

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

HPP Case No.: 17 of 2014

IN THE MATTER of AN APPLICATION FOR
REMOVAL OF EXECUTORS AND TRUSTEES

BETWEEN : **BYRON KWAN** of 88 Milverton Road, Raiwaqa, Suva,
Beneficiary
APPLICANT

AND : **NELSON KWAN** of 88 Milverton Road, Raiwaqa, Suva, Trustee
1st RESPONDENT

AND : **GERARD SEETO** of 88 Milverton Road, Raiwaqa, Suva, Trustee
2nd RESPONDENT

Counsel : Applicant in Person
Ms. M. Rakai for the Respondents

Date of Hearing : 22nd April, 2016

Date of Judgment : 10th May, 2016

JUDGMENT

INTRODUCTION

1. The Applicant filed this action seeking removal of the executors and trustees on the basis of they had failed to administer the estate property. The executors were unable to provide any account of the trust property for more than a decade. So, the request for removal was granted. Now they are seeking a stay of the execution of the judgment in terms of Order 45 rule 10 of the High Court Rules of 1988.

ANALYSIS

2. The Plaintiff who is a son of late Kwan Chew Kuvan, sought the removal of two executors under the will on the basis of that they mismanaged the estate for over a decade without providing any accounts for the beneficiaries. Admittedly the estate property had rental income, but how it was disbursed was never revealed for more than 13 years to the beneficiaries by the executors. The Defendants were represented by a firm of solicitors. After the hearing on 4th May, 2015 the orders were granted for the removal of the trustees. The said judgment was delivered on 27th May, 2015.
3. The present application for the stay of the execution of the judgment was filed on 26th November, 2015. So, for more than 6 months the persons who were removed by the court as the executors of the estate of Kwan Chew Kuvan did not apply to the court for a stay of execution.
4. The present application for the stay of the execution was filed in terms of Order 45 rule 10 of the High Court Rules of 1988.
5. 45 rule 10 of the High Court Rules of 1988 and states as follows:

'Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it think just.' (emphasis added)
6. **March v Bank of Hawaii** [2000] 1 FLR 230 Fiji Court of Appeal refused stay of execution of judgment and stated ;(page 237)

'The grant or refusal of a stay a discretionary matter for the Court [A.G v Emberson (1889) 24 QBD pp59]. It will be granted where the special circumstances of the case so require. There has to be sound reasons sufficient to justify the Court in suspending the rights of the successful party. In exercising its discretion the Court will look at the facts and circumstances which led to the judgment. The balance of convenience has also to be looked at as well as the competing rights of the parties before it,....'

7. The Applicant had instituted this action in person for the removal of the executors for mismanagement of the estate for over a decade.
8. The Applicant did not sought an executor to be appointed in his application for removal of the executors, but since the judgment filed a subsequent application seeking himself appointed for the executor of the estate. This was struck off due to a procedural non-compliance. The appointment of new administrator should be under Section 7 of Succession, Probate and Administrator Act (Cap 60).
9. There were no special circumstances alleged in the affidavit in support of this summons seeking stay of the execution of the judgment.
10. The summons indicates Rule 26(3) of the Court of Appeal Rules. The said rule states what whenever there is concurrent jurisdiction to the Court of Appeal and the High Court the initial application should be to the High Court. The summons did not mention any other provision of law for consideration or stay of judgment, but seeks stay of 'all proceedings'.
11. Without out prejudice to what was stated above I will now briefly consider stay of judgment. The rules relating to the stay of the judgment contained in the rule 34 of the Court of Appeal Rules.
12. In *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (18 March 2005) the Fiji Court of Appeal held,
'Principles on a stay application

[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005):

"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the

appeal is successful”: Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.

The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13 PRNZ 48, at p 50 and Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200:

(a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).

(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.”

13. The judgment removed the two executors, the estate properties are clear and rentals accrue from them. It is not difficult for another person to administer this estate. There is no novel issue to be determined. If a stay order is not granted the appeal will not be rendered nugatory. There should not be further delay in the execution of the judgment. This summons sought a stay order nearly 6 months after the judgment. This also indicates the conduct of the parties. The overall balance of convenience would favour the execution of the judgment rather than stay of it. The material before me would not justify the unsatisfactory status quo of the estate where the beneficiaries were not provided with any accounts of the estate for over a decade and their failure to submit them even to the court in this action. By not granting the stay the Respondents will not be injuriously affected as there are no such evidence before me. There is no effect on third parties in this by the execution of judgment and there is no public interest component.

CONCLUSION


13. This summons is made in terms of Order 45 rule 10 of the High Court Rules of 1988 and also Rule 26(3) of the Court of Appeal Rules for the stay of the execution of the judgment. The counsel was unable to state any special ground or special circumstances that support the stay of execution to suspend the rights of the Applicant. In the circumstances the summons for stay of the execution as well as stay of the judgment is refused. The cost of this application is summarily assessed at \$100.

FINAL ORDERS

- a. The undated summons issued on 26.11.2015 is struck off and dismissed.
- b. The cost of the application is summarily assessed at \$100.

Dated at Suva this 10th day of May, 2016




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Justice Deepthi Amaratunga
High Court, Suva