

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

CIVIL APPEAL NO. ABU 012 of 2023
[High Court Civil Action No. HBC 191 of 2022]

BETWEEN : **OSEA VEITALA**

Appellant

AND : **HOME FINANCE COMPANY t/a HFC BANK**

Respondent

Coram : **The Honourable Mr. Justice Filimone Jitoko**
President Court of Appeal

Counsel : **Ms. S. Devi and Mr. N. Vakacakau for the Appellant**
: **Mr. N. Lajendra for the Respondent**

Date of Hearing : **4 December, 2023**

Date of Ruling : **7 December, 2023**

RULING

1. This is the Respondent's Summons to Strike Out the Appellants summons filed on 16th October, 2023 seeking a stay pending the hearing of their appeal against the judgment of 1 February, 2023, by Vishwa Datt Sharma J ordering inter alia, vacant possession of the

land described as State Lease 19499 being Lot 1 on Plan No. (d) SO 6902 Waqadra (part of) bal. Lot 3 SO 279, situate in the Province of Ba, District of Nadi presently occupied by the Appellants. The Court further ordered that:

“[2] The execution of the order for vacant possession is stayed and suspended for 30 days to allow the Defendant together with the relatives, agents, servants and occupiers time to relocate.”

2. The Appellants had filed their Notice of Appeal on 15 March 2023 and served on the Respondent on the same day, and security for costs summons heard and fixed at \$2,500.00 on 28 March, 2023.
3. On 17 August, 2023 the Appellant filed an ex-parte summons for amendments to the grounds of their appeal with supporting affidavit. This Court directed that the application be made inter-partes and on 28 August 2023, the Court ordered affidavit in opposition to be filed by 15 September, with the Appellant’s reply by 29 September and that submissions to be filed concurrently by 10 October 2023. A date for hearing was to be fixed on 16 October.
4. The Appellants have yet to file their affidavit in reply as well as their submission. When the matter came before the court on 16 October, Counsel for the Appellant sought and were granted, further time to file their affidavit and submission. The affidavit in reply was subsequently filed later on the same day, 16 October. The submission remains to be filed.
5. Also on the same day, the 16th October, the Appellant filed an ex-parte Summons for Stay pending appeal with affidavit in support, which the Court directed that it be made inter partes.
6. On 27 October, 2023 the Respondent was directed to file its intended Summons to Strike with affidavit in support and the Appellants to file their affidavit in reply 7 days thereafter and the matter set down for arguments on 4 December 2023.

The Respondent's Submissions

7. Counsel for the Respondent (the Appellant in this Summons to Strike), based his application principally on Rule 26 (3) of the Court of Appeal Rules. Rule 26 deals with applications that are made to the Court of Appeal and read as follows:

“Applications to the Court of Appeal

- 26.-(1) *Every application to a judge of the Court of Appeal shall be by summons in chambers, and the provisions of the High Court Rules shall apply thereto.*
- (2) *Any application to the Court of Appeal for leave to appeal (whether made before or after the expiration of the time for appealing) shall be made on notice to the party or parties affected.*
- (3) *Whenever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.”*

8. In this instance, the Respondent agrees that the Appellant have correctly filed their application, including the stay, under Rule 26 (3) above, in the High Court on 22 June, 2023. The application remains pending in the High Court.
9. Given that the Appellants’ application for stay remains pending in the High Court, the present application before the Court of Appeal seeking the same relief, amounts to an abuse of process.
10. The Respondent referred to **Rajendra Chaudhry v Chief Registrar** Civil Appeal No. ABU 63 of 2012 where the then Acting President of the Court of Appeal, Honourable President of the Court of Appeal, Honourable Justice Calanchini clearly explained the correct procedure to be followed as set out under Rule 26 (3) with respect to an application for stay pending an appeal to the Court of Appeal, as follows:

“[6] An application for a stay of execution must be made to the Court below first. If the application is refused by the Court below then a further application may be made to the Court of Appeal. Under section 20 of the Court of Appeal Act Cap 12 a single judge of the Court of Appeal has jurisdiction to hear and determine such an application.

[7] *As the Appellant has not made an application for stay of execution to the Court below, this Court has no jurisdiction to hear the application at this stage.*”

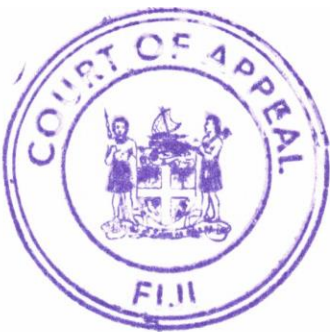
Appellants’ Submissions

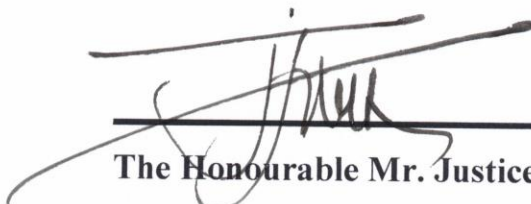
11. Appellants’ (Respondents in this Summons proceedings) concede that they had, pursuant to Rule 26 (3), filed their application of Stay in the High Court and the matter was heard on 21 August 2023. The Ruling was to be handed down on 25 October, 2023 but they have subsequently been informed that the Ruling will be on notice. It is still been awaited.
12. The Appellant’s claim that in the meantime, they have continuously been harassed by the Respondent’s surveyors and the notice given that Order 2 of the High Court, for the Appellant to cede vacant possession of the property within 30 days from judgment, there being no Stay place, their rights to remain on the property, while their appeal is being heard is jeopardised.
13. The affidavit in support also alluded to remarks by the Court, in the hearing of the Stay application, that the Appellants may not get the stay they were seeking. Although the veracity of this cannot be confirmed until the transcripts of the Court records is made available, it does nevertheless lend some credence to the reason why they are seeking the Court of Appeal’s intervention.
14. As to the application of Rule 26 (3), the Appellants referred to this Court’s recent Ruling in **Aman Singh v Trustees South Seas Club**, where the Court of Appeal added qualifications to the Rule.

Analysis

15. I agree with this Court’s decision in **Rajendra Chaudhary v Registrar of Titles** (supra) and more so in this instance where the Appellant have already filed their stay application in the High Court and is awaiting a decision. In the **Aman Singh** case, there had been no filing of such summons in the High Court and given the extraordinary circumstances of the case, the Court of Appeal intervened in the exercise of its discretionary powers.

16. This Court will not entertain a parallel proceedings seeking the same relief as that of the court below. At the very least, it tantamounts to abuse of process.
17. The court is mindful that while the Appellants' Summons of 16 October 023 was for Stay Pending Appeal, their latest affidavit of 23 November, 2023, introduce the alternative for the Court to grant an interim order or interim stay until the Ruling of the High Court.
18. It is perfectly within the discretionary powers of this Court to grant an interim stay pending the Ruling of the High Court if the circumstances demand it. However, given the assurance of the Respondent's Counsel that the Respondent will not interfere nor harass the Appellants' in the quite enjoyment of the property, in the interim, I am reluctant to grant an interim stay. The Court will nevertheless be willing to entertain an application should the need arise.
19. **Orders**
1. *The Appellants' Summons of 16 October, 2023 is struck out.*
 2. *A fresh date to be set for the hearing of the Appellants' Summons to amend their grounds of appeal.*
 3. *Costs in the cause.*




The Honourable Mr. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL
