

IN THE HIGH COURT OF FIJI

[WESTERN DIVISION] AT LAUTOKA

Civil Action No. HBC 208 of 2011S

(Civil Appeal No A0034/2014)

BETWEEN : **APIMELEKI KUNAVULA, SAVENACA**
WAINICAGI, ISAIA GONEWAI (SENIOR) all of
Korotogo, Sigatoka, self employed and **PITA KEWA**
NACUVA, retired Civil Servant of Suva, Fiji being the
TRUSTEES OF THE MATAQALI NABOKA

PLAINTIFFS

AND : **RUKSHANA BIBI KHAN** of Korotogo, Sigatoka,
Businesswoman

DEFENDANT

Appearances : Mr N. Tuifagalele for the **Defendant/Applicant**
Mr V. Singh for the **Plaintiff**

Interlocutory Judgement

Introduction

1. This is the Defendants application for stay of orders delivered by me on 24th April 2014. This application is opposed by the Plaintiff.
2. The affidavits filed in connection with this application are as follows.
 - a) The affidavit in support of the application sworn by the Defendant on 13th May 2014.
 - b) The affidavit in response of Pita Nacuva sworn on 24th June 2014.
 - c) The affidavit in reply of the Defendant sworn on 12th August 2014.
3. When this matter was taken up for hearing on 16th October 2014 counsel for both parties made oral submissions and submitted written submission with leave of the Court.

Preliminary Objections

4. Before going into the merits of the application for stay I would first deal with the

preliminary objections raised by the learned counsel for the Plaintiff in his submission.

5. The preliminary objections raised are as follows:
 - i) The affidavits filed on behalf of the Defendant do not have the endorsement as required under Order 41 Rule 9 (2) of the High Court Rules and therefore it makes the said affidavits defective and the Defendant cannot rely on them at the hearing in support of her application.
 - ii) The Defendants Notice of Motion does not state which rule or provision under which stay is sought. If the application is made pursuant to the inherent jurisdiction of the Court then it has not been stated in the face of the Notice of Motion.
 - iii) The Defendant has in reply has annexed certain documents marked annexure 'B', 'C' and 'D' that were not presented at the substantive hearing. The Defendant cannot tender further evidence in this matter as the substantive hearing is complete.
6. In regard to objection (i) I find that the Defendants affidavit is not endorsed as required under Order 41 Rule 9 (2). However, Under Order 41 rule 4, the Court has a discretion to allow a party to use in evidence a defective affidavit notwithstanding any irregularity in the form thereof.
7. In **Chandrika Prasad V Republic of Fiji and Attorney General (2001) 2 FLR 39** defective affidavits without the endorsement was allowed to be used in evidence notwithstanding the non-compliance with mandatory rule of O.41 r 9(2).
8. If the affidavits of the defendant are not accepted due to non-compliance with the above rule the Defendant will have no evidence before court to support her application for stay. Therefore, I grant leave pursuant to Order 41 rule 4 for the 2 affidavits to be used in evidence in these proceedings in the interest of Justice.
9. As pointed out by the learned counsel for the Plaintiff I find that the Notice of Motion filed by the Defendant for this application does not state under which rule or provision a stay is sought. However, in the written submission filed by the Defendant it is stated that the Defendant filed the application to stay pursuant to Order 45 rule 10 of the High Court Rules 1988.

Therefore, I will consider the application of the Defendant under the provisions of Order 45 Rule 10 to decide whether she is entitled to a stay as prayed for in her application.

10. The learned counsel for the Plaintiff also objects to the Defendants document marked 'B', 'C' and 'D' annexed to the affidavit in reply on the basis that those documents were not presented at the substantive hearing. I find that the said documents were not presented at the hearing. Therefore, I accept the objection raised by the Plaintiffs counsel and decide to disregard the said documents as evidence for this application.

Application for Stay

11. The Supreme Court of Fiji in **Native Land Trust Board V Lal [2012] FJSC 1** discussed the principles applicable to a stay application.

In paragraph 14 of the Judgement it is stated as follows;

".....[14] The Court considering a stay should take into account the following questions.....They are:

- a *"Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory....."*
- b *Whether the successful party will be injuriously affected by the stay.*
- c *The bona fides of the applicants as to the prosecution of the appeal.*
- d *The effect on third parties.*
- e *The novelty and importance of questions involved.*
- f *The public interest in the proceeding.*
- g *The overall balance of convenience and the status quo...."*

12. The Defendant has not deposed in her affidavit that her appeal will be rendered nugatory if a stay is not granted. Therefore, there is no evidence before the Court to suggest it. The plaintiffs have been denied access to their property and also deprived of enjoying the benefits from their property since they got the transfer in their favour from the Director of Lands on 5th march 2003. As such I am of the view that the successful party will be injuriously affected by a stay being issued to deprive them of the fruits of this litigation.

13. **Bowen L J in. The Annot Lyle (1886) 11 P/D 114 at 116 (CA)** said in respect an application for stay pending appeal as follows:

"There is no reason, in my opinionwe should make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds, to which prima facie he is entitled"

14. The Defendant has not alleged in affidavits that any third party will be affected if a stay is granted. Furthermore, there is no public interest in these proceedings.

15. The next question to be considered in this application is whether there is a novel or important questions for the Court of Appeal to determine.

16. In **Shaw V Holland [1900] 2 ch 305 at 313 CA, Lord Alverston** stated that;

"The general rule I think should be that proceedings under a judgement should not be stayed pending an appeal unless on special grounds"

17. "Special Circumstances" was discussed in **Monk V Bartram [1891] 1 Q.B. 346** In the said judgement Lord Esher said;

"It has never been the practice in either case to stay execution after the judge at the trial has refused to grant it unless special circumstances are shown to exist. It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that all allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are

not special circumstances on which the Court will grant a stay of execution".

18. In view of the guidelines set out in the above authorities, I will now consider whether the applicant has adduced evidence to prove that there are novel or special circumstances warranting a grant of a stay of execution.
19. In the Defendant written submissions it is stated that the stay application by the Defendant was filed pursuant to Order 45 Rule 10 of the High Court Rules. Order 45 rule 10 is as follows:

"Matters occurring after Judgements: stay of execution

"without prejudice to order 47, rule 1, a party against whom a judgement has been given or an order made may apply to the Court for a stay of execution of the judgement or order or other relief on the ground of matters which have occurred since the date of the judgement or order and the Court may by orders grant such relief, and on such terms, as it thinks just."

20. Though the written submissions of the Defendant state that the stay application is filed pursuant to Order 45 Rule 10, the evidence adduced by her does not refer to matters which have occurred since the date of the Judgement. The learned counsel for the Defendant in his oral submissions stated that the Plaintiff commenced execution proceedings after the judgement; therefore order 45 Rule 10 is applicable to seek a stay order. The commencement of the execution proceedings cannot be considered as a new matter which occurred after the judgement. There is no novelty in the execution proceedings. Its part and parcel of the same proceedings which will follow after a judgement. In my view its not a novel or special circumstance allowing a stay under Order 45 Rule 10 of the High Court Rules.
21. Next question to be considered is whether the appeal involves an important question to be determined by the Appellate Court. I will now consider the grounds of appeal to decide whether the appeal involves such an important question.
22. The Defendants first ground of appeal is that the court has failed to consider that the appellants is a tenant/lessee of the Director of lands. This issue was considered in paragraph 18 to 20 of the judgement pronounced by me on 24.4.2014. I quote here paragraphs 18 to 20 of my judgement.


"(18) It is evident from the documents produced by the Plaintiffs that the plaintiff mataqali is the proprietor of the properties comprised in Certificates of Title No 7358 and 7317 being Lot 29 and 30 and that the defendants has become a lessee of the plaintiff because the said lease had been transferred by operation of Law (with the transfer in title) on or about 5th March 2003"

"(19) Therefore the defendant tendering of rent to the Director of Lands 7 years after the transfer of title does not create a defence for the defendant"

"(20) Section 97 of the Property Law Act provides that the rent and benefit of the lessee covenants run with the reversion. That is the benefit and burden of the registered lease goes to the transferee of the title, the plaintiffs."

Therefore I find that the first ground of appeal lack any merit, as the Defendant cannot be a lessee of the Director of Lands after the transfer of title to the Plaintiffs.

23. The Defendants second ground of appeal is that the court failed to consider that there was no contracted lessor/lessee agreement between the Plaintiff and the Defendant. This ground is taken without considering Section 97 of the Property Law Act which provides for the benefits and burden of registered lease to go to the transferee of the title. I have dealt with this issue in my judgement as mentioned in the above paragraph.
24. The Defendants III, IV, V grounds of appeal are based on the 1st and 2nd grounds of appeal discussed above.
25. The VI ground of appeal is that the learned Judge erred in fact and law when he failed to consider that the Certificate of Title 7317 and 7358 had been cancelled and/or amalgamated by the Director of Lands and a new DP 5517 issued which allowed the issuance of two leases one to the Appellant and the other to the Respondent.
26. There is no evidence in proof of this contention and also the Court cannot consider any step that the Director of Lands intends to take in the future. The Defendant does not say that she is given a lease, she only states that a new DP 5517 is issued which allow the issuance of two leases. The court cannot grant relief to the Defendant on the assumption that a lease will be given to her. There was no evidence adduced to prove that the Certificate of Title 7317 and 7358 are cancelled. Therefore, this ground of appeal does not make any sense whatsoever.
27. Next question to be considered in this matter is the overall balance of convenience and the status quo.
28. The Plaintiff has been deprived of any benefit from their property for 11 years. The Defendant is utilising the Plaintiff's land and does not even accept that the Plaintiffs are the proprietors of the land. As discussed in paragraph 12 and 13 above the Plaintiffs must receive fruits of their litigation and not kept out of it till all proceedings are terminated. As such I hold that the balance of convenience favours the Plaintiff in this matter.
29. Having considered all of the above, I am of the view that the Defendant has not made out a case as to why a stay should be granted.
30. Accordingly, I make the following Orders:
 - a) The Motion to stay dated 13 May 2014 filed by the Defendant is dismissed.
 - b) The Defendant to pay costs summarily assessed in a sum of \$750.00 to the Plaintiff within 21 days from today.


Lal S. Abeygunaratne
Judge
04/11/2014

