

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

HBC NO. 141 OF 2013

BETWEEN : **SURESH CHANDRA** of Rarawai, Ba, Fiji, and Cultivator.

PLAINTIFF

AND : **JAGDISH CHAND**, Panel Beater and **ANISH CHAND**,
Panel Beater and **AKLESH CHAND**, Storeman, all of
Rarawai, Ba.

DEFENDANTS

Before : A.M. Mohamed Mackie- J

Appearance : Ms. J. Naidu for the Plaintiff
Mr. E. Maopa for the Defendants

Date Hearing : 11th October 2018

Written Sub. : 1st November 2018 by the Defendant and 13th December
2018.

Date of Ruling : 14th December 2018

RULING

A. INTRODUCTION:

1. This ruling is made pursuant to the hearing held before me on 11th October 2018, in relation to the Notice of Motion dated 26th March 2018 filed by the 1st and 3rd named defendants above named, praying for the following reliefs.

1. That the writ of possession granted by the Honorable Court be stayed.
2. The defendant be allowed to defend the matter.
3. The matter be set for hearing.
4. Such further or other order this court may deem just and equitable in the circumstances.

2. The said Notice of Motion states that it is supported by the affidavit of the first named defendant, **Jagdish Chandra**, and made under the inherent jurisdiction of the High Court. Notably, the Motion does not state under which Order & Rule of the High Court Rules 1988 (HCR), the application is made. However, at the hearing held before me, the learned counsel for the defendant took up the position that the application is made under Order 45 Rule 10 of the HCR and the court can act under Order 2 rule 1 of the HCR to cure the effect of non-compliance.
3. The learned counsel for the defendant moves that the execution of the ex-parte order granted by this court on 23rd October 2017 be stayed by considering such rule to assist the defendant who has filed this application in person, without legal background.
4. The plaintiff, by filing his affidavit in opposition, vehemently objects this application for stay. Apart from the submissions made orally, both learned counsel have filed respective written submissions as well.

B. BACKGROUND:

5. In the judgment dated 23rd October 2017, pronounced by this court after the formal proof hearing, the background history and the chronology of events of this action are given in detail. In order to avoid verbosity, I shall not reproduce same.

C. DISCUSSION:

6. Admittedly, none of the defendants have so far filed an appeal or application against the formal proof judgment entered against them in terms of relevant Order & rule/s of the HCR, other than filing this Notice of Motion for the stay of the execution of the judgment.
7. This is an action commenced on 5th August 2013. Though, the defendants were initially present in court through their Solicitors and had filed Statement of Defence, subsequently did not take part in court proceedings either personally or through their Solicitor despite several notices being sent to them and their

Solicitor. As a result the matter was heard ex-parte and the judgment was entered against them on 23rd October 2017.

8. Thereafter, the notice of judgment being, reportedly, served on them and on their then Solicitor, the 1st and 3rd named defendants appeared in person on 5th March 2018, and this court granted time enabling him to make appropriate application against the said judgment. However, none of the defendants filed any application until the plaintiff filed the application for writ of possession on 26th March 2018.
9. At the same time the 1st and 3rd named defendants appearing in person filed their Notice of Motion on 26th March 2018, which is presently under consideration, and the court, considering their plight, granted further adjournments to enable them to obtain legal aid or appear through their former Solicitors. Having failed to obtain the services of legal aid or their former Solicitors, the present Solicitors came on record to represent them for the hearing into his Notice of Motion. Accordingly the hearing held before this court on 11th October 2018.
10. The learned counsel for the defendants relies on Order 45 rule 10 for a stay of the execution of the judgment.

Matters occurring after judgment: stay of execution, etc. (O.45, r.10)

R. 10. 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 thinks just.

11. The Learned counsels for the defendant adduces the following, purported, events as matters occurred since the date of the judgment being the grounds to justify the stay.

- a. The recovery of the Last Will and Testament of Ram Sumari (the parties Mother).
 - b. The recovery of Terms of Settlement regarding the dispute on the properties in question.
 - c. The discovery of the letter from the Ministry of land (Divisional Surveyor Western) confirming the defendant's occupation on the land is legal and the institution of the action for vacant possession was never consented to by the Director of Land; and
 - d. The institution of civil action HBC 224 of 2018 filed on 8th October 2018.
12. The above, purported, events stated under paragraphs (a) (b) and (C), in my view, are not matters that occurred since the date of judgment, to be considered as grounds, in order to grant a stay as per the above rule. The matters that occurred after the delivery of judgment only can be considered as grounds for the stay under this order and rule.
13. However, no specific averments in relation to the occurrences of above matters, particularly, the alleged dates of the occurrences thereof are not found in the affidavit. Also no copies of documents in proof of the alleged occurrences of those matters are not before the court as annexures to the affidavit. Learned defence counsel made submissions only about the discovery of documents related to the alleged occurrences of those matters.
14. Filing of a new action after the date of the judgment, as stated in paragraph (d) above, cannot be a ground for the stay of the execution of the judgment entered in the former action. The defendants, who failed to defend the present action, cannot now rely on the purported new action to deny the fruits of the judgment to the plaintiff. Accordingly, the application under this order and rule has to fail.

Consent of the Director of Land

15. Learned counsel for the defendant in his submissions, also raised question with regard to the absence of the consent from the Director of Land for filing of this action by the plaintiff. Necessary consent has now been subsequently obtained by letter dated 27th July 2018 and same is filed of record.

16. Director's consent to file action is not a requirement to be fulfilled prior to the filing of the action. It can be obtained at a later stage before the court actually deals with the land through the execution of the judgment.

17. In January, 1964, the Supreme Court of Fiji in first instance, in the case of *Mohammed Rasul v Jeet Singh and Hazra Singh*, (1964) 10 FLR 16, held ;

"There is nothing in the express wording of Section 15 (1) which makes it necessary to obtain the consent of the Director of Lands before an action concerning a Protected Lease is initiated. All what Section 15 (1) provides, in this connection, is that no Court of Law may deal with any such lease without the consent of the Director of Lands. It appears to me that the consent of the Director can therefore be obtained up to any time before the land is actually "dealt with" by the Court, which in my view is certainly not the case at any time before an order has been made by the Court or a Judgment of the Court has been delivered. I can also see no reason why a Judgment of the Court dealing with the land could not properly be made "subject to the consent of the Director of Lands, with liberty to apply for further orders should that consent not be granted."

The wording of the above judicial decision is perfectly clear to me. "There is nothing in the express wording of Section 15 (1) which makes it necessary to obtain the consent of the Director of Lands before an action concerning a Protected Lease is initiate

I can also see no reason why a Judgment of the Court dealing with the land could not properly be made "subject to the consent of the Director of Lands" with liberty to apply for further orders should that consent not be granted."

18. In the case of **Brennan Sukhdeo and Lusiana Bolalailai v Avendra Narayan** [2007] FJHC 142; HBC 406.2006 (7 February 2007) it was held:

"In the present case there is consent albeit obtained after the commencement of proceedings. The critical words in the section are "be dealt with by a court of law". Simply filing an action in a court is not dealing in land. Action can be discontinued at any time before any orders are made. Dealing with a land occurs if the orders or judgment of a court in some way affects some interest of the lessee in the land. The prior consent of the Director is confined to transferring, alienating, mortgaging, charging etc. It does not extend to filing of actions...."

19. There is nothing in this section which requires one to obtain the consent of the Director before an action is filed in court. Such consent can be obtained at any time before the land is 'dealt with' by the court. Dealing with occurs when an order is made or judgment is delivered: **Mohammed Rasul v. Jeet Singh - 10 FLR 16.**"

20. It is clear from the above decisions that the consent of the Director of Lands which is required to be obtained pursuant to section 13(1) of the State Land Act (Cap 132) could be obtained after the institution of the action and before making any order affecting the rights of the lessee in the land or before allowing the writ of possession.

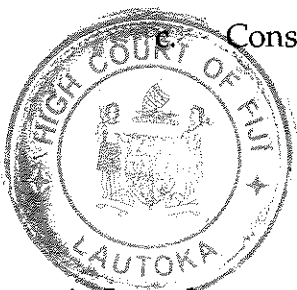
D. CONCLUSION:

21. In view of the above, I don't find any merits in defendant's application for stay. This is an action pending from the year 2013. The plaintiff obtained the formal proof judgment in his favor on 23rd October 2017. Though the notice of it was duly served, the defendant's did not make any application to this court, except for this ill-fated Motion for the stay of execution. The plaintiff's application for execution is pending from 26th March 2018. Accordingly, I decide to dismiss the application for stay and allow the plaintiff's application for execution.


E. FINAL ORDERS:

- a. The application made by the defendants for the stay of the execution is hereby rejected.
- b. The plaintiff may proceed with the execution of the judgment dated 23rd October 2017.

Considering the circumstances no order for cost is made.



At Lautoka
14th December, 2018


A. M. Mohammed Mackie
Judge