

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

CIVIL ACTION No. HBC 132 of 2014

BETWEEN : **SWARAN LATA** of Vatulaulau, Ba Domestic Duties as
the Administratrix of the estate of late NISCHAL,
PRATAP, of Vatulaulau.
PLAINTIFF

AND : **KUNAL KRITESH NAND** of Kumkum, Ba Driver
FIRST DEFENDANT

AND : **LAL'S DIGGING WORKS LIMITED**, having its registered
office at Yash Law, Barristers & Solicitors, Vitogo
Parade, Lautoka
SECOND DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. N. Padarath with Ms. Sagar. Y. for the Plaintiff
Mr. Mr. Reddy-J for the 1st Defendant.
Mr. M. Yunus, for the Second Defendant

HEARING : By way of written submissions. (16th February 2024)

WRITTEN SUBMISSIONS : By the Plaintiff on 16th February, 2024.
By the 1st Defendant on 19th March, 2024.
By the 2nd Defendant on 6th March, 2024

DATE OF RULING : On 4th April 2024.

RULING

(On Stay Pending Appeal)

INTRODUCTION:

1. Before me are 2 Applications, by way of Notices of Motion, one being filed on 23rd August 2023 by the 2nd Defendant and the other one being filed on 14th September 2023 by the 1st Defendant, both seeking for the stay of the execution of my judgment dated 10th July 2023, pending the final determination of their Appeals preferred to the Court of Appeal on 09th August 2023 and 18th August 2023 by the 1st and 2nd Defendants respectively.
2. The plaintiff, as the Administratrix of the Estate of her deceased Son **Nischal Pratap**, on 13th August 2014, by way of her writ of Summons and the Statement of Claim (SOC) filed action alleging that the 1st Defendant on 14th of August 2011, while driving the Vehicle bearing Registration No- CX-434, owned by the 2nd Defendant Company, due to his negligence and one or more of other failures stated in the SOC,

collided with her said Son, when he was crossing the Road, in front of his House situated along the Moto Road, Vatulaulau, Ba, and caused his death instantly.

3. Subsequent to the trial before me, this Court by its judgment dated and pronounced on 10th July 2023 granted the Plaintiff reliefs, *inter alia*, a sum of \$131,560.00 as general damages with 3% interest on it, special damages in a sum of \$3,000.00, and costs in a sum of \$5,000.00 all payable by the Defendants jointly and severally. The 2nd Defendant, being the registered owner of the relevant vehicle and the employer of the 1st Defendant, was found to be vicariously liable, as the 1st Defendant was, admittedly, engaged in driving during the course of his employment under the 2nd Defendant at the time material to the accident.
4. It is against the said judgment, the respective Appeals being filed by both the Defendants, the present Applications by them are before me seeking for the Stay of the execution of the impugned judgment till the final determination of the said appeals.

AFFIDAVITS IN SUPPORT:

5. In his affidavit in support of stay sworn on 13th September 2023 , the first Defendant, inter alia, states **THAT:**
 - a. He verily believes that if the execution of the judgment against him is not stayed, it shall be highly prejudicial to him since he has been advised by his Solicitor that he has meritorious grounds of appeal, which has high probability of success.
 - b. He has raised 6 grounds of the Appeal against the decision of learned trial judge.
 - c. If the stay is not granted pending the outcome of the Appeal, the Plaintiff's Solicitors will proceed with the execution of the said judgment against him.
6. On behalf of the 2nd Defendant Company, its Director, **Rita Roshini Prasad**, in her Affidavit in support sworn on 2nd August 2023 has averred , *inter alia*, **THAT;**
 - a. She verily believes that if the execution of the judgment against her (the Company) is not stayed, it shall be highly prejudicial to her since she has been advised by her Solicitor that she has meritorious grounds of appeal, which has high probability of success.
 - b. She has raised 16 grounds of appeal against the decision of the learned trial judge.
 - c. If the stay is not granted and if she pays the Plaintiff her share of the judgment sum, the Plaintiff would not be financially capable of returning the same unto her if her appeal becomes successful, since the Plaintiff is unemployed, 63 years old and a widow.
 - d. In the interest of justice and on balance of convenience that a stay of the execution of the judgment be granted until the determination of the appeal filed by her.

- e. She has a business and few vehicles, which currently generate income and if the stay is not granted, she will have to obtain a loan or sell her business or most of her properties to pay the judgment sum and the interest on it, and if the stay is not granted it will be highly prejudicial to her.
 - f. The Plaintiff, if minded, can obtain an injunction from this Court against her restraining the disposal of the properties and the business until the determination of the Appeal, as such the Plaintiff's right to the judgment sum would not be injuriously affected.
 - g. If she happens to sell the properties to pay the judgment sum with the interest, in the event a stay is not granted, she will lose her income to maintain her family with two daughters and in the event of mortgaging, she will have to pay the Mortgage sum plus interest on it from the income or lose the income totally and she will not be left with much money to survive with her family.
 - h. She has diligently filed her Appeal papers before the Court of appeal within the prescribed time.
 - i. In the event a stay is not granted and if the Plaintiff Solicitors proceed to execute the judgment against her, her right to appeal will be rendered nugatory.
7. The Plaintiff has filed her Affidavit in opposition only in relation to the Affidavit in support filed by the 2nd Defendant and not against that of the 1st defendant. Responding to the 2nd Defendant's Affidavit in support, the Plaintiff states that the contents alleged in paragraphs 5 to 17 and paragraph 20 are not matters of facts, but legal submissions and those averments violate Order 41 of the High Court Rule.
 8. Apart from the above response, the Plaintiff states further that she is 62 years old, unemployed, relies on the financial support from her other 3 children and she does not know the financial position of the 2nd Defendant.
 9. She states further that as per the advice she received, the grounds of appeal are not meritorious, she has waited for 9 years for the litigation to conclude, her deceased son was 32 years, she was wholly dependent on him and she finds it difficult to seek help from other her sons. She also states that if the 2nd Defendant is genuine in her appeal, she can deposit the partial sum of the judgment in court as a security in obtaining her judgment sum in the event the appeal fails.

THE DETERMINATION:

10. Both the Defendants have applied to this Court for a stay of execution pending Appeal pursuant to Order 45 Rule 10 of the High Court Rules. The Defendants submit that the Order 45 rule 10 of the HCR, empowers this Court to grant stay of execution on the ground of matters which have occurred since the date of the Judgment or Order on such terms this Court thinks just. It is trite law that generally, an appeal does not operate as a stay of execution on the decision of the court bellow.

11. It is the duty of the Defendants to establish by affidavit evidence that if stay is not granted their appeal would be rendered nugatory as they are the Appellants, who move for the stay of the execution.

12. The law on stay pending appeal was stated by His Lordship Chief Justice Gates in ***Native Land Trust Board v Shanti Lal, [CBV0009.11, 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 summarised 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 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 interest in the proceeding.

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

13. The cardinal principle governing the grant or refusal of a stay pending appeal is that a successful *“litigant should not be deprived of the fruits of his successful litigation”*: ***The Annot Lyle, [1886] UKLawRpPro 31; (1886) 11 PD 114 at 116*** as referred to in ***Prem Singh v Krishna Prasad, (CDV 001/2002).***

14. The first test requires the court to consider ***whether the applicant's appeal will be rendered nugatory***, if no stay is granted, albeit this factor *“is not determinative”*.

15. In ***Wilson v. Church, [1879] UKLawRpCh 233; [1879] 12 Ch.D 454*** it was held that where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court ordinarily, to stay the proceedings of the lower court, in order not to render the appeal, if successful, from being nugatory. It was further held that the Court would not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances.

16. The grounds of appeal primarily take issue with my finding that the accident happened due to the negligence and one or more of the failures occurred on the part of the 1st Defendant, particularly when there was no any eye witness, except for the 1st Defendant himself, who was driving the ill-fated vehicle at that time.

17. In the impugned judgment, I have arrived at my findings on the evidence presented. It is trite law that an appellate court will not interfere easily with findings of fact based on the credibility of the witnesses. The ground/s adduced by the Defendants are, however, appear to be arguable. The ***FCA in AG and Minister of Health v Loraine Die, (Misc. No 13 of 2010)*** 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”.

18. The only ground, as a general rule, for a stay of execution, is an affidavit showing that if the appeal were successful then there would be no possibility of getting back any costs or damages which had been paid to the other party. Vide **Prasad v Sharma [2022] fjh575; HBC 332.2020 (9th September 2022)**.
19. The 2nd Defendant at paragraph 19 of her Affidavit in support states that if her appeal is successful the Plaintiff, who is 63 years of age and unemployed, would not be financially capable of returning the judgment sum, if paid to her now as a result of a stay not being granted.
20. The above position is not disputed by the Plaintiff. She has not opted to refute it by filing a reply affidavit. Plaintiff in her affidavit in opposition filed on 9th October 2023 has conceded that she is 62 years old, does not work (Vide paragraph 14). she has also averred that she has no any fixed income and relies on her other 3 sons' support, who have their own families to support.
21. Conversely, the 2nd Defendant in paragraph 31 of her Affidavit in support has averred that she has means to satisfy the judgment if her appeal becomes unsuccessful. According to her averments therein, she has a business and few Vehicles. This averments in paragraph 31 the supporting affidavit of the 2nd Defendant have not been disputed by the Plaintiff in her affidavit in opposition, except for pleading ignorance of the 2nd Defendant's financial position, when responding to the contents in paragraph 18 of the Affidavit in support.
22. The 2nd Defendant by paragraph 33 of her Affidavit in support has also offered for her business and the assets thereof to be restrained from being disposed by her, if the Plaintiff is minded to obtain an injunction order. Additionally, by paragraph 35 of her Affidavit in support reiterated he financial position and given an undertaking for damages.
23. In **Naicker v Gounder [2022] FJHC 139 .2018 (17th October 2022)** at paragraph 20 by taking the dictum from the case of *Hammound Suddard Solicitors v Agrichem International Holding Ltd [2001] EWCA Civ 1915, LTL 18/12/2001*, I have stated that , since it is a monetary judgment , that the court must ask the following questions when considering an application for stay of execution pending appeal.
 - a. *If a stay is refused what are the risk of the appeal being stifled?*
 - b. *If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?*
 - c. *If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?*
24. The 1st Defendant in his Affidavit in support, except for referring to the merits of his 6 grounds of appeal, has not averred anything in relation to his financial position to pay or about any would be difficulties in recovering the amount, if paid, in the absence of a stay. He appears to be also relying on the grounds of appeal adduced on behalf of the 2nd Defendant.

25. If the stay is refused, the Defendants will, undoubtedly, have to face the execution of the judgment, which may, probably, force them to abandon their appeal to avoid further expenses, irrespective of the merits of her grounds of appeal adduced by them. I stand convinced that the refusal of stay would stifle and render the appeal nugatory. The refusal of stay may sometimes indirectly snatch the right of appeal, though the Appellant may have adduced meritorious grounds of appeal
26. The next factor to be considered is ***whether the plaintiff will be injuriously affected by the stay***, as laid down in the **Natural Waters of Viti Ltd** case. The plaintiff in her both the Affidavits in opposition, filed against the Affidavit in support by 1st and 2nd Defendants, has not expressed any concern about being injuriously affected on account of stay, if granted.
27. What the Plaintiff avers, inter alia, is that at the time of death, her son was engaged in Vegetable and Bee farming and through his weekly income out of it, he was contributing for the household expenses and she was solely dependent on him. She also averred that she has now lost her means to support after the death of him and she has to rely on her other 3 sons for support as she has no longer fixed income, which her late Son provided. That she finds it difficult to seek help from her other 3 sons, because they are married and have their own families to support.
28. Despite the alleged deprivation of the support from the deceased son and in the absence of any fixed income for her expenses, the Plaintiff from 14th August 2011, (which is the date of accident) and for last 12 years appears to have managed to maintain herself from the support, given by her other 3 sons.
29. Further, after commencement of this litigation in the year 2014, the Plaintiff has waited for last 9 years for her relief, but still being maintained by her other 3 sons, particularly, having to face apparent cost of litigation as well. So, waiting further for few months from now is, in my view, not going to injuriously affect the Plaintiff.
30. Apart from the above, in view of the contents of averments in paragraphs 31 of the 2nd Defendant's affidavit in support, which is on her financial position, I don't find any specific reason for the Plaintiff to be injuriously affected as a result of stay.
31. On the other hand, as alluded to in paragraph 23 (c) above, if a stay is refused and in the event the appeal finally succeeds, the risk run by the appellant for her to recover what has been paid to the respondent, in my view, is very high for the following reasons.
 - a) The Plaintiff is now 63 years old domestic worker, with no fixed income and maintained by her 3 sons, who also said to be with their own families to be maintained by them. The Plaintiff is also said to be a widow.
 - b) For obvious reason/s, there is a likelihood for the sum so paid, to have been spent or exhausted by the Plaintiff.
32. I find that the plaintiff has not demonstrated her ability to pay back the judgment sum, in the event the Defendants' appeals become successful. Instead she has demonstrated her financial position to be very weak.

33. The averments in paragraphs 5 to 17 and 20 of the Affidavit in support by the 2nd Defendant, as alluded to by the Affidavit in opposition by the Plaintiff, are in relation to the merits of the purported grounds of appeal adduced by the 2nd Defendant. It is not the duty of this Court at this juncture to go into the merits and demerits of the Grounds of Appeal, which will be appropriately dealt with by the Court of appeal. Those averments state that I have erred in my judgment. As such I should desist from examining the merits and demerits of the grounds of appeal.
34. I am satisfied as to the *bona fides* of the Defendants' appeal, with timely filing. Any issue in relation the services thereof can be raised before the Court of Appeal. The applications currently before this court by the defendants are also appear to have been diligently filed, while the Plaintiff said to have shown delay in sealing and serving the Order of this Court on the impugned judgment entered on 10th July 2023.
35. The tests **(d) (e) & (f)** as per paragraph 12 above laid down in ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd***, (supra)do not apply to the present matter. In my view, there are no novel or important questions of law involved in the application before me.
36. The final test is the overall balance of convenience. This requires me to consider whether there are special circumstances for the grant of the stay.
37. Halsbury's Laws of England, Vol 17, (4th Ed) at para 455:
- “The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay, if there are special circumstances, which must be deposed to an affidavit unless the application is made at the hearing”.* (Footnotes omitted)
38. The affidavit filed by the 2nd Defendant in support of the stay avers that she will face financial ruin, if a stay is not granted. While accepting her position, I also hold the view that she will face the same predicament, even if an order is made for 50% of the adjudged sum to be deposited at the registry, as suggested by the Plaintiff's Counsel, for this Court to grant a stay. In ***Linotype-Hell Finance Ltd v Baker, (1992) 4 All ER 887 at pg 888*** Staughton LJ stated as follows:
- ..it seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution.*
39. On consideration of all the factors, I am of the view, that the overall circumstances favour the Defendants' application for stay. In the exercise of my discretion, I allow the applications to stay the execution of my judgment dated 10th July 2023 with no conditions being imposed on the Defendants.

ORDERS

40. I make order as follows:

- a. The Applications for Stay filed by the 1st Defendant on 14th September 2023 and by the 2nd Defendant on 23rd August 2023 succeed.
- b. Stay is granted against the execution of my judgment dated 10th July 2023, until the final determination of both the Appeals preferred by the 1st and 2nd Defendants.
- c. The original record be dispatched to the Court of Appeal forthwith (if it has been called for).
- d. I make no order as to costs.




A.M. Mohamed Mackie
Judge

At the High Court of Lautoka on this 4th day of April, 2024.

SOLICITORS:

For the Plaintiff:

Samuel Ram Lawyers- Barristers & Solicitors.

For the 1st Defendant:

Jitend Reddy Lawyers- Barristers & Solicitors

For the 2nd Defendant:

M. Y. Law- Barristers & Solicitors