

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0036 of 2023
[Suva High Court Action No: HBC 61 of 2019]

BETWEEN : RAJESH RISHI RAM

Appellant

AND :
1. RAMESH CHAND SHARMA
2. RAJENDRA SHARMA

Respondents

Coram : Dr. Almeida Guneratne, P

Counsel : Mr A Sen for the Appellant
Mr M Saneem for the Respondent

Date of Hearing : 28th June, 2023

Date of Decision : 16th August, 2023

DECISION

[1] This is a renewed application by the appellant (defendant) for stay of execution of the judgment dated 25th April, 2023 of the High Court wherein the High Court ordered:

- "i) *The defendant is to give vacant possession of the property to the plaintiffs within 14 days of the date of the judgment.*
- ii) *There shall be costs against the defendant in the sum of \$6,500.00 which sum shall be paid to the plaintiffs within 14 days."*
- [2] The background history stands revealed from the grounds of appeal urged by the appellant in his Notice of Appeal filed within the time prescribed by law having complied with the conditions precedent to the prosecution of the appeal as well.
- [3] The Grounds of Appeal urged:

1. ***THE*** Learned Appellate Judge erred in law in failing to hold the 'audi alteram partem' rule, in particular, the Learned Appellate Judge failing to hold that the Appellant had a right of audience and to present his arguments with decided authorities before the Master who had determined the originating summons together with supporting affidavit filed by the Respondent for vacant possession under section 169 of ***Land Transfer Act***.
2. ***THE*** Learned Appellate Judge erred in failing to hold that the Appellant had a valid tenancy with the previous landlord, which was acknowledged and adopted by the Respondents and therefore the eviction proceedings were immature.
3. ***THE*** Learned Appellate Judge failed to take into consideration that the Appellant had argued fraud which displaced the presumption of proprietorship in favour of the Respondent thereby erred in failing to hold that the Respondents were not entitled to maintain an action under section 169 of the ***Land Transfer Act***.
4. ***THE*** Learned Appellate Judge erred in failing to hold that there was in existence a constructive trust pursuant to promises made by the predecessor of the Respondents which the Appellant had a right in law to rely upon which the Learned Appellate Judge failed to consider.
5. ***THAT*** the Learned Appellate Judge erred in law in requiring the Appellant to prove on affidavit in evidence as a conclusive right to remain in possession when the law only requires some tangible evidence establishing a right or an arguable defence which the Appellant had established through an affidavit in evidence.

6. ***THAT** the Learned Appellate Judge erred in law in making a determination of the dispute in a summary manner on the affidavits only when it involved substantial and complicated questions of issues of law which could only be determined upon a full hearing before the Court.*
7. ***THAT** the Learned Appellate Judge erred in law in applying Section 59 of the **Indemnity, Guarantee and Bailment Act 1881** when the Appellant did not claim an ownership of land, but only an interest in equity under the assurance given to him by the Respondents' late father Shiu Narayan Sharma for him to occupy the said building as long as he wanted and such promise was acknowledged and accepted by the Respondents.*
8. ***WHEREFORE** the Appellant prays that the appeal be allowed and the judgment of Master Bull and Her Lordship Honourable Madam Justice Anjala Wati be set aside and the Respondents be ordered to pay costs."*

[4] At the outset of the hearing Mr Sen on behalf of the Appellant urged me to consider a preliminary point he raised namely, that, the entirety of the proceedings in this case, beginning with the proceeding before 'the Master' is a nullity for the reason that, paragraph 2(k) of gazette notification (No. 16 of 16th June 2006) issued by the Chief Justice in transferring the jurisdiction of the High Court to 'the Master', the subject matter falling under possession of land under Sections 169 and 3 of the Land Transfer Act (Cap 131) and Orders 88 and 113 of the High Court Act is *ultra-vires* the Constitution of Fiji. The Learned Counsel contended that, the said gazette notification amounts to an amendment of legislation which only Parliament could have effected in accordance with the Constitution.

[5] A demanding point to be considered no doubt, but exercising statutory power as a single judge I was faced, to start with, Rule 5 of the Court of Appeal Act (the Act).

"Rule 5

- "5. *The appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of objection not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the grounds so stated:*

Provided that the Court of Appeal shall not rest its decision on any ground not stated in the notice of appeal, unless the respondent has had sufficient opportunity of contesting the case on that ground."

- [6] The point urged certainly raises a question of law (as envisaged in the said Rule) read with Section 3(4) of the Act, the High Court having exercised appellate jurisdiction, but not stated in the grounds of appeal.
- [7] Powers of the (full) Court, which a (single) judge may exercise are confined to the matters spelt out in Section 20(1) of the Act and the Appellant has not sought leave to appeal on the ground now sought to be urged as required by Section 20(1)(a).
- [8] Consequently, although a single judge is bereft of jurisdiction to entertain and determine the point urged, as Rule 5 of the Act itself contemplates the (full) Court of Appeal not being confined to the grounds of appeal stated, I leave the said point to be considered by the full Court.
- [9] I shall now turn to the matter of the stay sought by the Appellant pending his appeal.

Principles Applicable to an application for stay pending appeal

- [10] Those principles are well settled in the jurisprudence of Fiji. Some of the leading precedents in that regard, including the Court of Appeal decision in Natural Waters of Fiji Ltd v. Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 40, were surveyed in a recent single judge decision of this Court in Suresh Chandra v. Chief Registrar [ABU0045 of 2023, 7th August, 2023].

Broad Propositions Discernible from an analysis of the established principles

- [11] The Rule is, the successful party must be entitled to the fruits of the judgment. The exception is where there are special circumstances to stay execution of it. An example of

such circumstances is where the unsuccessful party's appeal against that judgment could be rendered nugatory if that party was to be eventually successful in the appeal.

[12] A Court hearing a stay application is thus required to embark on a balancing exercise weighing the said Rule and Exception and how it does that is by looking at the unsuccessful party's prospects of success in the pending appeal.

Some initial reflections

[13] Before I consider those principles and propositions in their application to the instant case I make some initial reflections.

The Broad situations in which an application for stay of proceedings of a judgment of the lower Court arise for consideration

[14] They are:

- (1) Where a final appeal is pending, the appeal being one filed within time and execution of the judgment of the lower Court is sought by the successful party.
- (2) Where leave to appeal is sought by the unsuccessful party, having failed to appeal within time and therefore seeking extension of time to appeal.
- (3) When leave to appeal is sought within time from an interlocutory order of the lower Court made in the course of proceedings.
- (4) Where leave to appeal is sought out of time.

Constitutional and Statutory Rights as opposed to where exercise of judicial discretion is super-imposed to acquire those rights

[15] The situation contemplated in paragraph 14(1) above is a right conferred under Section 99(4) of the Constitution where the provisions of Section 20(1)(e) of the Court of Appeal

Act are brought into play. As opposed to that in the situations in paragraphs 14(2)(3) and (4) above the exercise of Court's discretion is involved.

The situation under consideration in the instant case

[16] That is the one in paragraph 14(1) above. The Appellant has exercised his constitutional right within time having complied with the conditions precedent to have that right vindicated by the full Court to determine on the several grounds of appeal urged.

The Resulting Position – the decisive criteria

[17] Given the fact that the filing of the appeal (though within time) does not operate as an automatic stay of execution (vide: Rule 34(1)(a) of the Court of Appeal Act), it is my considered view that, the twin criteria to address are (i) as to where the balance of convenience lies and (ii) prejudice to parties.

[18] I have perused the respective affidavits filed by the parties, the written submissions tendered and gave consideration to the oral submissions made.

[19] If the appellant had continued to be in occupation of the property in question for fifty years as alleged without any payment of rent what then was the reason why he had been allowed to do so?

[20] That is a factor which the full Court will no doubt have regard to in the overall context of the grounds of appeal urged. Pending determination by the full Court, should the appellant be evicted and if he is successful in his appeal the prejudice that would be caused to him would be immeasurable.

[21] On the other hand, the Respondent should not be deprived of the fruits of victory he gained in the lower Court for an unduly period. If that is to happen it would certainly cause prejudice to him.

Determination

[22] Consequently, on a consideration of the said twin criteria of balance of convenience and prejudice in their application in the facts and circumstances of this case I make the following orders.

Orders:

- 1) *The Appellant is directed to take steps forthwith in terms of Rule 18 of the Court of Appeal Act to prosecute the Appeal if they have not been taken already.*
- 2) *The Appeal shall be taken for hearing on 18th September, 2023 at 9.30am and the Registrar is directed to have the appeal listed accordingly for hearing by the full Court.*
- 3) *The stay sought by the Appellant is granted until 18th September, 2023.*
- 4) *While I note that comprehensive written submissions have been filed by parties in these proceedings' parties may file further submissions before the full Court hearing in terms of Practice Direction No.1 of 2023 without the need to have a call over date for that purpose.*
- 5) *The Registrar is directed to submit these proceedings (including this Decision) to the full Court at the hearing of the appeal.*
- 6) *In all the circumstances of this case I make no order for costs.*



J. Almeida Guneratne

**Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL**

Solicitors:

Sen Lawyers for the Appellant

Saneem Lawyers for the Respondent