

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

**CIVIL APPEAL NO. ABU 072 of 2024**  
**[In the High Court at Suva No. HBC 171 of 2015]**

**BETWEEN** : **RENEE. D. LAL** 73 Naivurevure Road, Suva, Fiji, Lawyer.

**Appellant**

**AND** : **DILIP JAMNADAS** as Principal and as Trustee of Jamnadas & Associates Trust Account a legal Practitioner of the law firm of Jamnadas & Associates having its registered office situated at Level 6, FNPF Place, Victoria Parade, Suva.

**Respondent**

**Coram** : **Prematilaka, RJA**

**Counsel** : **Mr. A. Bale and Ms. M. Raga for the Appellant**  
**Ms. M. Fong for the Respondent**

**Date of Hearing** : **26 March 2025**

**Date of Ruling** : **11 April 2025**

**RULING**

[1] Lal Patel Bale Lawyers had filed a notice of appeal & grounds of appeal on 15 August 2024 against the judgment of the High Court delivered on 07 August 2024<sup>1</sup> where *inter alia* the appellant's summons seeking for stay and setting aside default judgment of 27 May 2022 was dismissed. The summons supported by the appellant's affidavit filed on the following day had sought an order to stay the said judgment until the determination of the appeal.

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<sup>1</sup> **Jamnadas (as Principal and as Trustee of Jamnadas and Associates Trust Account) v Lal** [2024] FJHC 494; HBC171.2015 (7 August 2024)

Security for costs of the appeal had been determined by the Chief Registrar on 24 September 2024 and paid on 22 October 2024.

- [2] This court on 27 August 2024 had noted that the respondent's counsel had raised a preliminary issue as to whether in terms of Rule 26(3) read with Rule 34 of the Court of Appeal Rules, the summons for the stay of the High Court judgment could be maintained at this stage in this court. The court having heard both counsel had decided to hear the preliminary objection first and given directives accordingly. The respondent had filed an affidavit-in-opposition subject to the said preliminary issue raised by his counsel. The written submissions of both parties had followed focusing the preliminary issue of jurisdiction of this court at this stage to hear the stay application and if so, consequently whether such stay order should be granted.

### ***Question of jurisdiction***

- [3] Whenever under the Court of Appeal 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.<sup>2</sup> One example of such an instances is that the period for filing and serving a notice of appeal or an application for leave to appeal or an application for leave to appeal under Rule 16 may be extended by the court below or by the Court of Appeal.<sup>3</sup> The qualifying words in Rule 26(3) are '*whenever under these Rules*'. So, Rule 26(3) only applies where the Court of Appeal Rules themselves provide that an application may be made to either court; another example relevant to the preliminary issue here is Rule 34(1) relating to applications for stay pending appeal, the opening words of which are "*Except insofar as the court below or the Court of Appeal may otherwise direct. . .*" In the case of an application under Rule 34(1), Rule 26(3) would require the application to be made first to the High Court.<sup>4</sup>

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<sup>2</sup> Rule 26(3) the Court of Appeal Rules

<sup>3</sup> Rule 27 of the Court of Appeal Rules

<sup>4</sup> **BDO Spicers Auckland Trustee Company Ltd v Native Land Trust Board** [2003] FJCA 67; ABU0062.2003S (28 November 2003)

- [4] Thus, it is very clear that when the jurisdiction to stay the judgment pending appeal is vested also in the High Court, an application to that effect must be made in the first instance to the High Court. The appellant has not done so and the respondent's counsel confirmed that there was no such application before the High Court made by the appellant. The dismissal of the appellant's summons on 07 August 2024 filed in the High Court seeking for stay and setting aside default judgment of 27 May 2022 is not what is envisaged by Rule 34(1). The refusal on the part of the High Court to stay the execution of the judgment must be pending the appeal in the Court of Appeal. In other words, the stay application should have been made to the High Court pending appeal because a single Judge of this Court could at his discretion stay the execution only pending appeal<sup>5</sup>. There is no such application made by the appellant to the High Court after 15 August 2024 *i.e.* the day of filing the appeal in the Court of Appeal. The summons dismissed by the High Court on 07 August 2024 was not 'pending appeal'. Therefore, it is quite clear that the appellant has not indeed invoked the jurisdiction of the High Court seeking stay of execution of the impugned judgment delivered on 07 August 2024.
- [5] Where the court below and the Court of Appeal enjoy concurrent jurisdiction in respect of an application, the application must first be made to the court below under Rule 26(3) of the Court of Appeal Rules and in the event that the court below (the High Court) refuses the application, it may then be renewed in the Court of Appeal ('renewed application') and pursuant to section 20(1) of the Court of Appeal Act, a judge of the Court of Appeal may exercise the Court's power to grant leave to appeal and to grant a stay of proceedings to prevent prejudice to the claims of a party pending the appeal.<sup>6</sup>
- [6] An application for a stay of execution, the notice of motion was struck out pursuant to Rule 26 (3) which provides that where there is concurrent jurisdiction exercisable by both the Court of Appeal and the court below, on the basis that any application that is subject to that concurrent jurisdiction must first be made in the court below and under Rule 34, the Court

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<sup>5</sup> See section 20(1)(e) of the Court of Appeal.

<sup>6</sup> **Wehrenberg v Suluka** [2018] FJCA 112; ABU99.2017 (6 July 2018); **Naidu v Medical Superintendent of Lautoka Hospital** [2018] FJCA 236; ABU52.2017 (30 November 2018)

of Appeal and the court below are granted concurrent jurisdiction in respect of an application for stay.<sup>7</sup>

[7] Whenever the Court of Appeal and the court below have concurrent jurisdiction in relation to a particular application such as an application for a stay of execution pending an appeal that application must first be made to the judge in the court below. An applicant is required to first make an application for a stay of execution pending appeal to the judge who adjudicated in the court below or if that judge is not available to another judge in the court below. A concurrent original jurisdiction is given to the Court of Appeal. This enables an appellant to make a fresh application for a stay of execution pending appeal to the Court of Appeal in the event that the first application was unsuccessful. In other words, the application for a stay pending appeal, although ancillary to the appeal, invokes the concurrent original jurisdiction of both courts. Rule 34 does not bestow upon this Court an appellate or review function. In the event of the application in the court below being refused the application is heard afresh in the Court of Appeal without any reference to the earlier decision of the judge in the court below.<sup>8</sup>

[8] Referring to Rule 34(1) read with 26(3), it has been held<sup>9</sup> (approved later<sup>10</sup> by the President, CA) that:

*‘[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 s 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 yet made an application for stay of execution to the Court below, this Court has no jurisdiction to hear the application at this stage. As a result the Appellant’s application for stay of execution is dismissed.’*

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<sup>7</sup> **Palu v Australia and New Zealand Bank** [2013] FJCA 11; Miscellaneous 19.2011 (8 February 2013)

<sup>8</sup> **Samshood v Vunimoli Sawmill Ltd** [2013] FJCA 35; ABU7.2012 (3 May 2013)

<sup>9</sup> **Chaudhry v Chief Registrar** [2012] FJLawRp 118; (2012) 2 FLR 398 (5 November 2012)

<sup>10</sup> **Veitala v Home Finance Co (trading as HFC Bank)** [2023] FJCA 272; ABU012.2023 (7 December 2023)

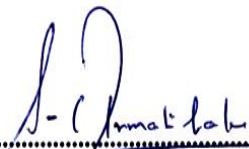
- [9] Therefore, the appellant's current application is not a renewed application for stay as it attempts to invoke the original jurisdiction of the Court of Appeal in the first instance without having it heard and refused by the High Court.
- [10] The appellant relies on the decision of Jitoko, VP in **Trustees of South Seas Club v Chung Lee** [2023] FJCA 88; ABU017.2022 (2 June 2023) in support of the contention that *'notwithstanding the limitations of the forum for appeal under Rule 26 (3), the Court of Appeal has still the jurisdiction to entertain the stay application..'* However, later in ***Veitala*** His Lordship Jitoko, P explained that in ***Trustees of South Seas Club***, given the extraordinary circumstances of the case, he intervened in the exercise of his discretionary powers. One must not forget that in ***Trustees of South Seas Club*** the decision to be made was whether the appeal deemed abandoned should be reinstated or not and the views of Jitoko, VP must be confined to the 'extraordinary circumstances' of the case as His Lordship in ***Veitala*** approved and followed the long-established view in ***Chaudhry***. Therefore, His Lordship's views in ***Trustees of South Seas Club*** are not of general application. I am not inclined to follow ***Trustees of South Seas Club*** against the overwhelming weight of authorities to date on this point.
- [11] Incidentally, it has been brought to my notice by both parties that on 15 September 2024 the respondent has filed bankruptcy proceedings following the High Court judgment on 07 August 2024 against the appellant in the Magistrates court No. 13 of 2024. By this application the appellant had sought a stay of bankruptcy proceedings in the Magistrates court but his application has been refused on 18 September 2024 by the Magistrate. The appellant has then appealed the Magistrate's decision on 18 October 2024 to the High Court. The Bankruptcy No. 13 of 2024 is still pending in the Magistrates court and has not proceeded any further as the Magistrates court is awaiting the Court of Appeal decision on the appellant's stay application (the last mention date being 04 April 2025). I do not think that the appellant has applied for a stay of the ruling in the Magistrates court pending the determination of the appeal in the High Court.

[12] Therefore, this court at this stage has no jurisdiction to hear the appellant's application for stay of execution of judgment, for she had not filed an application seeking stay of execution of judgment in the High Court in the first instance and not met with a refusal by the High Court. His current application must therefore should stand dismissed.

**Orders of the Court:**

1. *Summons/application for stay of judgment dated 07 August 2024 pending appeal is dismissed.*
2. *Costs lie where they fall.*



  
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Hon. Mr. Justice C. Prematilaka  
**RESIDENT JUSTICE OF APPEAL**

**Solicitors:**

Lal Patel Bale Lawyers for the Appellant  
Messrs. Jamnadas & Associates Lawyers for the Respondent