IN THE FAMILY DIVISION OF THE MAGISTRATE'S COURT AT SUVA

FILE No: 05/SUV/536

BETWEEN:

MV
Applicant

AND:

RTF
Respondent

APPEARANCES/REPRESENTATIONS

Mr Shahin Ali as Counsel for the Applicant
Ms Swastika Narayan as Counsel for the Respondent

INTRODUCTION

1. The Applicant filed a Form 12 and Form 23 Applications on17th March, 2016 seeking orders, to which I quote in verbatim as follows:-

    a. THAT the Orders dated 04th April 2005 pertaining to payment of maintenance and enforcement of the same via Judgment Debtor Summons or any other made be **permanently stayed** forthwith for want of prosecution and due to the same being statue barred pursuant to Section 27 of Family Law Act 2003,

    b. THAT the Orders granted by the Court on 18th February 2016 be set **aside and/or stayed** pending determination of appeal,

    c. THAT the Judgment Debtor Summons dated 01st September 2015 **stayed and/or set aside** forthwith,

    d. THAT **the Applicant Lady in the Judgment Debtor Summons effect service of the JDS filed on 01st September 2015** and all the documents pertaining to the present action on the Respondent Man, IT,

    e. THAT a **re-calculation of JDS be done** after obtaining the Respondent Man, IT's Response in the matter,

    f. THAT an urgent Hearing date be assigned to this Application,

    g. THAT and **abridgment of time for service of this Application be allowed to the Applicant**, MV,

    h. THAT the costs of this application be costs in course."

The Facts

2. Prior to review the affidavit filed by the Applicant in support of his F12 and 23, I am of the view it is prudent to briefly overview the background of this case as it will assist me to properly review the respective affidavits and submissions filed by the parties in the hearing of this F12 and 23 (notice of motion)

3. For this purpose, I turn to the Court Ruling granted by me on 18 February 2016. This Ruling is an extension to the said Ruling to understand the background of the case in depth.

4. I will not reiterate the entire evidence on the court but reference would only be made to the relevance of evidence to the present application and for analysis purpose.

5. This Court has heard all the evidence in Court. It has further scrutinized the documents that were tendered in Court together with the submissions for the parties.

BRIEF BACKGROUND

6. The Respondent was married to IT on 18th December, 1999.

7. The parties had a child from the marriage namely, JSF, a male born on 12thApril, 2005.

8. The parties separated on 01 February, 2002 when IT left for the Cook Islands. The parties never resided together thereafter and the marriage was subsequently dissolved on 10th August, 2015.

9. The Respondent had successfully obtained maintenance orders against IT, dated 4th April, 2005 in the amount of $300 per month.

10. When JDS proceedings were issued against the Applicant in this matter, he denied being the Surety.

11. This Court then directed both Counsels to submissions to determine whether the Applicant was the Surety.

12. On 18th February, 2016, this Court delivered its Ruling in which it declared that the Applicant is the Surety in this matter.

13. The Applicant now seeks to have this Ruling stayed and or set aside as per his Form 12 & 23 Application filed on 17th March, 2016.

14. The Respondent via her Form 13 Response and Form 23 supporting Affidavit seeks the dismissal of all the orders sought by the Applicant.

15. This is the Respondent's submissions in support of that contention. I wish to quote;

a. The Applicant seeks to consider The principle on stay proceedings was set out in the case of Aldridge & Keaton (Stay Appeal) 2009 Fam CAFC 106 (19 June 2009) and I wish to quote from the respondent's submission as follows;

b. There are 11 (eleven) principles which the above mentioned case refers to a Paragraph 18, and they are as follows:

a) The onus to establish a proper basis for the stay is on the applicant for the stay. However it is not necessary for the applicant to demonstrate any "special" or "exceptional" circumstances;

The Respondents submits inter alia that as this principle clearly states it is glaringly obvious that the Applicant is deliberately delaying the Court process. He was and has been determined to be the Surety in this matter. In fact he has been the Surety since April, 2005 as per the Court minutes. He has never raised any objections in the post to being the Surety although JDS proceedings have been issued against him previously. It

is submitted by the respondent that the Applicant has not established a proper basis for this stay application. It is rather an attempt to delay justice to the Respondent.

b) A person who has obtained a judgment is entitled to the benefit of that Judgment;

The Respondent in this matter is entitled to the outstanding maintenance payments which the Applicant as the Surety is obligated to pay as per the orders of the Court and agreement entered into by the Applicant in Court on 4Th April, 2005. The stay application is a deliberate attempt to delay and avoid paying the maintenance arrears. The Respondent is therefore entitled to the benefit of the decision of this Honorable Court which the Applicant must adhere to.

c) A person who has obtained a judgment is entitled to presume the judgment is correct:

In the present case, the Respondent has obtained specific orders and has taken out a Judgment Debtor Summons against the Applicant Surety issued by this Court. This Court in its Ruling dated 18th February, 2016, has determined that the Applicant is the Surety in this matter. The Respondent is no doubt entitled to presume that these are correct as they have been issued by this Court. Court minutes also prove that there have been previous JDS issued against the Applicant Surety. Furthermore, this Court has made a Ruling based on well-informed and well-founded reasons which have been substantiated through Court minutes. Respondent submitted that the judgment of this Court is therefore correct and the Applicant must respect that decision.

d) The mere filing of an appeal is insufficient to grant stay

The fact that the Applicant has tiled a stay is no doubt a challenge to the Ruling (of 18th February, 2016) of this Court. Although at this stage an appeal has not been filed, the fact that the Applicant has sought a stay in the proceedings to prevent him from undergoing a Means Test is unquestionably a challenge to this Court. The mere filing of a stay application is insufficient for the Applicant to be granted a stay and or the orders that he seeks.

e) The bono fides of the applicant

It is highly questionable whether the Applicant is truly bona fide and whether he has been truthful to this Court. He has been the Surety since 4th April. 2005, and has waited 10 years to challenge his obligations. It is arguable that because [It has been more than 10 years since he made that undertaking as a Surety, he has waived his rights to challenge it now. It is also noteworthy that the Applicant is only bringing about this challenge to this Court after realizing that there is a substantial amount of maintenance arrears which the Applicant as the Surety is obliged to pay. He also intends to travel overseas for which an Interim Stop Departure Order has been placed on him. Due to the fact that he is keen on leaving the country, he is now denying total liability as a Surety to enable him to depart if he country without fulfilling his obligations.

f) A stay may be granted on terms that are fair to all parties – this may involve a court weighing the balance of convenience and the competing rights of parties

The respondent submits that granting of a stay will be highly unfair to the Respondent and her child who is the recipient of the maintenance payments. It would be extremely inconvenient to both the Respondent and her son if this Court granted a stay in favor of the Applicant over the interests of the Respondent, but more importantly against the interests of the child. There are competing rights, however, this Court must have regard to the best interests of the child in this matter who has been denied the payment of maintenance monies as per the orders of the Court. The Respondent and her child would be greatly affected and continue to be deprived of maintenance monies which they are rightly entitled to. This Honorable Court must weigh the balance of convenience in favor of the Respondent for the benefit of the child.

g) A weighing of the risk that an appeal may be rendered nugatory if a stay is not granted — this will be a substantial factor for in determining whether it will be appropriate to grant a stay

The Respondent submits that the stay should not be granted as there is no prospect of success or likelihood that the Applicant will succeed in this application. It is therefore an unmeritorious application.

The application for stay is only a means to delay compliance with the orders of this Court. The fact that the Applicant is "not satisfied" with the Ruling as per his Form 23 Affidavit does not give him a right of passage to get a stay in this proceeding. As such, it would not be appropriate to grant a stay. The application for stay should be dismissed.

h) Some preliminary assessment of the strength of the proposed appeal - whether the appellant has on an arguable case

The Applicant is misconceived about the nature of JDS proceedings and is arguing that the claim for maintenance arrears is statute barred and that the Respondent cannot proceed with such a claim.

The Applicant also questions as to why the JDS was served on him and not IT. He is again ill-advised about his obligations as a Surety.

The Applicant claims that he is not the person named in the proceedings and is again challenging and raising issue of identity. It is obvious from the Applicant's Form 12 and 23 filed on 17th March, 2O16, that he is looking at all possible avenues to absolve him of his obligations as a Surety.

The stay application is unmeritorious and as such, the application for stay should not be granted.

i) The desirability of limiting the frequency of any change in a child's living arrangements

The Respondent has already made appropriate arrangements over the child's living arrangements which she has done so since the maintenance orders were made. There are no changes and or plans to change the current living arrangements as otherwise it would disrupt the child's welfare and well-being including his current living environment.

j) <u>The period of time in which the appeal can be heard and when her existing satisfactory arrangements may support the granting of the stay for a short period of time</u>

The granting of a stay even if it is a short one is strongly opposed by the respondent as it would be against the interest of the Respondent and her child, and also it won't be in the interests of justice. There have been no attempts to pay off the maintenance arrears and neither has the Applicant given any undertaking to this Court to make arrangements for payment. He is simply denying that he is the Surety.

k) <u>The best interests of the child the subject of the proceedings are a significant consideration</u>

The respondent submits that granting of the stay will greatly affect the interests of the child. The maintenance arrears which were to be paid by the Surety in the absence and default by IT are a substantial sum. Now, the Applicant is denying he is the Surety and trying to run away from his responsibility as a Surety. The Applicant was also in the process of going overseas and for this very reason; a Stop Departure Order was placed on him.

The child has been deprived of maintenance monies which by virtue of a Court order doted 4th April, 2005, he was entitled to. The Respondent had to take care of the child on her own and when the need arose, she had to seek assistance from families and friends.

16. Order XXX rule 5 states that *"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit". Order XXXII rule 11 states that "Any judgment by default may be set aside by the court or a magistrate upon such terms as to costs or otherwise as the court or magistrate may think fit".*

17. I find the differentiation between Order XXX rule 5 and the Order XXX II rule 11 is that the former applied in the instance where the defendant fails to appear at the hearing and judgment was delivered based on the evidence adduced before the court. The order XXXII rule 11 mainly applies for the instance where the court made judgment by default in pursuant of Order VI rule 8.

18. Order XXX rule 5 has given a wide range of discretionary power to the magistrate to **set aside** a judgment obtained against any party in the absence of such party.

19. ***Justice O'Regan*** held in *Mishra v Car Rentals(Pacific) Ltd [1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985) that "the question whether or not the judgment was entered irregularly or regularly. And we preface our observations by saying that in the application of similar rules as to that which is here under consideration, both in England and New Zealand,*

the cases in which a default judgment may be set aside have been grouped accordingly as the judgment was regularly or irregularly obtained. The distinction is clearly stated by Fry L. J. in Anlaby v. Praetorius (1888) 20 Q.B.D. 764 at p. 769 where he said:

"There is a strong distinction between setting aside a judgment for irregularity in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular, has been obtained through some slip or error on the part of the defendant in which case the Court has a discretion to impose terms as a condition of granting the defendant relief."

See, to like effect, Craig v. Kanssen (1943) K.B. 256 and the cases discussed therein.

20. Accordingly, if the judgment was obtained irregularly, as is contended, the appellant was entitled to have it **set aside** if regularly, the Court was obliged to act within the framework of the empowering provision - in this case - the proviso to O.XXXIV r.3 which confers an unfettered discretion upon the Court".

21. In view of the Justice O'regan findings in ***Mishra v Car Rentals (Pacific) Ltd*** (supra) the first consideration that the court is required to consider that whether the judgment in question is a regularly made judgment or an irregularly made judgment. Justice O'Regan outlined the irregularity of entering a judgment pursuant to Order XXX rule 3 in ***Mishra v Car Rentals (Pacific) Ltd*** (supra) where his lordship held that *"O.XXX r.3 which provides that if the plaintiff appears at the hearing "and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of the summons proceed to hear the case and give judgment on the evidence adduced by the plaintiff ".*

So, in the instant case, if the appellant had not appeared at the hearing and a judgment was entered without the hearing of the evidence both as to liability in negligence and of the special damages claimed, such judgment would have been also given irregularly with the consequences previously outlined."

22. In view of the above stated judicial precedent, I find in this instance case, the court heard the evidence of the both the parties and delivered its judgment accordingly, I do not find that this orders dated 4th April 2005 and 18th February 2016 is an irregularly made judgment. It was delivered in conformity with the rule 3 of Order XXX. I also quote from Waqanivalagi v Tabua [2012] FJMC 200; Civil Action 239.2009 (23 August 2012)

23. Having reviewed and discussed the leading judicial precedents on the issue of setting aside of regular judgment in ***Shocked and another v Goldschmidt and others (1998) 1 All E.R.372) Leggatt LJ*** held that *" the cases about setting aside judgments fall into two main categories; (a) those in which judgment is given in default of appearance or pleadings or discovery and (b) those in which judgment is given after a trial, albeit the absence of the party who later applies to* ***set aside****. Deferent considerations apply to these two categories because in the second, unless deprived of the opportunity by mistake or accident or without fault on his part, the absent party has deliberately elected not to appear and adjudication on the merits has thereupon followed....."*

Contrasting the cases in the two categories it seems to me that whereas in the first the court is primarily concerned to see whether there is a defence on the merits, in the second the predominant consideration is the reasons why the party against whom judgment was given absented himself".

On the application to ***set aside*** *a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false* ***(Vann v. Auford (1986) 83 L.S. Gaz. 1725****; The Times, April 23, 1986, C.A.) The fact that he has told lies in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the Court should exercise its direction."*

24. A defendant applying to **set aside** a default judgment must satisfy the following in order to succeed: (I consider principles relevant to the current case as those orders were not default Judgments)

    a. *meritorious defence which has a real prospect of success and carry some degree of conviction. It must have a realistic as opposed to a fanciful prospect of success. A supporting affidavit disclosing the condescending particulars of a meritorious defence is mandatory:* ***Wear smart Textile Limited v General Machinery Hire Limited and Anor*** *Civil Appeal No. ABU 0030/1997.*

    b. *some explanation as to why the default judgment was allowed:* ***Evans and Bartlam*** *[1937 2 All ER 646.*

        i. *some explanation for the delay in making an application to* ***set aside: Pankanj Bamola & Anor v Moran Ali*** *Court of Appeal Civil Appeal No. 50/90.*

        ii. *That the Plaintiff will not be prejudiced that may be caused to the Plaintiff as a consequence of setting aside the default judgment* ***Shiri Dutt v FNPF*** *[1988] 34 FLR67."*

25. This Court has also considered the law which has been conveniently set out by Connors J in Rosedale Ltd v Kelly [2004] FJHC 429; HBC0323.1997L (11 June 2004):

    "The issues for consideration by the court on an application to set aside the judgment entered after trial are set forth in Shocked and Another v Goldschmidt and Others[1998] 1 All E.R. 372. *The leading judgment of the court was given by Leggatt LJ who said at page 377: -*

    "The cases about setting aside judgments fall into two main categories: (a) those in which judgment is given in default of appearance or pleadings or discovery, and (b) those in which judgment is given after a trial, albeit in the absence of the party who later applies to set aside. Different considerations apply to these two categories because in the second, unless deprived of the opportunity by mistake or accident or without fault on his part, the absent party has deliberately elected not to appear, and adjudication on the merits has thereupon followed."

26. Jenkins LJ in Grimshaw v Dunbar [1953] 1 All E.R 350 at 355 said:

"...a party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If by mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that the litigant who is accidentally absent should be allowed to come to the court and present his case, no doubt on suitable terms as to costs..."

27. Leggatt LJ in Shocked after considering the authorities then set out at p. 381 a series of propositions or "general indications" which are: -

(1) *"Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.*

(2) *Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.*

(3) *Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.*

(4) *The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.*

(5) *Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it.*

(6) *In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.*

(7) *A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.*

(8) *There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short."*

28. The Lord Justice then said that the predominant consideration is the reason why the party against whom judgment was given absented himself.

29. "**It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be**

given a reasonable opportunity of appearing and presenting his case" – Rich J in Cameron v Cole [1944] HCA 5; 68 C.L.R. 571 at 589.

30. Most recently, the issue has been considered by the Supreme Court of New South Wales Court of Appeal in Murphy v Doman (as representative of the estate of Simpson (dec'd)) – unreported [2003] NSWCA 249 – 11 September 2003 where at paragraph 48 Handley JA said: -

"Taylor v Taylor [1979] 143 CLR 1 and Allesch v Maunz [2000] HCA 40; [2000] 203 CLR 172 are decisions to the same effect. They establish that where judgment had been given in the absence of a litigant who has been denied a hearing through no fault of his own and where his absence has been adequately explained, that litigant has a prima facie right to have that judgment set aside to permit a re-hearing on the merits."(Chand v Devi [2016] FJMC 176; Civil Case 56.2014 (17 August 2016)

31. In view of these findings, I am inclined to disregard the unsatisfactory reasons to invoke this court's discretionary power to set aside this judgment dated 4th April 2005 and 18th February, 2016, wherefore I hold that the Applicant fails to satisfy the court that he has meritorious grounds with the prospect of success if the judgment was set aside.

32. In conclusion, I refuse to set aside the judgment dated 4th April 2005 and 18th February, 2016.

Stay Application

33. Applicant sought inter alia that the Orders dated 04th April 2005 pertaining to payment of maintenance and enforcement of the same via Judgment Debtor Summons or any other made be **permanently stayed** forthwith for want of prosecution and due to the same being statue barred pursuant to Section 27 of Family Law Act 2003.

34. I reproduce the section for clarity.

Institution of proceedings

27.-(1) Subject to this section, proceedings under this Act must be instituted by application. (2) A respondent may, in a response to an application, include an application for any order or declaration under this Act. (3) Where a final order for dissolution of marriage or of nullity of marriage has been of the definition made, proceedings of a kind referred to in sub-paragraph (c) or (d) of the definition of "matrimonial cause" in section 2(1) (not being proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) cannot be instituted before the expiration of 2 years after the date of the making of the order or the date of commencement of this Act, whichever is the later, except by leave of the court in which the proceedings are to be instituted. (4) The court must not grant leave under subsection (3) unless it is satisfied that hardship would be caused to a party to a marriage or to a child of the marriage if leave were not granted.

Staying and transferring proceedings

28.-(1) If-

(a) there are pending in a court proceedings which have been instituted under this Act or are being continued in accordance with section 4; and
(b) it appears to that court that other proceedings which have been so instituted or are being so continued in relation to the same marriage or void marriage or to the same matter are pending in another court,

The first-mentioned court may stay the first-mentioned proceedings for such time as it considers appropriate or may dismiss the proceeding.

(2) If-

(a) there are pending in a court proceedings that have been instituted under this act or are being continued in accordance with section 4; and
(b) it appears to that court that it is in the interests of justice, or of convenience to the parties, that the proceedings be doubt with in another court having jurisdiction under this Act,

the court may transfer the proceedings to the other court.

(3) The judge of the Family Division may of his or her own motion or on the application of a party at any time order that any proceedings be transferred from the Family Division of the High Court to the Family Division of the Magistrates' Court or from the Magistrates' Court to the Family Division of the High Court. (4) No appeal lies from an order of the judge made under subsection (3).

35. Order XXX rule 3 deals with the instances where the defendant fails to appear at the hearing. The rule 3 of Order XXX stipulates that *"If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of the summons proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant".*

36. In line with the rule 3 of order XXX, it is a discretionary power of the court to adduce the evidence of the plaintiff and give judgment or may postpone the hearing. If the court decided to proceed with the hearing in the absence of the Defendant, the court has to satisfy that the defendant was dully serviced with the writ of summon. If the court satisfy the summon was dully serviced on the defendant, the court may either enter a judgment by default in pursuant of Order VI rule 8 if the claim was a case of liquidated demand and the defendant neglects to deliver and serve the notice of defence prescribed by rule 6 within the time limited by the said rule, and is not let in to defend in accordance with the provisions of rule 7 of order Vi, or enter a judgment based on the evidence presented by the plaintiff if the claim is a non-liquidated claims or if it is a liquidated claim where the defendant has filed his notice of intention of defence and/or his statement of defence but fails to appear at the hearing. According to the aforementioned rules stipulated in the Magistrates' court rules, I find that the Magistrates' court is empowered with its discretionary power to deliver two modes of judgments in the absence of the defendant. Firstly a judgment by default pursuant of rule 8 of order VI and judgment after adducing evidence in the absence of the defendant.

37. In light of the above provisions, I am of the view that the Applicant failed to justify as to why the court should the Orders dated 04th April 2005 pertaining to payment of maintenance and enforcement of the same via Judgment Debtor Summons or any other made be **permanently**

stayed forthwith for want of prosecution. The Court also has a doubt as to whether the Applicant being the surety has locus standi or not. But I do not wish to analyse this particular application due to lack of facts/ evidence submitted by the applicant.

38. I also consider the below mentioned applications by the Applicant together.

a. THAT the Orders granted by the Honourable Court on 18th February 2016 be set **aside and/or stayed** pending determination of appeal,

b. THAT the Judgment Debtor Summons dated 01st September 2015 **stayed and/or set aside** forthwith,

c. THAT **the Applicant Lady in the Judgment Debtor Summons effect service of the JDS filed on 01st September 2015** and all the documents pertaining to the present action on the Respondent Man, IT

d. THAT **a re-calculation of JDS be done** after obtaining the Respondent Man, IT's Response in the matter.

39. The principles' governing a Stay has been stated thus in Halsbury's Laws of England (4th Ed. Vol. 37 para 696):

40. The Court considering a Stay should take into account the following questions. They were the principles set out by the Court of Appeal and approved subsequently and applied frequently in this Court. They were summarized in Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (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 Philip 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 proceedings.

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

41. In the present case there is a pending Appeal.

42. The applicant refers to the case of **Jennings Construction Limited v Burgundy Royale investments Pty Ltd 161 CLR Page 681** which dealt with an application for a stay when special leave was been asked for to appeal to the High Court of Australia. In that case the High Court gave a stay saying that if a stay is not granted the security the liens in that case gave to the applicant for payment of monies would be lost as the respondent would sub divide the land and sell the same.

43. The high court in Jennings case also held that it is relevant to consider the following:-

a. Whether there is substantial prospect that special leave will be granted.
b. Whether the applicant has failed to take steps to seek a stay from the court where the matter is pending.
c. Whether the grant of a stay will cause loss to the Respondent.
d. Where the balance of convenience lies.

44. I am of the view that the applicant should have raised about **the Applicant Lady in the Judgment Debtor Summons effect service of the JDS filed on 01st September 2015** and all the documents pertaining to the present action on the Respondent Man, IT, and that **a re-calculation of JDS be done** after obtaining the Respondent Man, IT's Response in the matter, before the hearing of the case subjected to this proceedings. Also on the same token, the court wishes to raise a question from the applicant that as to why the court needs a surety what is the role of a surety.

45. As already noted the applicant submits that in this case stay should be granted and he explains the grounds in his F23 and I have perused the F23 dated 17thMarch 2016 and do not wish to reproduce the affidavit. But it is prudent to note that denying serving the maintenance order is not an excuse as he was not a party to the proceedings at that stage and later became the surety of the respondent in later sage of the proceedings. (Ref. to the analysis in the Ruling dated 18 February 2016.)

46. The court also noted that there is no fact from the applicant to suggest that a stay would not cause irreparable loss or damage to the respondent.

47. The balance of convenience required that the status quo as existed prior to the interim Order be maintained.

48. A stay will cause an irreparable loss to the Respondent as she is struggling to enforce the child maintenance order via the JDS.

49. Having noted the principles on stay in relation to this application this Court finds that for the reasons given here above the balance of convenience is in favour of a stay being granted and the subject matter of litigation being preserved. In particular, considering the Applicants

rights to Appeal in the High Court. Now the Court has to strike a balance between these two conflicts of interests.

50. Considering the notion of best interest of the child and object of the enforcement procedure (JDS) and definition and role of the surety, I order that the Applicant to deposit the JDS cost in the Chief Registrar's Trust fund and monies shall be held in the Trust until further. The FJ $30,311.50 is not to be disbursed by the either party to this litigation Registry/the Chief Registrar's Trust fund **until further order of the Court."**

51. The above due to the reasons that the Applicant deems to has deprived the Respondent and her child of maintenance monies which they are entitled to and considering the submission by the respondent with reasoning that The Applicant is now trying to escape liability and responsibility of the Surety.

52. The Applicant has already been determined to be the Surety in this matter and for these reasons; this Court must exercise its powers and discretion and rule in order to uphold interest of justice.

53. The Court must also take into account the best interest of the child and the fact that the maintenance arrears are a substantial $30,311.50 and the great injustice that the Respondent and her child have had to endure due to the deliberate non-compliance of Court orders by the Applicant.

54. At any event should there be a Judgment contrast to the findings of this court by the High Court, the Applicant would not prejudice as he may move the court to release the security deposit to him.

ORDER

I Orders granted by the Court on 18th February 2016

a. The Orders granted by the Court on 18th February 2016 be **stayed** pending determination of appeal subjected to the condition of the security deposit $30,311.50 in the chief Registrar's Trust Fund within 30 days with effecting from toady.

b. The Court will not **set aside** the Orders 18th February 2016 entered by this Court.

II Orders dated 04th April 2005

a. The Court cannot take insubstantial arguments where no clear reasons are given to permanent stay of the Orders dated 04th April 2005 pertaining to payment of maintenance and enforcement of the same via Judgment Debtor Summons or any other.

b. The Court must be given good cogent reasons in application to **set aside** an order. There is none in this case.

c. The Court will not **set aside** the Orders dated 04th April 2005 entered by this Court.

III 01st September 2015

a. The Court will not **set aside** the Judgment Debtor Summons dated 01st September 2015 **stayed and/or set aside**. The Court must be given good cogent reasons in application to
b. **set aside** an order. There is none in relation to this JDS.

c. The Court also **refuse** to grant an order enabling the Applicant Lady in the Judgment Debtor Summons effect service of the JDS filed on 01st September 2015 and all the documents pertaining to the present action on the Respondent Man, IT,

d. The Court also **refuse** to grant an order for **re-calculation of the JDS be done** after obtaining the Respondent Man, IT's Response. But the Applicant is at liberty to obtain an appointment from the Registry, before the means test for a general **re-calculation of JDS in his capacity as the surety.**

e. The Court would mindful to set an urgent Hearing date for this Application subjected to the outcome of the Appeal.

55. Parties to bear their own costs.

Right of Appeal – 30 days.

LAKSHIKA FERNANDO (MS)

RESIDENT MAGISTRATE

DATED AT SUVA on this 04th day of October 2016.