

**IN THE HIGH COURT OF FIJI**  
**(WESTERN DIVISION) AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. 92 OF 2013**

**BETWEEN** : **RAHMAT ALI & NAZRUL NISHA** both of Lot 4, Martintar,  
Nadi.

**APPLICANTS/PLAINTIFFS**

**A N D** : **ABDUL SAHEED RAHMAN** of Lot 4, Martintar as the  
Administrator of the Estate of Karadania of Navo, Nadi,  
Farmer.

**RESPONDENT/DEFENDANT**

**Appearances** : Mr A. Liverpool for Plaintiffs/Applicants

: Mr N. Kumar for Defendant/Respondent

**Date of Hearing** : 6 April 2017

**Date of Ruling** : 6 April 2017

## **R U L I N G**

**[on stay pending appeal]**

### **Introduction**

[01] This is an application for stay of execution pending appeal.

[02] By a Notice of Motion filed 1 July 2016 (*the application*), the plaintiffs/applicants (*the applicants*) seek to stay of all proceedings in relation to the execution of the judgment entered on 5 May 2016 herein until determination of the appeal. The application is supported by an affidavit of Nazrul Nisha, the second named plaintiff.

[03] The plaintiffs in their application state that the application is made pursuant to Order 45 rule 10 of the High Court Rules (*HCR*).

[04] Opposing the application, the defendant/respondent (*the respondent*) filed an affidavit of Abdul Rasheed Rahiman.

[05] At the hearing both parties orally argued the matter and they also tendered their written submissions.

### **The Background**

[06] The trial commenced on 26 November 2015 when first named plaintiff (Rahmat Ali) was called to give evidence. He gave evidence till 4.00pm on that day. The plaintiff then sought another date for continuation of the trial. After a few adjournments the trial was set down for continuation on 5 & 6 May 2016. The matter was taken up for continuation on 5 May 2016 when Mr M. Young, counsel for the plaintiff made an application for adjournment of the hearing on the ground that Mr Nandan who was in the carriage of the case is ill. He tendered a Medical Certificate. This court refused to adjourn the matter to another date, disregarding the Medical Certificate. Consequently, the trial continued on the basis that the plaintiffs had closed their case. At the trial, the first named plaintiff (Rahmat Ali) gave evidence on behalf of the plaintiffs. At the continuation of the trial on 5 May 2016, the defendant, Abdul Saheed Rahman gave evidence. Immediately after the close of the trial, the court dismissed the action with summarily assessed costs of \$2000.00. The plaintiffs appealed to the Court of Appeal. The appeal is pending before the Court of Appeal. In the meantime, the plaintiffs apply to this court for a stay of execution pending appeal.

### **The Law on Stay of execution**

[07] Rule 34 of the Court of Appeal Rules (*'CAR'*) is relevant in an application for a stay of execution pending appeal. O.34 (1) (a) provides:

*“Except so far as the court below or the Court of Appeal may otherwise direct-*

*(a) An appeal shall not operate as a stay of execution or of proceedings under decision of the court below;*

*...”*

[08] Rule 26.-(3) of the CAR also relevant to this application. Rule 3 states:

*“Where 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.”*

### **The Governing Principle**

[09] The questions to be asked when considering an application for stay of execution include:

- 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 question involved.
- f) The public interest in the proceeding.
- g) The overall balance of convenience and the status quo.” (See *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (18 March 2005), *New Word Ltd v Vanua Levu Hardware (Fiji) Ltd* [2016] FJSC 29)

## **The Decision**

- [10] The applicants rely on O.45, r.10 of the HCR. The plaintiffs had misquoted this rule in their application. Under rule 10, the Court may grant a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of judgment or order. Such a situation does not arise here. The Right of appeal is a normal course in any proceedings. There is a separate law (Rule 34 (1) (a) and Rule 26 (3) of the CAR) applicable to an application to a stay of pending appeal.
- [11] The application was argued on the basis that it is an application for a stay pending appeal.
- [12] The primary ground that was urged by counsel for the plaintiffs was that the appeal would be rendered nugatory if a stay is not granted.
- [13] The applicants brought this action seeking a declaration that she has a beneficial interest in the estate of Karadania, the subject land. That was not seriously disputed by the defendant. The defendant agrees on the fact that the plaintiffs have a beneficial interest in the subject matter because the plaintiffs have assisted in the building of the house they occupy. However, the plaintiffs' interest in the property appears to be minimal.
- [14] The applicants failed to prosecute the case diligently and in the middle of the trial, the plaintiff wanted to adjourn the trial. There was an application by the plaintiffs to have the further trial adjourned to another day on the basis that their counsel (Mr S. Nandan) was sick and submitted a medical report. The court refused to adjourn the further hearing despite the medical report. The court did not act on the medical report submitted by the plaintiffs.

- [15] The court has discretion whether to grant or to refuse adjournment of the trial or further trial of the matter in appropriate cases if the interest of justice so demands. The court's power to grant an adjournment derives from Order 35, r.3 of the HCR.
- [16] The appeal relates to the decision made by this court exercising its discretionary power. I am unable to see any novelty or importance of question involved in the appeal. The appeal in the Court of Appeal concentrates on the issue whether this court misdirected itself in law and fact in failing to grant an adjournment in the matter thus causing miscarriage of justice.
- [17] Counsel for the applicants, Mr Liverpool submits that the appeal would be rendered nugatory if a stay is not granted. I would, with all due respect, say that is not correct. The action has been dismissed. There is no question of execution arising out of the dismissal of the action. The applicants are still occupying the property in dispute. However, a notice to quit may be issued on the applicants and if there is non-compliance with the notice, the respondent may pursue summary proceedings under section 169 of the Land Transfer Act in the High Court to recover possession of the property. Then the applicants still have the right to show cause in the possessory action and establish their right to possession of the property. In my opinion, the applicants' appeal will not be stilled if the court refuses a stay of execution. Moreover, the question of execution does not arise out of the dismissal of the action. Therefore, there is nothing to stay.
- [18] The status quo still remains, even if the court refuses the application for a stay status unless the applicants were ejected by an order of the court. There is no risk of immediate dispossession of the applicants from the property as a result of the dismissal of the action.

[19] This is not the issue between the applicants and the respondent only. The property is an estate property. The respondent is the administrator of that estate. Currently, only the applicants are enjoying the property. The beneficiaries' rights are also involved in this dispute. I believe, it was highlighted in the evidence before me, there are more than 10 beneficiaries who have beneficial interest over the property. They are unable to enjoy the property because of the dispute between the applicants and the respondent.

### **Conclusion**

[20] The question of execution does not arise out the judgment dismissing the applicants' action. As a result, there is no likelihood that the appeal will be stilled if a stay is refused. I would, therefore, refuse a stay of execution pending appeal with summarily assessed cost of \$500.00 payable to the respondent by the applicants.

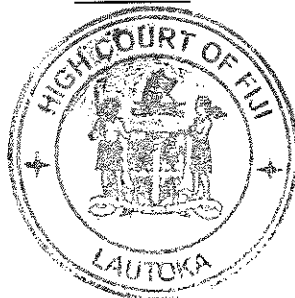
### **The outcome**

1. Stay of execution pending appeal refused.
2. Applicants will pay summarily assessed cost of \$500.00 to the respondent.

*M H Mohamed Ajmeer 6/7/17*  
.....

**M H Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**6 April 2017**

Solicitors:

M/s Reddy & Nandan Lawyers for applicants

M/s Krishna & Company, Barristers & Solicitors for respondent