

IN THE SUPREME COURT OF FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. CBV 003 of 2016
[High Court No. HBC 197 of 2013]

BETWEEN : **MANDA YOLANDE IHAKA** *Petitioner*

AND : **VINAY SANDEEP PRAKASH** *Respondent*

Before : **Almeida Guneratne, J**

Counsel : **Mr. K. Vuataki for the Petitioner**
Mr. R. Singh with Ms. A. Swamy for the Respondent

Date of Hearing : **8 June, 2016**

Date of Ruling : **20 June, 2016**

RULING

The Application

- [1] The present application arises out of a Notice of Motion dated 11th May, 2016. Two principal reliefs have been sought by the said motion viz:
- (i) Special leave to appeal against the single Judge Ruling of Calanchini, P. of the Court of Appeal, dated 15th April, 2016 refusing an application for extension of time to appeal to the (full) Court of Appeal against the judgment of the Lautoka High Court dated 25th September, 2014.
 - (ii) For an interim stay against the said judgment of the High Court.

- [2] The matter being listed before me for mention, sitting as a single Judge of this Court on 16th May, 2016, only the application for a “a stay” as referred to at paragraph [1] [ii] above was fixed by me for hearing on 8th June 2016 as falling within my jurisdiction (vide: **Stephen Patrick Ward v Yogesh Chandra**, CBV 0010/2010, minutes of the Supreme Court – 7th and 20th April 2011) Parties were directed to file affidavits in response and written submissions should they consider them to be necessary.

The Hearing for a stay on 8th June 2016

- [3] When the matter was taken up for hearing for a Ruling on the interim stay matter in question, I pointed out to the learned counsel for the petitioner that, in the Notice of Appeal dated 17 March, 2015 filed in the Court of Appeal seeking extension of time to appeal against the said Judgment of the High Court no stay had been sought.

Ought not that fact be a bar to seek an interim stay from this Court?

- [4] Could the Appellant, having not sought “a stay” in the Court of Appeal make an inductive leap and seek it in this Court? If it had been sought in the said application for extension of time to appeal, that would have been different for with the refusal to grant extension of time to appeal, relief for an interim stay against the High Court Judgment would have stood as being deemed to have been refused as well.
- [5] Although I was inclined to make an order on the aforesaid issue as a preliminary matter, given the fact that, it was an issue raised by Court, learned Counsel for the Respondent having not raised the same in the affidavits and submissions filed by him, I felt that I should leave it at that.

Ruling on the Stay

- [6] Thus, I proceed to consider the application for an “interim stay against the High Court Judgment” on its merits in the light of criteria applicable to the granting or refusal of the same.

Principles governing a stay application

[7] In **Stephen Patrick Ward v. Yogesh Chandra** (supra), His Lordship the Chief Justice opined thus:

*“In arriving at a decision as to whether the Petitioner’s circumstances are sufficiently exceptional for the grant of stay relief pending appeal, it is necessary to consider the relevant principles set out in the Court of Appeal in **Natural Waters of Viti Limited v. Crystal Clear Mineral Water (Fiji) Ltd.** Civil Appeal ABU0011.04S,*

They were:

- “(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 proceeding.*
- (g) The overall balance of convenience and the status quo.”*

Application of the Principles governing a Stay application to the facts of the instant case

[8] I shall now proceed to assess the instant case in the light of those principles bearing in mind that one single criterion cannot be taken in isolation and that they must be considered cumulatively.

Re : The bona fides of the applicant as to the prosecution of the appeal

[9] For instance, a party aggrieved by a decision of a Court only seeks to test it in appeal. The system gives such party that opportunity to the extent of seeking extension of time to file an appeal. There is nothing to suggest in this case that the appellant has indulged in any delaying tactics in the prosecution of his efforts to vindicate his

interests. It follows therefore that the appellant's bona fides as to the prosecution of the present appeal to this Court ought not to be held against him. But, does that entitle him for a stay?

Re : Whether the successful party will be injuriously affected by the Stay

- [10] The judgment of the High Court was in September, 2014. It was decreed by that judgment that a sum of \$37,000 with interest at 3% per annum which the Respondent had paid to the Appellant in the fact circumstances of that case be refunded. It appears that to date, the Respondent has not sought execution of that decree. He has been waiting patiently to see satisfaction of that decree for over a period of 1½ years. Thus, on that criterion taken *per se* I am unable to decide the matter against the granting of a stay. On the other hand, does that alone entitle him to the grant of a stay? Should the Respondent's patience to enjoy the fruits of his victory be held in favour of the appellant? After all, in the proceedings before me, Mr. Singh who appeared for the Respondent resisted the application for a stay.

Re : The criterion of "effect on third parties"

- [11] The case involves "a money matter" – a decree for a refund of money paid by the Respondent to the Appellant. His Lordship the President of the Court of Appeal in refusing the Appellant's application for extension of time to file appeal to that Court has captured the background facts in his ruling and it is not necessary to waste time and paper on that for the purposes of this application. The matter boils down to a "money matter" between the Appellant and the Respondent. I cannot see it affecting third parties. Thus, that factor cannot be held as standing in favour of the Appellant

Re : the novelty and importance of questions involved

- [12] In that regard, going through the relevant material on record I noted the following:
- (i) that, the iTaukei Land Trust Board (the Board) had not consented "in writing" to the Sale and Purchase agreement between the Appellant and the Respondent

(which was the central issue for determination in the High Court) although it appears that the Board had accepted some payment by way of a deposit;

- (ii) that, on a perusal of Clause 2(4) of the proposed agreement between the parties the same had not reached fruition for the reason noted by me in (i) above.

[13] On those established facts as appearing on Record, I could see no novelty or any importance of questions involved in as much as:-

The decisive factor was that, “the Board” had not given its “consent in writing” to the writing that purported to be an agreement, even assuming that it had accepted some payment by way of a deposit.

[14] Consequently, I am not convinced that the criterion of “Novelty and importance of questions involved” is met in the instant case.

Re : the criterion of Public Interest in the proceeding

[15] On that, Mr. Vuataki for the Appellant stressed on the point that, although the present matter involves a matter of “an agreement” between the Appellant and the Respondent in turn concerning a sum of \$37,000.00, there are several such agreements with third parties as well and if the appellant’s (his clients) grievance is not entertained all those agreements would stand to suffer.

[16] On the other hand, Mr. Singh contended that, to begin with there was no material on Record to substantiate that argument based on the criterion of public interest.

[17] Without slighting in any way the efforts made by Mr. Vuataki, I was driven to agree with the point made by Mr. Singh. Further, when he made the point that, in the result the present dispute stood reduced to one between two individual parties (the Appellant and the Respondent) and therefore there was no element of ‘public interest’ involved at all, a point with which I agree.

Re : Criterion whether, if no Stay is granted, the appellant's right of appeal will be rendered nugatory

[18] In the context of that criterion I feel obliged to make some preliminary observations.

Right of Appeal?

[19] The appellant's present application is not in the nature of an appeal (as a matter of it being in the nature of a right to appeal) but rather as an application in the nature of an application seeking special leave to appeal against a Single Judge's Ruling of the Court of Appeal.

[20] That is my reading of Section 98(4) of our Constitution. Given the background to the present application as revealed from the Record I find that Section 8 of the Supreme Court Act of 1998 also has no relevance.

Re : Principle (a) referred to at Paragraph [17] in the Stephen Patrick Ward v. Yogesh Chandra (supra) – Need to Qualify the said criterion

[21] For the aforesaid reasons, I am of the view that it needs to be modified and/or qualified to read as follows in the context of the Fijian context – viz”

“Whether, if no stay is granted an applicant's application for special leave to appeal will be rendered nugatory.”

[22] Having made those remarks I now proceed to deal with the present application for a stay on the criterion of whether the said application will be rendered nugatory should a stay be refused.

[23] In that regard, I found authority in the case of **Iftakhar Iqbal Khan v. Michael Fenech** (quoted by my Lord the Chief Justice in **Stephen Patrick's** case (supra) at paragraph [22] thereof which states thus:

“Execution in this case is payment of a sum of money. Only in the rarest of cases is that sufficient to justify a stay as subsequent success in the appeal will be implemented by repayment to the appellant. This is not a case of

performance or restraint of some action or destruction of property which will irreversibly change the status quo and render a successful appeal nugatory. The description in the petitioner's affidavit of the consequence of having to pay before the application for special leave is heard is insufficient to meet that test."

- [24] I adopt that thinking with no reservations whatsoever in its application to the factual aspects in the instant case with the consequence that, the Appellant fails to seek "a stay" against the execution of the decree of the judgment of the High Court.

Re : the criterion of overall balance of convenience and the need to maintain the Status Quo

- [25] In view of the antecedent criteria on which I have considered above in their application to the facts and circumstances of the instant case this criterion and/or this principle stands redundant for I am struck largely by the approach adopted in **Iftakhar Iqbal Khan** decision (supra).

- [26] Furthermore, having perused the Single Judge Ruling by Calanchini P, where His Lordship refused to grant extension of time to appeal to the (Full) Court of Appeal, I could not see any fault in that thinking in so refusing the said application for extension of time either, but that is a matter for the appellant to agitate in his pending application for special leave to appeal before the (Full) Supreme Court for which reason I shall and I must constrain myself from saying anything that might have an impact in prejudicing that application.

Conclusion

- [27] For all those reasons I have articulated above I am not inclined to grant a stay against the execution of the decree issued by the High Court as far back as September, 2014.
- [28] Nevertheless, in order not to test the Respondent's patience in waiting to enjoy the fruits of his victory any longer I feel it is apt to make an order in directing the

Registrar of this Court to list this case on an early date to enable the (Full) Supreme Court to determine the question of the application for special leave to appeal against the Single Judge Ruling of the Court of Appeal.

Re : the Last Ditch Attempt made by Learned Counsel for the Appellant in his effort to obtain a Stay

[29] That effort made by Counsel must not be slighted for he did make a point in relation to “the conditions of the Sale-Purchase Agreement” as being distinct from the requirement of “Consent of the Board” for the said ‘Agreement’ between the parties to have been regarded as a valid agreement. Counsel argued that it ought not have been regarded as an agreement “*void ab initio*” as the High Court had held.

[30] But that is a matter for the (Full) Court to go into and make a determination.

[31] I, sitting as a single Judge of this Court am possessed of limited jurisdiction either to grant a stay or refuse and for the reasons I have adduced above in this Ruling, I have not been disposed towards granting a stay.

Orders in the Ruling

1. *The application for the stay in question is declined and/or refused.*
2. *The Appellant (Applicant) is ordered to pay a sum of \$1,800.00 as costs of this application to the Respondent within 21 days of this Ruling.*
3. *The Registrar of this Court is directed to list the matter of Special Leave to Appeal pending in this Court on an early date after consulting His Lordship, the Chief Justice.*



Idel A. Guneratne

**Hon. Justice Almeida Guneratne
JUSTICE OF THE SUPREME COURT**