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

CIVIL APPEAL NO.ABU0063 OF 2006S
(High Court Civil Action No. HBC127 of 1994S)

BETWEEN:

EDMUND MARCH

Appellant

AND:

ELI FONG
(As trustee of the estate of Tom Nabong deceased)

Respondent

Counsel: **V. Daveta for the Appellant**
D. Sharma for the Respondent

Date of Decision: **Tuesday, 22 August 2006, Suva**

DECISION

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[1] This is an application for a stay of execution of a judgment of the High Court delivered on 12 May 2006. In the absence of the pleadings the general facts had to be ascertained from such papers as were exhibited to the affidavit in support.

[2] According to an affidavit filed by Tom Nabong on or about 15 March 1994, he was the owner of about 350 acres of land at Savusavu. In about 1976 the Appellant approached Nabong with a view to subdividing and developing the land. A power of attorney was granted by Nabong to the Appellant on 4 August 1976.

[3] In 1994 Nabong commenced proceedings in the High Court against the Appellant. He claimed that the Appellant, using the power of attorney, had defrauded him of

all but 5 acres of the land and had thereby unjustly enriched himself. He sought orders that the land remaining under the Appellant's control be transferred back to him, that the Appellant account for the lands which he had sold and that the Appellant reimburse him the money received from the sales.

[4] In March 1997 Tom Nabong died. The Respondent is the sole executor of his estate. It appears from the High Court's judgment that he was given leave to carry on the proceedings after Nabong's death.

[5] On 27 and 28 April 2006 the trial finally took place. Eli Fong was the only witness and produced the only documents which included Tom Nabong's Will. Eli Fong was extensively cross-examined by the Appellant. According to paragraph 22 of the judgment there were several affidavits by the Appellant on file and these were also taken into account.

[6] On 12 May 2006 judgment was delivered. The Court found that 1974 in the Appellant "set forth upon [a] fraudulent course of conduct to divest [Tom Nabong and his grand mother Tomanita] of all the lands in their name..... the fraud was continuing throughout until and including the final transfer of 4 acres of land in December 1992."

[7] A number of orders were made by the High Court. The order which is particularly relevant to this application was order (b). It is as follows:

> "that the [Appellant] do convey, transfer and assign to the [Respondent] all the unsold titles and balance of land in or deriving from the original three blocks that remain in the [Appellant's] name and execute a registered transfer in favour of [Respondent]. This is to be completed by 3 p.m. on 27 June 2006."

[8] On 23 June 2006 a notice of appeal was filed. Among other grounds the Appellant stated that:

(i) the Court erred in applying the hearsay provisions of the Civil Evidence Act 2002;

(ii) the Court unfairly failed to allow the Appellant adequate time and opportunity to consider and respond to documents produced for the first time by the Respondent on the day of the trial; and

(iii) the Court erred in rejecting the Appellant's application to strike out the Respondent's action.

[9] On the same day that the notice of appeal was filed the Appellant also filed a notice of motion seeking a stay of execution of the judgment pending disposal of the appeal by the Court of Appeal. In his supporting affidavit the Appellant, in addition to restating his grounds of appeal, suggested that the Judge had been biased against him, that Tom Nabong's signature on the will was forged and that the Appellant had been denied his constitutional right to a fair hearing. He deposed that he would:

> "..... suffer immense prejudice and substantial injustice if the stay of execution .... is not granted."

[10] The Respondent filed an affidavit in answer on 5 July 2006. After suggesting that the Appellant was attempting to mislead the Court and introduce fresh evidence, the Respondent averred that he had been advised that the appeal was "hardly likely to succeed". He also deposed that the Appellant had failed to comply with order (b) for the transfer of the properties in question. These properties were stated to be heavily mortgaged and in danger of being sold under mortgagee sale. If a stay was

refused then there was a chance that negotiations between the Respondent and the mortgagees might prevent the land being disposed of.

[11] On 10 July the Respondent's solicitors filed an ex-parte notice of motion seeking an order that the Deputy Registrar transfer the lands which were the subject of order (b) of the judgment. Mr Sharma told me that the notice was accompanied by an affidavit which exhibited a letter sent by the Respondent's solicitors to the Appellant seeking compliance with the order. No reply had been received and the order had not been complied with.

[12] On 11 July the High Court heard the Appellant's application for a stay. During the course of the hearing it also dealt with the ex-parte application. The application for the stay was dismissed and the order sought in the ex-parte application was granted. The present application is brought under the provisions of s.20 (1)(e) of the Court of Appeal Act and Rules 34 (1)(a) and 26(3) of the Court of Appeal Rules.

[13] On 8 August 2006 this application came on for hearing. Mr Daveta referred me to a letter sent by the Chief Registrar to his principal on 11 July advising:

> "there is no written ruling in the matter, only the order was made and read before counsel.
>
> Please be advised that if the counsel have failed to note down the orders than you are to make a proper search in the Registry upon payment of fees and have the order sealed."

[14] Mr Daveta's first submission was that the Appellant had a good chance of succeeding in his appeal. His second submission was that the Appellant would be severely prejudiced if a stay was not granted pending the hearing of that appeal. Mr Daveta also told me that he not received a copy of the ex-parte application filed by the Respondent nor its accompanying affidavit. The application was dealt with

without him having being given an opportunity to consider its nature and an appropriate response.

[15] The grant or refusal of a stay pending appeal is a discretionary matter (Attorney General v. Emerson (1889) 24 QBD 56). Although the Court does not "make a practice of depriving a successful litigant of the fruits of his litigation" pending the appeal (The Annot Lyle (1886) 11 P.D. 114, 116) a stay will be granted where the special circumstances of the case so require.

[16] Mr Sharma helpfully referred me to three local decisions in which applications for stay were considered and the established principles applied. Perhaps the two most important of these principles are first, when a party is appealing and is thereby bona fide exercising his undoubted right of appeal, the Court will ensure that the appeal, if successful, is not nugatory (Wilson v. Church (No.2) (1879) 12 Ch.D.458). Secondly, that a stay will not be refused if an unsuccessful defendant is able to satisfy the Court (a) that without a stay he will be ruined (b) that his appeal has some real prospect of success (Linotype – Hell Finance Ltd. v. Baker [1992] 4 All ER 887).

[17] As is well understood, an appellate Court is generally reluctant to interfere with the exercise of a discretion but it will do so where the discretion has been exercised following the application of wrong principles or the failure to take relevant matters into account. Clearly, therefore, it is of utmost importance to be able to establish the manner in which the discretion was exercised and in particular what facts and matters were taken into account before the decision was reached.

[18] With these considerations in mind I asked Mr Sharma whether his own recollection of what had transpired at the hearing in the High Court was consistent with the Chief Registrar's indication that no written ruling had been delivered. Mr Sharma told me that his impression was that an extempore ruling had indeed being written out and than delivered. He accepted, however, that contrary to established practice, no actual ruling had been made available to the parties. Mr Daveta told

me that he did not recall any ruling being delivered at all. In these circumstances, I asked Mr Sharma and Mr Daveta to inspect the High Court file and, if possible, to obtain a transcript of what had taken place. The hearing was adjourned to allow this inspection to take place.

[19] Upon the resumption of the adjourned hearing a certified correct transcript of the stay application proceedings in the High Court was produced. The transcript is relatively brief, running to about 4 typed pages. It is not altogether easy to understand the contents of the transcript which are in note form, however it appears that the Appellant's main contention, as expressed by Mr Daveta, was that a stay should be granted because of the Appellant's prospects of success on appeal.

[20] In answer, Mr Sharma described the Appellant's submissions as misconceived. He rejected the suggestion that the Appellant had a good prospect of success on the appeal; indeed, he suggested that the Appellant had no chance of success at all. Mr Sharma than went on to submit that a stay should only be granted in exceptional circumstances. He dismissed the Appellant's suggestion that he would suffer prejudice if a stay was not granted.

[21] Having heard argument on the stay application, the Judge than dealt with the ex-parte application. Apparently, the Respondent relied on the affidavit filed in support while Mr Daveta is recorded as having nothing to say. This is consistent with what Mr Daveta told me. With disarming frankness he admitted that he had been unable to grasp what was going on at the hearing at the High Court. Since he had not received the copy of the ex-parte application or the supporting affidavit before they were dealt with, his bemusement was not altogether surprising.

[22] After hearing counsel, the Judge wrote out (and presumably delivered) the following ruling:

> "Court : will not stay the judgment for the reasons set out by plaintiff's counsel. Evidence is sought to be adduced in affidavit not

before trial. Not high prospect of success. Challenge to will is very late. Not met criteria for staying judgment. Defendant had not begun to comply with judgment of the 12 of May. Seeks to attack will from a long time ago. All this is consistent with my findings of Defendant's behaviour and mentality in the judgment.

(i) No stay on judgment of 12/5/06.

(ii) Make order in terms of ex-parte motion of 10/7 forthwith."

[23] With all respect to the Judge, in my view the ruling which he delivered cannot "sensibly be regarded as adequate for the occasion" (See R v. Awatere) [1982] 1 NZLR 644, 649 and also Bell-Booth v. Bell-Booth [1998] 2 NZLR 2, 6). It is not sufficient to state that a decision has been reached "for the reasons set out by counsel" when there is no written copy of these reasons and the reasons themselves are not individually identified. Furthermore, although, as has been seen, Mr Sharma did apparently address the Court on the Appellant's prospects of success, the prospects of success or otherwise are not alone determinative of an application for a stay pending appeal. As has been pointed out, the nugatoriness of an appeal and the possibility of ruin as a result of a stay not being granted are also very important matters which must usually be carefully considered. There is nothing in the papers to suggest that they were considered in this case.

[24] The three stay application rulings to which I was referred by Mr Sharma are perfect models (by two different Judges) of the kind of ruling which it has never, in my experience in Fiji, been doubted were suitable and adequate and reasonably could be required when disposing of an important interlocutory application of the kind involved in this case. They are: State v. Central Agricultural Tribunal Exparte Reddy [1995] FJHC 145; Hamid v. Prasad [2003] FJHC 251 and Lum v. Stoddart [1994] FJHC 170. So far as I am aware, it has never been doubted either that section 27 of the High Court Act, which requires "the full terms" of a decision "to be reduced to writing and a copy.... made available to the parties" applies not only to judgments

proper but also to other interlocutory rulings or decisions. The almost invariable practice has been for these written rulings to be delivered shortly after the hearing when there has been an opportunity to have them typed. It is not for the parties to have to request a typed copy of the reasons: it is for the Court to supply them.

[25] Mr Sharma, conceded that no ruling of the usual kind had been delivered, but suggested that in fact the High Court was right to reach the conclusion to reject the application for a stay. He also suggested that although the manner of dealing with the ex-parte application had been unusual, in view of the fact that it was merely the reverse of the stay application, no harm had been done in disposing of it. In my view there is merit in that submission but I do not think that it amounts to a justification for dealing with the matter in the way it was handled.

[26] Mr Sharma urged me either to accept the conclusion reached by the High Court or to hear the application and cross application *de novo*. Were I to do so, he predicted that the same conclusion would be reached.

[27] I have anxiously considered Mr Sharma's suggestion but am unable to accept it. In my view, it is for the High Court, not the Court of Appeal initially to consider applications of this kind and then to provide detailed reasons for the conclusions reached. Then, as already pointed out, if the Court of Appeal is satisfied that the correct principles have been applied, a decision within the discretion of the High Court will seldom be overturned.

[28] Whereas the High Court has in its possession all the pleadings, affidavit, exhibits and other papers which have been filed in the case, this Court only has such documents as the Appellant chose to file in support of his application. Without the papers which are not before it, this Court is simply not in a position fairly to evaluate the application which was before the High Court.

[29] In my opinion the only satisfactory way of dealing with the application and the cross application is to remit them to the High Court for rehearing before another Judge. Since these applications are incidental to the appeal itself I find that I have power to make these orders under the provisions of s.20(k) of the Court of Appeal Act and Rules 22(4) and 23(1) and (3) of the Court of Appeal Rules.

[30] I direct that the Appellant shall file written submissions in support of his application in the High Court within 21 days and that the Respondent files written submissions in answer 21 days thereafter. The application and cross application are to be set down for mention before the Master of the High Court on the first available date following 2 October 2006. He will than allocate a date for the hearing of the applications by a Judge. An interim stay of execution of the judgment dated 12 May 2006 until the delivery of the ruling on the remitted applications is granted.

[31] I will hear counsel as to costs.

FIJI COURT OF APPEAL

M.D. Scott
Resident Justice of Appeal

Solicitors:

Naco Chambers, Suva for the Appellant
R Patel and Company, Suva for the Respondent