

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CIVIL CASE NO. HBC 92 OF 2012

BETWEEN : **G. P. REDDY COMPANY LIMITED**, a limited liability company
having its registered office at Lautoka.

Plaintiff

AND : **PAC INVESTMENT & DEVELOPMENT LIMITED**, a limited
liability company having its registered office at Lautoka – Fiji.

Defendant

Counsel : Mr. R. R. Gordon for the Plaintiff/Applicant.

: Mr. Victor Sharma for the Defendant/Respondent.

Written Submissions: Filed by the Respondent- Defendant on 28 September 2018 and by the
Applicant- Plaintiff on 3 October 2018.

Date of Ruling : 25 October 2018.

Ruling by : Hon. Mr. Justice Mohamed Mackie.

RULING

[On stay pending appeal]

A. Introduction:

1. The applicant / plaintiff (the applicant) moves for stay pending appeal of my judgment delivered on 6th July 2018.
2. By the Summons (the application) filed in this regard on 23 August 2018 the applicant seeks following reliefs.
 - a. That the whole of the judgment and/or orders delivered and / or pronounced by me in Lautoka High Court Civil Action Number 92 of 2012 on 6th July 2018 be stayed until the final determination of the applicant's appeal of that judgment and/or orders vide Court of Appeal Civil Appeal No.77 of 2018.
 - b. That the Notice of Assessment of Damages and Interest dated 2nd August 2018 and /or filed by the Respondent company on 30th July 2018 be stayed until the final

determination of the applicant's appeal of the whole of the judgment and/ or the orders delivered and/or pronounced by me in Lautoka High Court Civil Action No. 92 of 2012 on 6 July 2018.

3. The application is supported by an affidavit of Mr. GANPATI REDDY, the Managing director of the applicant company.
4. The applicant states that the application is made pursuant to Order 45 rule 10 of the High Court Rules (HCR) and the Inherent Jurisdiction of this Court.
5. The defendant- respondent (the respondent) opposing this application, filed an affidavit sworn on 13th September 2018 by Mr. VIJAY RAJNESH PRAKASH, a director of the respondent company, and supported by number of documents marked as "RP-1".
6. Instead of an oral hearing, learned counsel for both the parties agreed to dispose the same by way of written submissions and accordingly filed respective submissions as stated above.

B. The Background:

7. The applicant company by its Amended Statement of Claim (ASOC) dated 21st May 2012, *inter-alia* , moved for the following reliefs against the respondent company;
 - The defendant (respondent) do all things to ensure that the Plaintiff obtains a lease of the area of 3257 square meters and that the same does not go to Punja & Sons or William & Gosling or others;
 - The defendant ensure that the area of 3257 square meters do be made to subject of a separate crown lease, subject to the State Department's requirement, in the name of the Plaintiff;
 - Alternatively, the defendant ensure that the area of 3257 square meters be amalgamated to the plaintiff's existing lease No. 13851 over 2574 square meters;
 - The defendant and/or its servants and/or its agents be restrained from interfering of the Plaintiff's possession of the said area of 3257 square meters and the buildings/sheds and structures situated thereon as specified in the annexure "C" of the affidavit of the Plaintiff's Managing Director Mr. Ganapati Reddy filed on 14th May, 2012;
 - An order that the first Defendant do perform all acts at its expense or as the Court directs to grant a lease of the subject area to the Plaintiff;

8. The respondent company by its statement of defence filed on 27th June 2012, while denying the most of the averments in the ASOC , made a counter claim and moved, *inter alia*, for the following reliefs:
 - a. Plaintiff's claim be dismissed with costs.
 - b. Judgment be entered against the Plaintiff in the sum of \$1,042,668.11 as prayed for in the counter claim.
 - c. General damages to be assessed.
 - d. Interest on the judgment sum under law Reform (miscellaneous provisions) (Death and Interest) Act, Cap 27.
 - e. Exemplary and punitive damages.
 - f. Cost of this action.

9. This Court, after 5 days long trial and the inspection of the land and premises in suit, carried out on the request made by the applicant's learned Counsel with the consent of the respondent's learned Counsel, delivered the judgment on 6 July 2018 to the following effect.
 - a. *Plaintiff's action is hereby dismissed.*
 - b. *The Defendant's counterclaim for loss and damages in terms of paragraph 71 of the statement of defence is declined.*
 - c. *General damages in favor of the Defendant are to be assessed before the learned Master.*
 - d. *The Plaintiff shall pay unto the Defendant a sum of \$30,000.00 as punitive & exemplary damages and interest of 6% on it from the date of this judgment.*
 - e. *The plaintiff shall pay unto the Defendant a sum of \$ 15,000.00 as summarily assessed costs.*

10. The initial appeal made by the applicant within the prescribed time period to the Court of Appeal under Civil Appeal No. 77 of 2018 being dismissed due to non- appearance of the applicant's Lawyers on 25th September 2018 at the Court of Appeal, which resulted the appeal deemed to be abandoned, the applicant is now said to have filed on 27th September 2018 a fresh appeal under Civil Appeal Number 95 of 2018, with the same Notice of Appeal and Grounds of Appeal.

11. The appeal is now pending before the Court of Appeal. In the meantime, the applicant applies to this court for a stay of execution pending appeal.

C. The Law on Stay of execution:

12. 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;

13. 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.”

D. The Governing Principles:

14. 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)

15. The learned counsel for the applicant has drawn my attention to the above factors discussed in the above styled action (*Natural Waters*), which refers to the following decision as well, and moved that the similar process ought to be followed in the application in hand.

[7]. *the principle to be applied on an application for pending appeal are conveniently summarized in the New Zealand text , Mc Gechan on procedure (2005):*

“On an stay application the Court’s task is “ carefully to weigh all 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.

E. The Decision

16. The applicant relies on O.45, r.10 of the HCR. The applicant has misquoted this rule in its 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. However, I shall consider this as an application for stay pending appeal. (emphasis mine)

17. The primary ground that was urged by counsel for the applicant was that the applicant's appeal would be rendered nugatory, if a stay is not granted.
18. Mr. Ganapati Reddy, director of the applicant company, in paragraphs 7, 8, 9, 15 and 16 of his supporting affidavit states as follows.

"7. One of the grounds of appeal is that the Master of the High Court cannot, after hearing of the matter before a judge, assesses damages in lieu of the judge who heard the case".

"8. I verily believe that this is an important question of law that the Court of appeal needs to decide".

"9. If the Master proceeds to assess damages and the Court of Appeal is later of the opinion that the Master of the High Court cannot, after hearing of the matter before a judge, assess damages in lieu of the judge who heard the case, then the appeal of the plaintiff Company will be rendered nugatory and the parties would have incurred unnecessary cost of the unnecessary assessment".

"15. The Defendant is threatening to evict the plaintiff and/or its tenant(s). Now shown to me and marked as "GR-2" is a copy of the said letter from the Defendant to Plaintiff which was delivered to the tenant(s) of the Plaintiff"

"16. If the Defendant proceeds to evict the Plaintiff and its tenant(s) from the disputed property and the Plaintiff succeeds in its appeal then the appeal will be rendered nugatory and the Plaintiff would have suffered irreparable harm, loss and damages".

19. The applicant in its prayers to the ASOC has tacitly admitted that the title for the disputed area of 3257 square meters is with the respondent. The applicant does not want this disputed portion of land, which is presently, occupied by it along with its adjacently located undisputed lot in the extent of 2574 square meters, to be sold to Punja & Sons or William & Gosling or others.
20. As highlighted in paragraphs 14 (d) I, ii, iii, iv & v of my judgment dated 6 July 2018, Mr. Ganapati Reddy, the PW-1 of the applicant company, through his evidence has made several admissions, particularly, to the effect that the title to the disputed area of 3257 square meters is with the respondent company, the extent of land given to the applicant company was only 2574 square meters, being lot 5 in SO plan No. 2502, his company discontinued its previous action No. HBE 418 of 1996, against the Land Developer, the Director of Lands and the Attorney General, by entering into a deed of settlement and

relinquished any further claim for more land in that area, that applicant company receives \$2,000.00 as rental from the disputed area of land and the respondent company keeps on paying the ground rental to the disputed area of 3257 square meters, while it is under applicant's occupation.

21. The learned Counsel for the applicant, Mr. Gordon 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 applicant's action has been dismissed. There is no question of execution for possession arising out of the dismissal of its action. The applicant is occupying the disputed area of 3257 square meters, through its tenants along with its undisputed area of 2574 square meters as a one lot. A notice to quit has already been received by the applicant Company from the respondent company and if there is non-compliance with the notice, the respondent may pursue relevant 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 its right to possession of the property. Learned counsel states that the applicant has no defence to take up if such an action is brought.
22. The respondent in this action did not ask for the eviction of the applicant as a relief, except for the dismissal and various other reliefs including damages. This court has not made any order for the eviction of the applicant. In my opinion, the applicant's appeal will not be rendered nugatory or stifled if the court refuses a stay of execution. Therefore, need for eviction of the applicant through this action will not arise and thus a stay has no role to play in this regard.
23. The status quo will remain, even if this court refuses the application for a stay, unless the applicant is ejected by an order of a competent court in a different action. There is no risk of immediate dispossession of the applicant from the property as a result of the refusal of the stay. Therefore, the averments in paragraphs 15 and 16 of the supporting affidavit and the Counsel's submissions on it will not carry any weight in favor of the applicant. Since, the question of possession has not been dealt with in the judgment; it is not open for this court now to make any orders affecting the status quo of the land in dispute. At the same time this court cannot grant a stay against the possible eviction of the applicant that may arise in a future action.
24. The other main concern of the applicant is the impending proceedings for the assessment of damages before the Master of this Court, as per my judgment. This court has found that the respondent has suffered general damages, and directed the quantum of it to be assessed before the Master. Apart from it, this court has ordered \$ 30,000.00 as punitive and exemplary damages together with \$15,000.00 being the summarily assessed costs payable by the applicant to the respondent.

25. It is submitted by an on behalf of the applicant that the above decision of this court for the damages to be assessed by the Master is a wrong decision as the Master, after hearing of the matter before the judge, cannot assess damages, in lieu of the judge who heard the case, and this is an important question of law the Court of Appeal needs to decide. (Paragraphs 7 and 8 of the supporting affidavit.
26. It is further stated that if the Master proceeds to assess the damages and the Court of Appeal later is of the opinion that the Master cannot assess damages in the matter heard by the judge, the appeal of the applicant Company would be rendered nugatory and the parties would have incurred unnecessary costs of the unnecessary assessment. Vide paragraph 9 of the supporting affidavit.
27. The mere exercise of Master's jurisdiction in the assessment of damages is not bound to immediately and substantially affect the applicant. However, even if the respondent proceeds with the execution for the recovery of the damages and costs already ordered by this court, together with the damages to be assessed by the Master, the recovery process is not going to affect the possession of the disputed land. The reason being the respondent cannot recover damages by executing the writ of possession against its own land. The execution mechanism has to follow some other assets of the applicant and not the land in dispute.
28. The Managing director of the applicant company (PW-1) has admitted that the respondent has already entered into two agreements with Punjas & Sons and William & Gosling for the sale of the disputed land. The evidence adduced by the respondent company through its affidavit in opposition with regard to respondent's impending tax liability is a substantial financial burden and the respondent seems to be in need of funds to meet it. The applicant has not disputed this. The applicant, according to the evidence, is earning a monthly income of \$2,000.00 from the disputed lot by renting out, while the disputed land is, admittedly, owned by the respondent.
29. In paragraphs 15 and 16 of the supporting affidavit, what Mr. Ganpati Reddy avers is that the respondent is threatening to evict the applicant and it would suffer irreparable loss and damages if the respondent proceeds with eviction process. As I stated above, the question of eviction does not arise here. The affidavit does not say anything about the threat of execution of writ for the recovery of damages and cost.
30. Though, there going to be no immediate dispossession as observed above, the fact remains that the applicant is enriching by possessing the land in dispute which is admittedly owned by the respondent for 12 years from the year 2006. Further, the possible prosecution for specific performance by the 3rd parties, who have entered into sale agreement also, cannot be ruled out. It is likely to compel the respondent to face severe hardships and spend more money in that regard. I am satisfied that the

respondent being the successful party will be injuriously affected by the stay as far as the recovery of damages and costs is concerned. This recovery process is not going to affect 3rd parties and since this ruling does not affect the possession or status quo of the land in dispute, consideration of the effect on 3rd parties not warranted.

31. Though, the eviction is not possible through this action, the respondent is incurring and continues to incur damages and loss of income, while the applicant keeps on earning extra monthly income out of respondent's property.
32. It is argued on behalf of the applicant that this court ought not to have transferred the matter to the Master for hearing on quantum of damages and if stay is not granted the appeal would be nugatory. The Master has jurisdiction to hear and assess the damages. This court has decided the liability of the applicant towards the respondent.

Jurisdiction of the Master (O59, r, 2).

2. The Master shall have and exercise all the power, authority and jurisdiction which may be exercised by a judge in relation to the following causes and matters-

(d) assessment of damages where liability has been determined.

33. In my view, the plaintiff has not presented strong grounds of appeal against the execution of writ for the recovery of damages and cost. I do not find novel questions of law or issues of public interest involved. I do not find any special or exceptional circumstances in this case to grant stay.
34. Finally, I consider the balance of convenience test. The applicant contends that the appeal will be rendered nugatory, if the stay is not granted. It is further stated that the applicant is in possession of the disputed land for 36 years and it will suffer irreparable harm. The respondent's contention is that it has been denied the enjoyment of his property and income from 2006.

In Reddy's Enterprises Ltd v The Governor of the Reserve Bank of Fiji, (supra) Tikaram RJA at pg 88 said:

The rule is that the court "does not make a practice of depriving a successful litigant of the fruits of litigation and locking up funds to which prima face he is entitled" pending appeal. (The Annoy Lyle (1886) 11 PD 114,116, CA; Monk v. Bertram, (1891) 1 QB 346)

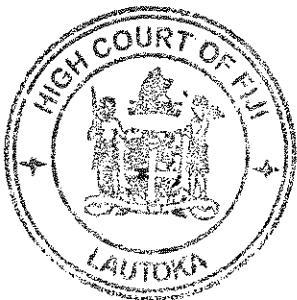
35. Mr. Gordon argues that the respondent does not have the capacity to compensate or repay, if the appeal is successful. The fact that the respondent company has some tax

F. CONCLUSIONS-

- a. The question of execution for the eviction does not arise out the judgment dismissing the applicants' action. As a result, there is no likelihood that the appeal will be stifled if a stay is refused. On the other hand, with regard to the proceeding for the assessment of damages and recovery of it, having considered the overall balance of convenience and in the exercise of my discretion, I decline the stay against the assessment of damages and recovery of it with other dues.
- b. If the applicant is still desirous of having the execution of such a writ stayed till the appeal is over, it can deposit \$200,000.00 in cash to the credit of this case (in an interest bearing account) before such execution.

G. THE OUTCOME:

- a. The application for the stay of the execution refused.
- b. The assessment hearing may commence and continue.
- c. However, if the applicant is desirous of having such an execution process stayed, it shall deposit a sum of \$200,000.00 in cash, into an interest earning account through this case, to be finally disposed depending on the outcome of the pending appeal.
- d. Applicants shall pay summarily assessed cost of \$300.00 to the Respondent.



A. M. Mohammed Mackie

Judge

At Lautoka

25th October, 2018

M/s. Gordon & Company – Barristers and Solicitors for the Applicant.

M/s. Vijay Naidu Associates – Barristers and Solicitors for the Respondent.