

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION  
CIVIL ACTION NO. 127 OF 1994

Between:

ELI FONG as Trustee of the Estate of  
TOM NABONG

Plaintiff

and

EDMUND MARCH

Defendant

Mr. D. Sharma with Mr. R. Nand for the Plaintiff  
Mr. V. Daveta for the Defendant

DECISION

[1] By motion dated 26 February 2008 the Plaintiff applied for the following orders:

- “(a) An order that the Orders made by this Honourable Court on 9<sup>th</sup> November 2006 be vacated forthwith.
- (b) Costs of this application
- (c) Such further or other orders or directions as the Court may deem just.”

- [2] The grounds on which the application is made are contained in the Plaintiff's affidavit and filed herein.
- [3] The matter went before the Master of the High Court who made certain Orders for filing of affidavit in Response and filing of written submissions.
- [4] The Defendant filed his affidavit in Response followed by Affidavit in Response of the Plaintiff. Both parties through their counsel filed written submissions.
- [5] The Master has now submitted the application to me for argument and determination.

#### **Background to the case**

- [6] On 12 May 2006 this Court (Coventry J) delivered a substantive judgment in favour of the Plaintiff (vide pages 29-31 of the judgment).
- [7] The Defendant failed or refused to comply with any of the said Orders.
- [8] A Notice of Appeal to Court of Appeal was filed by the Defendant and an application for stay of execution was also filed.
- [9] On 7 November 2006 this Court (Pathik J) delivered its Ruling on stay of execution. The Court concluded as follows:

*“On a balance of convenience I find that the respondent will suffer a greater harm than the applicant if stay was granted.*”

*However, I consider that a certain degree of status quo be maintained and this I propose to do by granting a limited conditional stay.*

*As I mentioned earlier, there is an order in favour of the respondent for transfer of certain properties by the applicant. Now, if that has been complied with then, it is ordered that the respondent not to sell or deal with the titles in question until the hearing and determination of the appeal herein. AND it is further ordered that the applicant proceed with due diligence to have the appeal ready for hearing preferably in the next session of Fiji Court of Appeal in February 2007 AND the parties are at liberty to apply generally.*

*For the above reasons stay application is refused except to the extent referred to hereabove with costs the sum of \$400.00 against the applicant/defendant to be paid to the plaintiff's/respondent's solicitors within 14 days."*

#### **Plaintiff's/Applicant's contention**

- [10] It is the Plaintiff's contention that the appeal has not progressed at all as apart from filing of the Appeal and the payment of security for costs, no Record has been finalized or prepared by the Defendant or filed in Court.
- [11] The appeal could have been heard in February 2007 but the Defendant has taken very little steps to diligently pursue the appeal and the delay has been inordinate and inexcusable.
- [12] The Defendant has failed to comply with Coventry J's order of, inter alia, transferring all untitled land to enable the Plaintiff to pay off the mortgage debts.
- [13] The land remains mortgaged and could be sold at anytime by the NBF Asset Management Bank or Public Trustee of Fiji.

- [14] As at 30 June 2006 the total debt owed to NBF Asset Management Bank and Public Trustee was \$3,975,846.45. The Defendant has not made any effort to pay a single cent of this amount to date.
- [15] The Plaintiff's family live on the said lands and cannot develop or deal with the lands because of the Court Order of 7 November 2006.

**Defendant's counsel's submission**

- [16] The Defendant objects to the application to vacate the said Order of 7 November being made as the delay in having the Records prepared was caused by the Court Registry officials.
- [17] On 4 April 2008 when the Defendant's counsel filed his submission the position was that on 21 April 2008 a formal application was to be heard in the Appeal Court in regards to the alleged difficulties in filing the Record.
- [18] The Defendant raises a number of matters disputing the Plaintiff's claim which evidently does not arise out of the said Judgment of Justice Coventry.
- [19] The Defendant says that the mortgage to the National Bank of Fiji was as third party guarantee mortgage in favour of the purchaser who had agreed to purchase the land.
- [20] He says that a '*court action challenging the Public Trustee mortgage had been heard by Justice Jitoko and a decision is still pending for more than 3 years now.*'
- [21] The Defendant says that '*the summons challenging the validity of probate being action and is to be heard.*'

[22] The defendant further says that *'there is sufficient evidence in the Defendant's hand to prove the Plaintiff position as Trustee & Executor of the estate of the late Tom Nabong pursuant to the purported will is unfounded, baseless and an imposter. Further, the Plaintiff upon examination of the Judge record and affidavit sworn by him, he has committed a litany of lies with the collusion and connivance of his counsel.'*

[23] The Defendant is asking that the Plaintiff's motion be struck out and that he be allowed to proceed with grounds of appeal.

#### **Consideration of the application**

[24] Both counsel appeared before me on 16 April 2008 on the hearing of the motion when Mr. D. Sharma submitted that the defendant had not complied with the Court Orders and that the proposed Appeal had not been pursued with due diligence. The Court Record has not been filed with Court of Appeal. Counsel further said that the Order for stay was a conditional one requiring the Defendant to pursue the Appeal with due diligence. He said that we are now into year 2008 and no progress has been made.

[25] The Defendant sought adjournment until 21 April 2008 when the appeal was to be called in the Court of Appeal although there was no application for enlargement of time.

[26] Mr. Daveta, when asked told this Court that he is not ready to argue the present motion. He said that he relies on his written submission. He further stated that he will be seeking extension of time from Fiji Court of Appeal.

- [27] In reply Mr. Sharma questioned as to what the Defendant has been doing all this time. Mr. Sharma said that he relies on the submission filed by him.
- [28] Although I stated that I will be Ruling on Notice, on 29 April 2008 I called both counsel in Chambers to ascertain the position of Appeal in Court of Appeal.
- [29] Mr. Daveta said that he will file Record today (29<sup>th</sup> April) in Court of Appeal but it was due to be filed by 28 April.
- [30] Mr. Sharma said that they appeared in Court of Appeal before Byrne JA when the Court expressed its concern and ordered that Record be filed within 8 days by 28 April 2008 by 4.00 p.m.
- [31] My inquiry with the Appeal Court reveals that the Record has not been filed although date of hearing has been given for 24 June 2008.
- [32] It is abundantly clear from the chronological order of events that the defendant and/or his solicitors have not complied with any of the Orders of the Court made by Coventry J and Pathik J.
- [33] My Order was a conditional one for stay provided that the proposed appeal from the Judgment of Coventry J is pursued with due diligence. As can be seen, since my order of 7 November 2006, 17 months have elapsed and there is no sign of any progress having been made in getting ready for the Appeal.
- [34] In these circumstances the Defendant is not entitled to any further indulgence from this Court. Even the Court of Appeal's Order for filing of Record has not been complied with.

- [35] There has been a complete disregard of Court Orders. Court orders are there to be obeyed. No acceptable reasons have been advanced for disobedience of the Orders.
- [36] As far as the motion before me is concerned, I made certain conditional order on 7 November 2006, since this has not been complied with in all the circumstances of this case I am left with no alternative but to **grant the application** by vacating the conditional order for stay **which I hereby do** with an order for **costs** against the Defendant in the sum of \$700.00 to be paid to the Plaintiff within 10 days.



**D. Pathik**

**Judge**

At Suva  
19 May 2008