stay is a discretionary matter for the Court: *Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union*, citing *AG v. Emberson* (1889) 24 QBVC, at 58, 59
2. The Court does not make a practice of depriving a successful litigant of the fruits of litigation by locking up funds to which prima facie the litigant is entitled, pending an appeal: *Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union*, citing *Supreme Court Practice 1979*, p. 909; *The Annot Lyle* (1886) 11 PD, at 116 (CA); *Monk v. Bartram* (1891) 1 QBV 346
3. When a party is appealing, exercising an undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory: *Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union*, citing *Wilson v. Church* (No. 2)(1879) 12 ChD, at 456, 459 (CA)
4. If there is a risk that the appeal will prove abortive if successful and a stay is not granted the Court will ordinarily exercise its discretion in favour of granting a stay: *Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union*, citing *Scarborough v. Lew's Junction Stores Pty Ltd* [1963] VicRp 20; (1963) VR 129, at 130
5. In exercising its discretion the Court will weigh considerations such as balance of convenience and the competing rights of the parties before it: *Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union*, citing *AG v. Emberson*
6. A stay will be granted where the special circumstances of the case so require, that is, they justify departure from the ordinary rule that a successful litigant is entitled to the fruits of the litigation pending the determination of any appeal: *Prasad v. Prasad* [1997] FJHC 30; Hbc0307d.96s (6 March 1997),

citing *Annot Lyle* (18886) [1886] UKLawRpPro 31; 11 PD 114, at 116; *Scarborough v. Lew's Junction Stores Pty Ltd* [1963] VicRp 20; (1963) VR 129, at 130; and see also *Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union*

7. In exercising its discretion the Court will weigh considerations such as balance of convenience and the competing rights of the parties before it: *Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union*, citing *AG v. Emberson*
  8. 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: *Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union*, citing *Atkins v. GW Ry* (1886) 2 TLR 400
  9. 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: *Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union*"
11. In *New World -v- Vanualevu Hardware (Fiji) Ltd* [2015] FJCA 172; ABU 76.2015 (17 December 2015) Callanchini, President C.A held that –

"[14] The factors that should be exercised by this Court in an application such as is presently before the Court were identified in *Natural Waters of Viti Ltd -v- Crystal Clear Mineral Water (Fiji) Ltd* (ABU 11 of 2004 delivered on 18 March 2005). Generally a successful party is entitled to the fruits of the judgment which has been obtained in the court below. For this Court to interfere with that right the onus is on the Appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are taken into account by a court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay."

12. In addition, the following factors were considered in *Natural Waters of Viti Ltd -v- Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJC 13; ABU 0011. 2004 (18 March 2005) as follows -
- (c ) Whether the injurious party will be affected by the stay;
  - (d) the *bonafide* of the applications as to the prosecution of the appeal;
  - (e) the effect on third parties;
  - (f) novelty and importance of questions involved;



- (g) the public interest in the proceeding;
- (h) The overall balance of convenience and the status quo.”

## **PART E: ANALYSIS**

### ***(i) whether the appeal will be rendered nugatory if the stay is not granted***

13. In the case of Honeymoon Island (Fiji) Limited and Oceanic Schooner Company (Fiji) Limited, William Gock and Paul Myers -v- Follies International Limited Civil Appeal ABU 0063 of 2007 Byrne J referred to the case of High Court of Australia in [1986] 160 C.L.R 220 in the headnote which reads:

“The discretion conferred by r.12 to order the stay of proceedings is to be exercised only where special circumstances exist that justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal. Special circumstances justifying a stay will exist where it is necessary to prevent an appeal, if successful, from being nugatory. Generally that will occur when, because of the respondent’s financial state, there is no reasonable prospect of recovering monies paid pursuant to the judgment. Special circumstances are not limited to that situation and they will exist where, for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed.”

14. His Lordship Justice Byrne then went on to state in Honeymoon (Fiji) Limited (Supra) stated:

“I think sometimes assumed that special circumstances have to exist before a Stay can be granted in a civil process but this is not an inflexible rule.”

15. The Defendant/Applicant submitted that the Plaintiff/Respondent would not be prejudiced if stay is granted for a few months pending appeal as he is not residing on the property and resides overseas, not taken any progressive approach to maintaining the property and did not show any aspect of securing the property. The Defendant/Applicant submits he will be affected as he stays in residence at the place and is responsible for the repayment of mortgages and to secure rental payments by tenants. If stay is not granted, the Defendant/Applicant will be displaced of residence as the property would have been sold and he will lose out on everything rendering the Appeal a nugatory. The Applicant/Defendant has acted in good faith and has taken



responsibility for the property and complying with injunctive orders of the Court regarding mortgagee sale.

16. The Plaintiff/Respondent argues that a stay is not required. The sale of the property will eventuate if the Defendant/Applicant is unable to purchase the Plaintiff/Respondent's shares and the value of the property will be ascertainable on valuation. The Defendant/Applicant has failed to obtain a valuation although in residence at the property and failed to provide information on rental income. Both parties are prejudiced if orders from the High Court are not complied with. The grounds of appeal are unmeritorious.
17. The Court finds that the Appeal would be rendered nugatory if Stay is not granted. The reason is because the order enable parties to purchase each other shares or in the event purchase of shares cannot be executed, the sale of the property. Not issuing a stay would eventuate with the property being valued and sold thereby rendering the decision on Appeal a nugatory.

*(ii) Whether injurious party will be affected by the stay*

18. The Defendant/Applicant has argued that the Plaintiff/Respondent will not suffer any consequences if Stay is granted.
19. However the Plaintiff has argued otherwise stating that he would not be able to share in the fruits of success i.e. the valuation of the property and thereafter the sale of the property to a third party with the sharing of the proceeds of sale as per Court orders if stay is granted.
20. The Court finds that it will not be injurious for parties if Stay is granted. Both parties have been given specific compliance conditions in the orders and requires both parties to participate in complying with the orders in totality. Hence the imposition of a Stay will mean that both parties do not affect the order until the Appeal is determined. Thus is also puts on hold the sale of shares or the sale of the property until final decision in the Appellate Court.

*(iii) the bonafide of the applications as to the prosecution of the appeal and*

*(iv) Novelty and importance of question raised*

*(v) Public interest*

21. There are 24 grounds of Appeal. The Grounds of Appeal, in summary, pertain to –

- (i) the unfairness of the judge to consider the submissions of the Applicant/Defendant;
- (ii) failing to consider that the Applicant/Defendant had no legal representation nor that the Respondent/Plaintiff was unable to give any evidence as a witness;
- (iii) harm to the Appellant in equally dividing the proceeds of sale as shares to the two parties;
- (iv) failure of the Court to take into consideration the instalments paid by the Applicant/Defendant pending the judgment as well as the lack of contributions from 2009 to 2012 to reduce the debt by the Respondent/Plaintiff;
- (v) misleading and false accusations against the Applicant/Defendant owning properties;
- (vi) failing to disclose pending cases on similar issues;
- (vii) use of monies by the Plaintiff/Respondent on loans obtained for financing the loans.

22. In Kumar -v- Kumar [2023] FJCA 243; ABU056,2022 (20 October 2023) Jitoko J, P CA had this to say;

“[17] Counsel for the appellant argued that the exercise of the court’s discretion under section 119 of the Property Law Act envisaged first and foremost, the contemplation by the court of the partitioning of the jointly owned property, before other options including sale is considered. He refers to the set-up and wording of the Act, firstly the leading of the division that reads:

“Part XIII Partition of Land and Division of Chattels”

and the sub-heading of section 119 that reads:

“In action for partition court may direct land to be sold,” and specifically, section 119 (1) leading on to sub-section (2) under which this proceedings began, categorically states:

“119 (1) Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or, upwards, in the land to which the action relates requests the court to direct a sale of the land and distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly.

[18] The appellant submitted that the court had failed to consider the partitioning of the property before it proceeded to direct the sale. This especially so, given that the appellant had submitted a subdivision proposal for the property, drafted by a registered surveyor agreed to by the both parties. The respondent did not favour the partition the partition and independently sought the sale of the property instead. For his part, the appellant favoured the partitioning. It is for the court upon weighing all the evidence, before exercising its discretion, to decide what is beneficial and in the best interest of all the parties.

[19] While I agree with the court's interpretation in Thomas v The Estate of Eliza Miller & Tess Golding [1946] 42 FLR 268, that a section 119 proceedings need not always begin by an action for partition, the relevant consideration is, should not the court always raise it as a viable, if not a first, option before sale.

[20] To the extent that the proper interpretation by the court of the provisions of section 119 and especially as it relates to partitioning before order for sale is made, I believe is an important legal issue, and lends some support to the merit of the appeal."

23. The Grounds of Appeal seeks for full trial to been conducted with examination of the testimonies of the witnesses to be given on oath. None of this occurred as the Plaintiff/Respondent was unable to be present. The Defendant/Applicant was also unable to secure a counsel and hence relied upon his Affidavit as well.

#### ***Legal Principle of Section 119 of the Property Act***

24. The principle regarding partitioning or sale of land under Section 119 of the Property Law Act was discussed in the case of Thomas v Estate of Eliza Miller [1996] FJ Law Rp 15; [1996] 42 FLR 268 (12 December 1996) 42 where Pathik J expounded:

"I agree with Mr. Gago's submission that in s. 119(1), (2) and (3) provision is made for three separate kinds of action which can be maintained in relation to any property. I reject the defendants' contention that land can only be sold on a court order if there is "an action for partition and not otherwise", and therefore that an application under s. 119(2) must be based on an "action for partition".

In England under the old law the Court had no power to decree sale instead of partition until the Partition Act, 1868 when the court was given power to order a sale. The views of the holders of the greater share prevailed, unless the minority could prove to the Court that their view was the most beneficial. Rules were laid down for the guidance of the Court which are similar to the provisions under our section 119(1), (2) & (3). In all these cases the Court had a discretion.

Where a large estate had to be divided among a few people, the expense was not heavy; but many cases have occurred where a small estate has been given (generally by Will), as in the case before me, to a very large number of persons, some of whom cannot be found, and in these cases the expenses were out of all proportion to the value of the estate. This produced numerous inconveniences and absurdities such as for example a house which was partitioned by actually building a wall up the middle (Turner v Morgan [1803] EngR 490; (1803) 8 Ves 143, Lord Eldon LC). This led to the passing of the Partition Act 1868 (31 & 32 Vict. C. 40) and the Partition Act 1876 under which the Court was given jurisdiction to order a sale of the property and distribution of the proceeds in lieu of making an order for partition. But since the Law of Property Act, 1925 the necessity for sale by the Court no longer exists in England, since, whenever several persons share land beneficially, it is now vested in trustees on trust for sale. Hence the Partition Acts no longer enable the Court to order a sale in a partition action but an action for partition can apparently still be brought, if occasion arises.

This is not a partition action. The subject matter of this application is not based on 119(1) which requires the court to direct a sale of the land and a distribution of the proceeds but there the applicant's interest has to be "one moiety" before that can be done. A "moiety" is defined in *Atu*<sup>1</sup>(supra) to

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19. <sup>1</sup> In *Atu v Atu* [1983] 29 FLR 100 the Court considered a similar application and discussed that:

"...Section 119(1) of the Property Law Act provides as follows:

"Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly."

Subject to one issue Mr. Knight raised which I will consider later, unless the Court sees good reason to the contrary, it is mandatory to direct sale of the property since the plaintiff's interest in the property is not less than one moiety.

A 'moiety' means a half and the issue raised by Mr. Knight is that section 119 is not available to the plaintiff because he is a joint tenant and not a tenant in common entitled to a moiety or upwards of the property.

mean "a half". Therefore no action for partition of land and subsequent sale can be brought by an applicant where interest in the property is below one-half of the total interests in land. Such is the case here.

Here the Plaintiff is neither applying for a partition nor a distribution of the proceeds. The word "partition" is described in Halsbury 1st Ed. Vol 21 at p. 810 as:

"The legal term 'partition' is applied to the division of land tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them."

It is further stated in Halsbury that "the co-owners may be joint tenants, tenants in common or co-partners".

The application here is under s. 119(2) under which sale of land under the direction of the court may be ordered if such sale is considered by the court to be "for the benefit of the parties interested" for the said section 119(2) clearly specifies the circumstances under which the Court could make an Order for sale notwithstanding the dissent or disability of any other party provided that "the sale would be for the benefit of the parties concerned". In the definition of "land" is included "all estate and interests in land" (section 2 of the Act).

In any consideration of the issue in this case the court acts on evidence and decisions will have to be reached on the basis of the evidence. On the affidavit evidence the Plaintiff has proved and satisfied the Court that s. 119(2) is available to her.

In coming to this conclusion I have been persuaded by the observations made by Brooke J.A. in his judgment in *Re Dibattista et al. and Menecola*

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It is not necessary to enter upon a description of joint tenancies and tenancies in common because partition of land by the Court is available to persons having concurrent interests whether jointly or in common in a property.

Halsbury Laws of England Volume 21 first edition at p. 810 when describing the legal term "partition" says:

"The legal term 'partition' is applied to the division of lands, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them."

In a note regarding co-owners, the author says:

"The co-owners may be joint tenants, tenants in common or co-partners."

The plaintiff is entitled to an order for sale of the property unless the Court considers there are good reasons to the contrary."

et al. (Ontario Court of Appeal 74 DLR (4th) p. 569). There he refers to Cook v. Johnston (1970) 2 OR 1 (HCJ) where Grant J considered the question of when and in what circumstances the court may order a sale. I quote below what Grant J said in his judgment at pp. 1-2:

"In Morris v. Morris (1917) 12 OWN 80 Middleton, J., in dealing with a similar matter stated at p. 81: "Sale as an alternative for partition is quite appropriate when a partition cannot be made."

25. The Grounds of Appeal thereafter seeks the following orders: it seeks the dismissal of the originating summons and partition action for sale of property by tender or advertisement by sale and seeks declaratory orders that the Applicant/Defendant has made contributions and thus be ordered to take over the 50% ownership by the Plaintiff/Respondent and that the 50% share be sold by mutually agreed sum.
26. This is not an application for partition but for sale of the 50% property owned by the Plaintiff/Respondent at a mutually agreed sum.
27. Hence there are no issues of novelty requiring the Court of Appeal to consider the application. These issues were to have been traversed before my brother judge. He had considered the issues prior to determining the appropriate orders to make.
28. As to whether the application is bone fide, the Court finds that there is no merit in the application as the application does not suggest any issues of law requiring Court of Appeal to determine.
29. There is no public interest affected by the current stay application. These matters have been well determined by the Court of Appeal.

*(iv) the effect on third parties;*

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

30. The Applicant/Defendant contends they and the current tenants may be affected if stay is not granted as they will be required to vacate the premises. The Court finds there is a direct effect on third parties as a result.
31. For the purposes of a balance of convenience, the Court finds there are no proper reasons for the status quo to remain the same until the Appeal is determined. The Orders by my brother judge pertaining to valuation and sale internally between the parties and if not, by tender or advertisement are discretionary powers given to the Court.



32. The Court finds that the orders set in Court of Appeal will arrive at the same result if the parties execute the Orders of the Court.
33. On a balance of convenience, I find no proper reasons for retaining the status quo.

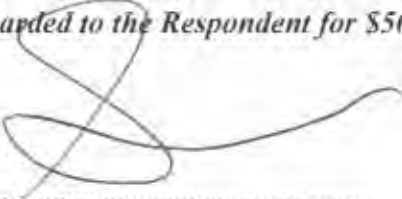
**Costs**

34. The Court grants costs be awarded to the Plaintiff/Respondent for \$500.

**Orders of the Court:**

35. The Court orders as follows:

- (a) That the Application for Stay pending Appeal be dismissed;*  
*(b) That costs be awarded to the Respondent for \$500.*



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Mrs Senileba LWTT Levaci

**Acting Puisne Judge**