

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 283 of 2018

BETWEEN : **THE LAND TRANSPORT AUTHORITY** a statutory body
established under the Land Transport Act 1998, having its registered
office at Lot 1 Daniva Road, Valelevu, Nasinu.

PLAINTIFF

AND : **SHAHID LOGGING SUPPLIES** of Laucala Beach Estate, Suva.

1ST DEFENDANT

AND : **THE SHERIFF OF FIJI** of Nausori Magistrates Court.

2ND DEFENDANT

AND : **THE CHIEF REGISTRAR** established under the Justice Decree
2009 having its office at Government Building, Old Wing, Victoria
Parade, Suva.

3RD DEFENDANT

AND : **ATTORNEY-GENERAL OF FIJI** of established under the
Constitution of Fiji having its office at Suvavou House, Victoria Parade,
Suva.

4TH DEFENDANT

Counsel : **Ms Dauvere E. for the Plaintiff**
: **Mr Nand A. for 1st Defendant**
: **Ms Narayan B. for 2nd, 3rd and 4th Defendant**

Date of Hearing : **6th and 29th November, 2018**
Date of Ruling : **30 November 2018**

JUDGMENT

INTRODUCTION

1. The Plaintiff filed originating summons in terms of Order 47 rule 1(a), Order 47 rule 3 and rule 5. The Plaintiff was ordered to pay an amount of money in the Magistrate's

Court after a trial. The judgment creditor obtained a writ for the recovery of money since the Defendant did not comply with the order for payment. In the execution of writ of fieri facias a property was seized. The Plaintiff appealed against the decision of the Magistrate, and property seized was not sold and money was not recovered at that time. The Plaintiff's appeal was struck off in 2012. The property recovered was sold only in 2018, and it was found insufficient to fulfill the judgment sum. So another writ was issued for the remaining judgment sum which was yet to be recovered. The Plaintiff filed originating summons, in High Court for the revocation of the second writ issued by Magistrate's Court for the recovery of the remaining amount.

LAW

2. The Plaintiff had filed this originating summons seeking revocation of writ of fieri facias dated 15.7.2018 issued by the Magistrate's Court.
3. Primarily, Magistrates' Court Act 1944 and Magistrates Court Rules 1945 applies to the matters in the Magistrate's Court.
4. Order 36 of the Magistrates' Court Rules deals with execution of writ of *fiery facias*, but it is silent on the issue of stay of execution.
5. Order 37 rule 6 of the Magistrates Court Rules deal with stay of execution pending appeal and that provision states that even during the pendency of the appeal execution can take place, unless an order contrary to that being made by the same court or by High Court.
6. There is no provision in the Magistrates Court Act or Magistrates Court Rules that deal with stay of writ of fieri facias when there is no appeal.
7. Order 47 of the High Court Rules of 1988 deals with stay of execution of writ of fieri facias and Order 47 of the High Court reads;

WRITS OF FIERI FACIAS

"Power to stay execution by writ of fieri facias (O.47,r.1)

1. (1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution-

- (a) That there are special circumstances which render it inexpedient to enforce the judgment or order, or
 - (b) That the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.
2. An application under this rule, if not made at the time the judgment is given or order made, must be summons and may be so made notwithstanding that the party liable to execution did not acknowledge service of the writ of originating summons in the action or did not state in his acknowledgment of service that he intended to apply for a stay of execution under this rule pursuant to Order 13, rule 9.
 3. An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his.
 4. The summons and a copy of the supporting affidavit must, not less than 4 clear days before the return day, be served on the party entitled to enforce the judgment or order.
 5. An order staying execution under this rule may be varied or revoked by a subsequent order.

Separate writs to enforce payment of cost, etc. (O.47,r.2)

2. (1) Where only the payment of money, together with costs to be taxed, is adjudged or ordered, then, if when the money becomes payable under the judgment or order the costs have not been taxed, the party entitled to enforce that judgment or order may issue a writ of fieri facias to enforce payment of the sum (other than for costs) adjudged or ordered and, not less than 8 days after the issue of that writ, he may issue a second writ to enforce payment of the taxed costs.

(2) A party entitled to enforce a judgment or order for the delivery of possession of any property (other than money) may, if he so elects, issue a separate writ of fieri facias to enforce payment of any damages or costs awarded to him by that judgment or order.”

8. From the above High Court Rule, it is evident that a writ of fieri facias can be stayed for a period or absolutely.
9. Such an application must be made to the court by way of summons supported by an affidavit. There should be ‘special circumstances which render it inexpedient to enforce the judgment’ or the ‘applicant is unable from cause to apply the money’.

10. Such an application is not limited to a person who had acknowledged the writ or originating summons. There is no need to state that stay of execution will be sought at the time of acknowledgment. (See O.47 r.2).

ANALYSIS

11. The writ of fieri facias issued by the Magistrates Court on 15.7.2018 for the recovery of the remaining judgment sum.
12. The Plaintiff cannot invoke the jurisdiction of High Court to seek a stay of the said writ in terms of Order 47 of the High Court Rules of 1988.
13. High Court Rules can be applied in the Magistrates' Court when there is a lacuna in the Magistrates Court Rules 1945 in terms of Order 3 rule 8 of the said rules.
14. This provision cannot be used to make a direct application to High Court, but utilization of the said High Court Order in the Magistrate Court, when it is silent.
15. The Plaintiff's counsel said that she is filing this application in the High Court as the application for stay needs to be by way of Originating Summons and such an application cannot be filed in the Magistrates Court.
16. This is not the correct position. Such an application for stay of the writ 'must be made' by summons.
17. So this application for Originating Summons is struck off since the writ of fieri facias was issued from the Magistrates court.

FINAL ORDERS

- a. The Originating Summons struck off.
- b. The cost is summarily assessed \$1000 for the 1st Defendant.



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Justice Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva