IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 8 of 2010
(High Court HBC 180 of 2009L)

BETWEEN	**:**	**MOHAMMED AKHTAR and RAM NARAYAN**
		Appellants
AND	**:**	**FAIYAZ SIDIQ KOYA SIDIQ and FAIZAL RIYAD KOYA**
		Respondents
Coram	:	**Marshall JA** **Calanchini JA** **Wati JA**
Counsel	**:**	**Dr M S Sahu Khan for the Appellants** **Ms T Draunidalo for the Respondents**
Date of Hearing	**:**	**17 September 2010**
Date of Judgment	**:**	**12 April 2013**

JUDGMENT

Calanchini AP

[1]. This is an appeal against the decision delivered by the High Court at Lautoka on 29 January 2010 granting a stay of proceedings in HBC 235 of 2008 until further order on the application of the Respondents. The High Court also granted an injunction restraining the Appellants from pursuing any claim against the Respondents for money paid by a Mr Ignazio Gonzales (as purchaser) to solicitors acting for a Mr Yaar

Mohammed (as vendor) (the First Appellant's father) pursuant to a contract dated 25 September 1985 for the sale and purchase of 12 acres of land until further order. The Court also ordered the Respondents to pay $22,000.00 into Court within six weeks. The Appellants were ordered to pay costs of $2400.00 within 21 days. There were also orders made in respect of the Second Appellant's affidavit which are of no consequence to the appeal.

[2]. This appeal was initially heard by a Court constituted by three justices of appeal. However Marshall JA left the Court of Appeal in June 2012. Unfortunately, due to the heavy workload of the Court, the judgment had not been delivered as at that date. Pursuant to section 19 of the Court of Appeal Act Cap 12, it became necessary, so as to avoid a re-hearing of the appeal, to obtain the consent of the parties for the appeal to continue before the two remaining judges as a duly constituted Court. For reasons that are not relevant to the appeal, that process was not completed until 1 February 2013. The Second Appellant (who has the carriage of the proceedings as a result of a Deed executed by the First Appellant) and the Respondents have consented to the appeal continuing before the two remaining judges who heard Counsel on 17 September 2010.

[3]. The Respondents commenced these proceedings against the Appellants by writ of summons issued on 29 September 2009. Attached to the writ was a Statement of Claim seeking the following relief:

> *a.* *A Declaration that forthwith the Plaintiffs or their executors and assigns do not give any form of payment or benefit to the Defendants under the unlawful contract for the sale of the Land between the Vendor and the Purchaser;*
>
> *b.* *An Order restraining forthwith the Plaintiffs or their executors and assigns from giving any form of payment or benefit to the Defendants under the unlawful contract for the sale of the Land between the Vendor and the Purchaser;*
>
> *c.* *An Order restraining forthwith the Defendants or their executors and assigns from taking any form of payment or benefit from the Plaintiffs under the unlawful contract for the sale of the Land between the Vendor and the Purchaser;*

d. An Order that forthwith the sum of $92,000.00 (Ninety two thousand dollars) be refunded by the Defendants to the Plaintiffs;

e. General and Punitive Damages for the $92,000.00 (Ninety two Thousand Dollars) paid by the Plaintiffs to the Defendants under a mistake of fact;

f. General and Punitive Damages for the $92,000.00 (Ninety two Thousand Dollars) paid to the Defendants under a mistake of law;

g. General and Punitive Damages for the anxiety caused by payment of the $92,000.00 (Ninety two Thousand Dollars) to the Defendants under a mistake of fact;

h. General and Punitive Damages for the anxiety caused by payment of the $92,000.00 (Ninety two Thousand Dollars) to the Defendants under a mistake of law.

i. Costs on a full indemnity basis;

j. Any other Order deemed just and reasonable in the circumstances."

[4]. On the same day the Respondents also filed and served a Notice of Motion seeking the following interim relief:

a. An Order to Stay forthwith all proceedings in Lautoka High Court Civil Action HBC 235 of 2008;

*b. Forthwith and until further Order, the Defendants or their executors and assigns are hereby restrained from taking any form of payment or benefit from the Plaintiffs under the unlawful contract dated 25 September 1985 for the sale of all that land contained in Certificate of Title 27072 ("**Land'**) between the late Yaar Mohammed, father's name Noor Mohammed, formerly of Malomalo, Sigatoka, Cultivator ("**Vendor**") and the late Ignazio Gonzalez, formerly resident of the United States of America ("**Purchaser**");*

c. Forthwith and until further Order, the Plaintiffs or their executors and assigns are hereby restrained from giving any form of payment or benefit to the Defendants under the unlawful contract for the sale of the Land between the Vendor and the Purchaser;

d. Forthwith and until further Order, the Defendants or their executors and assigns are hereby restrained from taking any form of payment or benefit from the Plaintiffs under the unlawful contract for the sale of the Land between the Vendor and the Purchaser;

e. Costs of this application to be costs in the cause;

f. Any other Orders deemed just and equitable by this Honourable Court."

[5]. The Respondents filed an affidavit sworn on 20 August 2009 by Faiyaz Siddiq Koya in support of their Motion. The Appellants filed an answering affidavit sworn on 20 November 2009 by Ram Narayan. An affidavit in reply sworn on 2 December 2009 by Faiyaz Siddiq Koya was subsequently filed on behalf of the Respondents. It was the Notice of Motion that came before the learned Judge on 25 January 2010 and upon which the orders were made on 29 January 2010. The interim relief claimed is somewhat unusual in that the Respondents as applicants sought amongst others, an order against themselves.

[6]. At this stage it is necessary to set out in some detail the background facts, almost all of which are not disputed, in order to understand the context in which the relief was claimed and the orders made by the Court. Reference will be made only to those background facts that are relevant to the issues raised by the present proceedings.

[7]. On 25 September 1985 a Mr Yaar Mohammed (the Vendor) entered into a contract with a Mr Ignazio Gonzalez (the purchaser) for the sale and purchase of 12 acres of land being part of a lot of 101 acres owned by Mr Mohammed in the province of Nadroga. At all relevant times Mr Gonzalez was a citizen of and classified as a resident in the United States of America. He was a visitor to and had contact with Fiji over some years.

[8]. The written sale and purchase agreement was formal in nature and was drawn up by a local solicitor in Nadi by the name of Mr D S Naidu who for that purpose acted for both parties. The price was $90,000.00 to be paid in instalments with the whole amount to be paid no later than 16 September 1990. The outstanding amount was to carry interest. Possession of the 12 acres was to be given to the purchaser on the date

of the agreement being 25 September 1985. The necessary approval of statutory authorities was to be obtained. This requirement related only to planning requirements and sub division approvals.

[9]. Some time in 1988 the vendor (Mr Mohammed) decided to seek the services of another solicitor by the name of Mr Amjal Khan of Khan and Associates in Nadi. At times both parties subsequently attended at Mr Khan's office but it would appear that Mr Khan never regarded the purchaser (Mr Gonzalez) as his client.

[10]. In 1990, due to the lack of progress being made by the parties in fulfilling their obligations under the contract, Mr Khan proposed some variations to the agreement. The variations are not relevant to these proceedings. However, Mr Khan was noted as the solicitor for the vendor and Mr Naidu as solicitor for the purchaser. Payment of the purchase moneys was to start when a construction road was completed and the purchaser had possession of the land.

[11]. There was a subsequent formal written variation to the agreement. This was executed on 5 April 1990. The details of the variations to the original agreement also are not directly relevant to the present proceedings.

[12]. Sometime in the middle of 1990 the parties first learned of the existence of section 6(1) of the Land Sales Act Cap 137. Because the purchaser (Mr Gonzalez) was not a resident of Fiji he could not enter into a contract to purchase more than one acre of land without the prior consent in writing of the Minister for Lands. The 1985 agreement had been made without any such consent apparently because the solicitor who drafted the agreement for the parties had been unaware of the requirements of section 6(1). A belated application for ministerial consent was made on 16 July 1990. On 16 October 1990 the Minister granted consent on condition that the *"vendor to obtain clearance from the Commissioner of Inland Revenue, who will ensure that necessary clearance is also received from the Governor of the Reserve Bank."* However this condition was never met. The Commissioner of Inland Revenue did not provide the relevant clearance and as a result the Minister's consent was never actually given.

[13]. Some years later in a judgment delivered on 21 May 2004 the Supreme Court in **Gonzalez –v- Akhtar and Another** (CBV 11 of 2002) held that a contract formed in contravention of section 6(1) was illegal and unenforceable. The Supreme Court concluded that the 1985 agreement was formed without the prior written consent of the Minister and was as a result in breach of section 6(1) and was illegal and unenforceable. It was unenforceable in the sense that its illegality meant that it was void ab inito.

[14]. However, returning to the chronology of events. On 13 December 1990 the parties entered into a further agreement that once again varied the original agreement. It provided that Khan & Associates would continue to act as solicitors for the vendor (Mr Mohammed). It also provided that the purchaser would deposit in the trust account of Khan & Associates an amount sufficient to satisfy the debt owing to the Fiji Development Bank. The Bank had held a charge over all the land since 1982. On 13 February 1991 the purchaser (Mr Gonzales) paid the sum of $120,174.32 into the trust account of Khan & Associates.

[15]. On 24 June 1991 the vendor (Mr Mohammed) changed his solicitors and directed Mr Ajmal Khan to transfer his file to the firm of Koya and Company. Mr Khan also transferred the monies that had been paid into his firm's trust account by the purchaser Gonzalezs, less authorised costs and disbursements. The amount transferred was $114,811.54.

[16]. On 27 August 1991 the purchaser (Mr Gonzales) lodged a caveat over the subject land with the Registrar of Titles.

[17]. On 26 September 1991 Koya & Co wrote to Mr Naidu calling on the purchaser to settle within 21 days. On 9 January 1992 the vendor through Mr Koya rescinded the contract. On 22 January 1992 Mr Naidu said that it was the vendor who was unable to complete the contract as he had not satisfied the Minister's consent. He had not obtained the clearance of the Commissioner of Inland Revenue.

[18]. On 23 January 1992 the Registrar of Titles sent a notice to the purchaser that the caveat would be removed unless he obtained an order from the High Court within 21

days. On 27 March 1992 the High Court ordered that the caveat be extended until further order of the Court.

[19]. Shortly afterwards the purchaser (Mr Gonzales) commenced proceedings in the High Court (HBC 73 of 1992) claiming, as against the vendor (Mr Mohammed) specific performance or, in lieu thereof, damages for breach of contract. In the High Court the purchaser (Gonzales) eventually succeeded in the claim for damages against the vendor. Some time later on appeal the Court of Appeal (ABU 63 and 68 of 1998) reversed the High Court decision and then the Supreme Court dismissed the purchaser's appeal (**Gonzalez –v- Akhtar and others** (supra).

[20]. The purchaser (Mr Gonzales) died in May 1992. His daughter Ms J Gonzalez was granted letters of administration of his estate in the United States which were subsequently sealed in the High Court on 15 September 1994. Ms Gonzales continued the proceedings commenced by her father.

[21]. Mr Koya died in 1993 and in December of that year the vendor engaged another firm of Solicitors, Sahu Khan and Sahu Khan to act for him. It was through the firm of Sahu Khan and Sahu Khan that a third party entered into negotiations with the Fiji Development Bank and the vendor that subsequently resulted in a transfer of the mortgage over the land to a nominee and the transfer of the same land to a third party.

[22]. As a result, by 15 November 1994 the estate of Mr Gonzalez had lost any rights that he or it may have had under the caveat or the subsequent order of the High Court that had extended its operation. The more significant development from the standpoint of the present proceedings was that at the same time it had become apparent that the monies transferred from the trust account of Khan & Associates to that of Mr Koya had disappeared. It is at this point that the pursuit of those monies by the Appellants becomes the central issue in subsequent proceedings in the High Court and which resulted in the orders that are now on appeal to this Court. The history of that litigation may be stated briefly.

23]. In 1994 the vendor (Mr Mohammed) instructed his new Solicitors, Sahu Khan and Sahu Khan, to commence proceedings against Mrs Koya who had become the executrix and trustee of the estate of Mr Koya.

[24]. In those proceedings the vendor claimed the amount of $114,811.54 that had been paid into Mr Koya's trust account by Mr Khan when his file was transferred to Mr Koya. The money had been paid into Mr Khan's trust account by Mr Gonzalez (the purchaser) as part payment under an agreement which the Supreme Court subsequently held to be illegal. The vendor claimed from Mrs Koya the money as moneys had and received which together with interest accrued thereon of $38,748.89 increased the claim to a total amount of $153,560.43.

[25]. There was no defence filed by Mrs Koya and as a result Mr Mohammed's solicitors (Sahu Khan & Sahu Khan) obtained default judgment on 24 May 1994 in the sum $153,560.43. On 6 July 1994 Mr Mohammed registered a judgment caveat against the Koya family home. By consent the caveat was ordered to remain registered on the property until further order of the Court. For reasons which are not relevant the Respondents (the Koyas) executed a Deed of Guarantee on 20 April 1995 for the payment of the Default Judgment debt in exchange for Mr Mohammed removing the caveat.

[26]. Then in 1996 Mr Mohammed died. The First Appellant became the executor and trustee of his father's estate. By a subsequent Deed of Assignment the First Appellant assigned his interest in the judgment debt to the Second Appellant on 20 September 2006.

[27]. Before that, however, the judgment debt had accumulated interest and as at December 2002 stood at $218,823.61. The First Appellant commenced proceedings in High Court action HBC 413 of 2002 on 31 December 2002 following the failure of the Respondents to comply with a demand dated 13 December 2002 for payment of $60,000.00. The First Appellant claimed the sum of $223,858.73 from the Respondents pursuant to the Deed of Guarantee and interest at 5% from 24 December 2002 until payment.

[28]. On 21 January 2003 the Respondents filed their Defence to the First Appellant's claim. The Defence filed in that action can be found on pages 149 – 151 of the Record. On 14 October 2004 the High Court, in a contested inter partes hearing, ordered that the Respondents' Defence be struck out on all the grounds that are specified in Order 18 Rule 18 (1) of the High Court Rules. The Court also ordered that judgment be entered for the First Appellant against the Respondents in the sum of $223,858.73 together with costs of $900.00 to be paid to the First Appellant by the Respondents.

[29]. By September 2006 the Respondents had paid $47,000.00 leaving the balance of the judgment debt at $176,858.70. On 12 December 2006 in Bankruptcy proceedings the Respondents were ordered by consent to pay the debt which then stood at $184,735.59 by monthly instalments of $5000.00. The Respondents did not make the payments and in High Court action HBC 235 of 2008 commenced by originating summons the Second Appellant sought an order to advertise and sell the Respondents' family home.

[30]. Having paid a total of $92,000.00 by 2008, the Respondents obtained what has been described as "*independent*" legal advice and commenced the present proceedings in the High Court (HBC 180 of 2009).

[31]. In his Interlocutory Judgment the learned Judge commenced by stating that the principles in an application for stay and an application for interim injunction are the same. The serious issue to be tried, therefore, was the fate of the money paid by Gonzales (as deposit) into the trust account of Mr Amjal Khan. The learned Judge concluded that as a result of the decision in **Gonzales –v- Akhtar and Others** (supra) the deposit belongs to Gonzales. He stated that the deposit did not belong to the late Mr Koya nor did it belong to the late Mr Mohummed or anyone who claims through him.

[32]. In paragraph 28 of the Judgment, the learned Judge stated:

> *"_ _ _ in my view, if the money does not belong to either the solicitor or the client this Court can intervene and order that the money be paid into Court. On, as in this case, where it is clear*

that the Deposit belongs to Gonzales and to neither the Plaintiffs nor the Defendants, this Court can intervene and ask the balance to be paid into Court until further order. To not intervene would be, in my view, to allow the money to be taken or claimed by someone who does not own it. That cannot be right when the true owner is known as a direct result of a decision of the highest court in the land. In any event, I only need to be satisfied that there is a serious issue to be tried which I consider that the issues that I have just dismissed are such."

[33]. The learned Judge considered that the balance of convenience clearly fell in favour of maintaining the status quo until final determination of this action. The Judge made orders that he considered reflected the actual relief that the Respondents were seeking in the Motion. Those orders were:

> *"1. All proceedings in Civil Action HBC 235 of 2008 in this Courts are stayed until further order.*
>
> *2. The Defendants, their servants and agents are restrained from making any demand or claim against the Plaintiffs in respect of moneys paid under or pursuant to the contract between Yaar Mohammed and Ignazio Gonzalez entered into on 25 September 1985 and any agreements, guarantees, Court orders and judgments relating thereto until further order.*
>
> *3. The sum of $22,000 shall be paid into Court by the Plaintiffs within 6 weeks.*
>
> *4. The Defendants shall pay the Plaintiffs costs of $2,400 within 21 days.*
>
> *5. Paragraphs 10(ii), (vi); 19(iv); 20(ii), (vi), (vii); 21(a), (f) of the Second Defendant's affidavit filed on 20 November 2009 and any references thereof in the Defendants' Submissions are to be expunged from the record."*

[34]. The Appellants now appeal those orders and seek an order that they be set aside on the following grounds:

> *"**1. THE** Learned Trial Judge erred in Law and in fact in granting the injunction inasmuch as the Respondents have no rights whatsoever to question the Judgment of the High Court and confirmed by the Fiji Court of Appeal in entering the Judgment against the Respondents under Action No. 0413 of 2002 ("The Said Action").*

2. ***THE*** *Learned Trial Judge erred in Law and in fact in holding that the `Appellants their servants and agents are restrained from making any demand or claim against the Respondents in respect of moneys paid under or pursuant to the contract between Yaar Mohammed and Ignazio Gonzales entered into 25th day of September 1985 and any agreements, guarantees, Court Orders and Judgments relating thereto until further Order inasmuch as:-*

(i) The enforcement of the Judgment by the Appellants were not made in pursuance to the purported Contract referred to by the Learned Trial Judge but under the Judgment of the high Court in the Said Action and which was confirmed by the Fiji Court of Appeal.

(ii) The Court had not powers whatsoever to go behind the merits or facts of the Judgment of the High Court as confirmed by the Fiji Court of Appeal under the Said Action.

(iii) The decision of the Trial Judge had been contrary to all basic principles regarding the finality of Judgments of the Courts and the decision herein would create a very dangerous precedent for the respect and authority of the High Court Judgments particularly when the same had been confirmed by the Fiji Court Appeal.

3. ***THE*** *Learned Trial Judge erred in Law and in fact in not taking into account the fact that the Judgment was entered under the Said Action was in respect of the Guarantee executed by the Respondents in favour of the First Appellant in consideration of the First Appellant removing his Judgment Caveat in respect of the Property to enable the Respondents to have themselves registered as registered proprietors.*

4. ***THE*** *Learned Trial Judge erred in Law and in fact in not holding that the Respondents were estopped from challenging a validity of the Judgment under the Said Action and in particular that Judgment against them was lawfully entered under their Guarantee and they received the full benefit of the Transfer of the Property in question over which there was a Judgment Caveat by the Deceased for whom the First Appellant is the executor and trustee and which Caveat was only removed when the Respondents agreed and undertook to pay the earlier Judgment debt if the Judgment Caveat was removed to allow transfer of the property in question to them.*

> ***5.*** ***THE*** *Learned Trial Judge erred in Law and in fact in not upholding the principles of res judicata and issue estoppel and particularly when the Respondents well after the Judgment in the Said Action had agreed to a Consent Order made in the Bankruptcy Action in the Magistrate's Court Nadi on 12th day of December, 2006 to make instalment payment of $5,000.00 per month and which the Respondents made for 11 months and then stopped and requested for further time to pay and when they defaulted and only when the Appellants intended to enforce the Consent Orders that they instituted Proceedings in 2009 seeking the Orders subject to this Appeal."*

[35]. Before considering the grounds of appeal, I consider it appropriate to make some preliminary observations concerning the proceedings in general. First, regardless of which test is applied to determine whether a particular order is a final or interlocutory order, it is clear to me that an order staying proceedings is an interlocutory order.

[36]. The effect of a stay was discussed in 37 Halsbury Laws of England (4th Edition) 326 at para 438:

> *"In contrast with a judgment for the defendant or the dismissal or discontinuance of an action, in the case of a stay of proceedings, whether conditional or absolute, the action still subsists, it is still pending and the stay is therefore always potentially capable of being removed."*

[37]. As a result, an application for a stay order or the granting of a stay order does not bring the proceedings to an end. As an interlocutory order leave of the Court of Appeal was required under section 12 (2) of the Court of Appeal Act. Although not argued before the Court by Counsel I would be prepared to grant leave to appeal to enable the order granting a stay of proceedings to be considered by the Court of Appeal.

[38]. Furthermore, since the Appellants' challenge is based on the contention that the stay order ought not to have been made, this is not a situation where the Court is required to determine whether the order should be varied, suspended or discharged. That type of application assumes that the order was validly made and would come before the same court. This, on the other hand, is an appeal challenging the validity of the order.

[39]. It is necessary at this stage to return to the proceedings commenced by the Appellants in civil action HBC 413 of 2002 (at pages 141 – 145 of the Record). In that action Mr Akhtar (Mr Mohammed's son) claimed the sum of $223,858.73 from the Koyas (the Respondents in this appeal) The claim was clearly made under the Deed of Guarantee dated 20 April 1995 made between the Koyas and Mr Mohammed. There is a copy of the sealed final orders dated 14 October 2004 made by the High Court in the Record at page 94. Contrary to what the learned trial Judge had said in his judgment (at page 10 of the Record) the orders were not made by consent. The Court ordered the defence filed by the Koyas be struck out and that judgment be entered in the sum of $223,858.73 together with costs of $900.00. That judgment was a final judgment. The Koyas were dissatisfied and sought to appeal the final judgment of the High Court.

[40]. Although granted leave to appeal out of time, the Respondents' appeal was deemed to have been abandoned for non-compliance with Rule 17 of the Court of Appeal Rules. The Judgment has remained a valid judgment of the High Court. As a valid judgment it could be enforced by the Second Appellant. Enforcement (or execution) is the process of giving effect to the judgment. Moreover, as a money judgment it could be enforced by way of a bankruptcy notice leading to the bankruptcy of the Respondents.

[41]. The bankruptcy proceedings by way of enforcement were commenced in the Nadi Magistrates Court (No. 36 of 2005) by the First Appellant. On 12 December 2006 the learned Resident Magistrate sitting in the Court's Bankruptcy jurisdiction made consent orders to the effect that the balance then owing of $184,735.59 be paid by the Respondents at the rate of $5,000.00 on the 15th day of each from 15 January 2007 and in default thereof the whole amount to become due and payable. Interest was awarded on the principal sum at the rate of 10%. The consent orders were sealed on 16 January 2007. Some payments were made after that date. However by 20 November 2009 the amount owing under the consent order was $192,224.76.

[42]. It would appear that the Appellants then sought to enforce the judgment obtained against the Respondents in the High Court proceedings (HBC 413 of 2002) by registering the judgment under the Land Transfer Act Cap 131, against lease number 55977 owned by the Respondents. This land was the same land over which the First

Appellant had previously held a caveat following the entry of a default judgment (in HBC 94 of 1994) against the late Mrs Amina Koya as executrix of the estate of the late Siddiq Koya. That caveat had been removed by the First Appellant in consideration of the guarantee given by the Respondents in the Deed dated 20 April 1995. In action HBC 235 of 2008 the Appellants were applying to the Court for an order to sell the land under that judgment caveat.

[43]. It would appear that those proceedings (HBC 235 of 2008) have been discontinued by Notice dated 7 October 2009 signed by the legal practitioners for the parties and filed on 26 October 2009 pursuant to Order 21 Rule 2 (7) of the High Court Rules.

[44]. The first order sought by the Respondents was that there be a stay of proceedings in this action (HBC 235 of 2008). On the basis that action HBC 235 of 2008 has been discontinued in accordance with Order 21, it is necessary to determine the effect of the Appellants' discontinuing the enforcement proceedings. The discontinuance procedure under Order 21 achieves the same result as the old jurisdiction to enter a non-suit. When an action has been discontinued, new proceedings may be commenced on the same cause of action. This is because unlike a stay, a valid discontinuance puts an end to the action. As Lord Denning MR in **Cooper –v- Williams** [1963] 2 QB 567 at page 580 observed:

> *" _ _ _ I am of the opinion that the effect of a stay is that it is not equivalent to a discontinuance, or to a judgment for the plaintiff or the defendants. It is a stay which can be and may be removed if proper grounds are shown."*

[45]. Therefore if the enforcement proceedings in HBC 235 of 2008 have been validly discontinued, then those proceedings are at an end. There are no proceedings in existence to stay. In my view there was no basis upon which a stay order could be made in respect of enforcement proceedings that had been discontinued by the time the learned Judge had made his orders on 29 January 2010.

[46]. The remaining grounds of appeal are concerned almost entirely with the second order made by the learned Judge. The learned Judge has granted an injunction restraining the Appellants from (i) claiming or demanding from the Respondents any money paid

under 1985 contract between Mr Mohammed and Mr Gonzales and (ii) seeking to enforce any agreement guarantees, court orders or judgments by demanding or claiming monies.

[47]. Having already reviewed the history of these proceedings, I am of the view that the reference to the initial contract dated 25 September 1985 between Mr Mohammed (the vendor) and Mr Gonzales (the purchaser) is misleading. It is not disputed that Mr Gonzales paid a sum of money (about $120,000) under a contract held to be illegal under statute into the trust account of Mr Khan (Khan & Associates) who was at the time acting for the vendor Mr Mohammed. It is also not disputed that some time later Mr Khan transferred Mr Mohammed's file and the balance of the money held in his trust account (about $114,000) to Mr S Koya at the request of Mr Mohammed. It is also not disputed that when Mr Mohammed's file was transferred by the Koya firm to the firm of Sahu Khan and Sahu Khan the trust account monies were not transferred but as the courts have indicated *"had disappeared."*

[48]. It is also not disputed that Mr Mohammed had obtained a default judgment against Mrs Koya as the executrix of her late husband's estate in respect of that missing money (HBC 94 of 1994L). Then there is the agreement reached between the Respondents and Mr Mohammed. This agreement is in the form of a written Guarantee dated 20 April 1995 to be read with a document *"Acknowledgment and Undertaking*" dated 20 April 1995 signed by the Respondents. Under that agreement the Respondents jointly and severally guaranteed the repayment of the default judgment together with interest and costs entered against Mrs Koya upon demand in writing. The guarantee was a continuing guarantee. The consideration for the guarantee was the withdrawal by Mr Mohammed of the judgment caveat on Lease No.55977 then owned by Mrs Koya. Significantly it was also agreed that the guarantee did not release the estate of Mr Koya (i.e. Mrs Koya) from liability under the judgment debt. Furthermore it was agreed that notwithstanding the primary liability of the estate of Mr Koya, the guarantors agreed to become primarily liable for all such claims under the said action and/or judgment debt (HBC 94 of 1994L).

[49]. The Appellants then commenced HBC 413 of 2002 and subsequently obtained judgment on 14 October 2004 for $223,858.73 against the Respondents. It was that

judgment that the Appellants had sought to enforce by bankruptcy proceedings and then a judgment caveat over the Respondents' land.

[50]. The end result of all the litigation is that the Appellants have two judgments in their favour. The first judgment was obtained in HBC 94 of 1994 on 24 May 1994 in the sum of $153,560.43 plus interest at 13.5% on the principal sum of $114,811.54 from 1 April 1994 to 24 May 1994 being the default judgment against Mrs A Koya as executrix of the estate of Mr S. Koya. This judgment remains a valid judgment of the High Court.

[51]. The second judgment was obtained in HBC 413 of 2002 on 14 October 2004 in the sum of $223,858.73 being a final judgment entered as a result of the Court striking out the Defence filed by the Respondents. This judgment also remains a valid judgment of the High Court.

[52]. In respect of this first judgment there are currently no enforcements proceedings on foot. The caveat placed on the lease owned by the Koyas as a result of the first judgment was removed as consideration for the Guarantee Deed executed by the Respondent. Although the caveat placed on the same lease following the second judgment remains on the title, the enforcement proceedings (under HBC 235 of 2008) have been withdrawn. The bankruptcy proceedings commenced in the Magistrates Court were settled by consent.

[53]. The learned judge has granted to the Respondents an interlocutory injunction (i) restraining the Appellants from claiming or demanding money paid under the 1985 contract and (ii) restraining the Appellant from claiming or demanding money under any agreement guarantee, court orders or judgments.

[54]. The purpose of an interlocutory injunction is that it provides a means for holding the status quo until the matter is determined. The injunction restrains a party from acting in such a way that the proceedings might be frustrated. In the context of civil procedure the injunction is granted to ensure that a defendant is prevented from disposing of property or funds. In the present case the Appellants have not been restrained from disposing of anything. Given that the Respondents as part of their

substantive relief sought the repayment of $92,000.00 from the Appellants it might have been open to the Respondents to apply for and for the Court to consider interim injunctive relief to preserve funds held by the Appellants.

[55]. In the case of the money paid into the Koya trust account following the 1985 contract, the Appellants have already obtained an enforceable judgment. In the case of the Deed of Guarantee the Appellants already have an enforceable judgment. The learned Judge in the present proceedings has no jurisdiction to interfere with those judgments. The issues raised by the Respondents in their Statement of Claim should have been raised either as part of the Defence or by way of equitable relief. Those issues cannot now be raised afresh in the present proceedings commenced by the Respondents which are in my view misconceived.

[56]. It seems to me that the only remedy available to the Respondents at that stage of the proceedings was to apply for a stay of execution of the two judgments.

[57]. Whether the relief sought in the Respondent's Motion can be considered as an application for stay of execution is not an easy question to answer. The learned judge has not, except for the application to stay HBC 235 of 2008, considered any of the interim applications as an application for a stay of execution.

[58]. Be that as it may, it does seem to me that it would be useful and of some assistance to the parties if the Respondents' application was considered as if it were an application for a stay of execution. As such it is necessary to consider what is the nature of the High Court's jurisdiction to grant a stay of execution. A stay of execution must be distinguished from a stay of proceedings and also from a stay pending appeal.

[59]. The jurisdiction of the court to grant a stay of execution is discussed in 17 Halsbury's Laws of England (4th Ed.) 269. At paragraph 451 the following is stated:

> *"The court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases. On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and*

not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself."

[60]. In this case the Respondents argue that the Appellants have no claim to the money under either the judgment in default obtained against Mrs Koya in her capacity as executrix or the judgment obtained against them on the guarantee agreement since it was initially paid under an illegal contract. It is further claimed that the decision of the Supreme Court in **Gonzales –v- Akhtar** (supra) has decided that the moneys remain the property of the purchaser Mr Gonzales. Putting aside the correctness of those assertions, the point at this stage is that they are matters that must be raised in the Defence which should have been filed in both actions.

[61]. In one case there was no defence, and in the second case the Defence, which did not raise these issues, was struck out. There is therefore at this stage no basis that would justify the court exercising its inherent jurisdiction to grant a stay.

[62]. In addition to the limited inherent jurisdiction of the court to stay execution, under Order 47 Rule 1 of the High Court Rules, where a judgment is given or an order made for the payment by any person of money, the court has the power to order the stay of the execution by writ of fieri facias of the judgment or order either absolutely or for such period and subject to such conditions as the court thinks fit.

[63]. Under Order 47 Rule 1 the court will only grant a stay if it is satisfied that (i) there are special circumstances which render it inexpedient to enforce the judgment or order or (ii) the applicant is unable from any cause to pay the money. As for the special circumstances rendering it inexpedient to enforce payment, the court will only be entitled to stay execution if the circumstances go to the enforcement of the judgment and not those which go to its validity or correctness. As for the inability of the applicant to pay the money, it should be noted that although the court has no power to order the payment of a judgment debt by instalments, a stay of execution so long as the judgment debt is paid by instalments will achieve the same result. (See Halsburys (supra) at paragraphs 451 and 452).

[64]. In my view there is no material in either of the affidavits sworn by the First Respondent that would entitle the court to consider granting a stay of execution either under its limited inherent jurisdiction or the jurisdiction under Order 47 Rule 1.

[65]. Under Order 45 Rule 10 a party against whom a judgment has been given or an order made may apply to the court for a stay of execution on the ground of matters which have occurred since the date of the judgment or order. The court may grant such an order or such other relief on such terms as it thinks fit upon being satisfied that the matters are such as would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the judgment or order: **London Permanent Benefit Building Society –v- de Baer** [1969] 1 Ch 321 at page 334. This Rule should not be construed as a method of attacking the validity of a judgment but only as a method of staying its enforcement.

[66]. The condition precedent to the court exercising the discretion given under O.45 R.10 is that the matter relied upon must have occurred since the date of the judgment. In this case the first judgment was a default judgment that was entered on 24 May 1994. The second judgment was entered on 14 October 2004.

[67]. The sale and purchase agreement was dated 25 September 1985. It was finally held to be illegal and void ab initio by the Supreme Court in a judgment hand down on 21 May 2004. It would have been open to the Respondents to plead the Supreme Court judgment in the Defence any time prior to its being struck out on 14 October 2004. Although the Defence was initially filed on 21 January 2003, there was more than sufficient time for the Respondents to have filed an amended Defence any time between 21 May 2004 and 14 October 2004. Even if the Respondents were not aware of the Supreme Court judgment handed down on 21 May 2004, they were represented by independent legal practitioners who knew or ought to have known about the existence of the Supreme Court decision after 21 May 2004.

[68]. The only matter that has occurred since the second judgment was entered is the Respondents claim to *"taking independent legal advice."* In my view that claim lacks substance and merit. As previously noted, the Respondents were represented by legal practitioners up to the time when their Defence was struck out on 14 October 2004.

The fact that the decision of the Supreme Court in **Gonzales –v- Akhtar** (supra) delivered on 21 May 2004 was not pleaded by way of an amendment in their Defence cannot be relied upon by the Respondents as the basis for an application for a stay of execution under Order 45 Rule 10.

[69]. For all of the above reasons I would allow the appeal and set aside orders 1, 2 and 4 made by the learned Judge. Order 3 was not challenged by the Appellants and the Respondents did not file a Respondents Notice. Order 5 was not raised by the Appellants in their Notice of Appeal. I would also order that the costs of the Motion be costs in the cause and that the costs of this appeal be paid by the Respondents. Those costs are fixed in the sum of $3,500.00 to be paid to the Appellants within 28 days from the date of this decision.

Wati JA

[70]. I agree with the reasons and the proposed orders of Calanchini AP.

Orders:

1. *Appeal allowed.*
2. *Orders 1, 2 and 4 made by the High Court on 29 January 2010 are set aside.*
3. *Costs of the motion are to be costs in the cause.*
4. *Costs of this appeal are fixed in the sum of $3,500.00 to be paid by the Respondents to the Appellants.*

HON. MR JUSTICE W. CALANCHINI AP

HON MADAM JUSTICE WATI JA