

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 99 OF 2012

BETWEEN : **VINOD KUMAR MUDALIAR** of Lovu, Lautoka, Businessman.

APPLICANT/SECOND DEFENDANT

AND : **YU-E-LI** also known as **LI YU-E** also known as **LEI LOK NGO**
of Ravouvou Street, Lautoka, Businesswoman as administratrix
of the **ESTATE OF CHO TAT LAM** late of Ravouvou Street,
Lautoka, Businessman.

RESPONDENT/ PLAINTIFF

Appearances : Mr R. Kumar for the applicant/second defendant
Non-appearance for the respondent/plaintiff
Date of Hearing : 25 April 2018
Date of Ruling : 25 April 2018

R U L I N G

[on a stay of execution pending appeal]

[01] Before me is an *ex parte* application filed by the applicant/second defendant (hereinafter '*the defendant*').

[02] By his *ex parte* application filed today (25 April 2018) together with a supporting affidavit sworn by the defendant on 23 April 2018 ('*the application*'), the defendant seeks an interim stay on the execution of my judgment delivered in favour of the respondent/plaintiff (hereinafter '*the plaintiff*') on 14 November 2016 that the defendants are jointly and severally liable to pay compensation and costs of the proceedings for causing the death of the deceased and that damages are to be assessed before the Master ('*the judgment*'). The basis of the application is that an appeal against the judgment is pending in the Court of Appeal. The

order the defendant seeks in the application is twofold: First, an interim stay pending the hearing or determination of the matter *inter partes*. Second, a stay pending the hearing and determination of the defendant's appeal before the Court of Appeal or until further order of this court.

- [03] The defendant did not push for the second relief that a stay be granted pending appeal. He said that he will file a fresh application for stay pending appeal to be heard *inter partes* in the event that his *ex parte* application fails.
- [04] The application is made pursuant to Order 34 of the Court of Appeal Rules ('CAR'). Order 34 (1) (a), CAR says: an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below.
- [05] The hearing of the application came on before me at 2.30 pm today (25 April 2018) as an urgent application.
- [06] Mr Kumar, counsel appearing for the defendant submits that an appeal against the judgment is pending and awaiting determination by the Court of Appeal and the hearing on the assessment of damages is scheduled to be taken on 24 May 2018 in the meantime. He further argues that if the assessment hearing proceeded and an order is made to pay the damages and executed, the appeal will be rendered nugatory.
- [07] The defendant seeks an urgent *ex parte* stay on the execution of the judgment, pending appeal. The defendant has annexed a copy of the appeal ('Civil Appeal No. ABU 140 of 2016') filed in the Court of Appeal against the judgment. However, the defendant does not depose in his affidavit the specific reasons why he is seeking an urgent *ex parte* order staying the execution of the judgment. The defendant's counsel concedes that the affidavit in support does not contain such averments. The only ground urged by counsel for the defendant is that the hearing on assessment of damages is set down before the Master on 24 May 2018 and that will render the appeal nugatory if the Master made an order and executed in the meantime.

- [08] It is worth noting that the hearing on the assessment of damages will not render the appeal stified in anyway. When the Master makes an order on assessment of damages, the defendant will have a right of appeal. He can appeal the Master's order and seek a stay of execution of that order.
- [09] The basic rule is that a litigant is entitled to enjoy the fruits of the judgment. The court may stay the execution of the judgment under appeal, if the applicant satisfies that the appeal will be rendered nugatory if a stay is not granted.
- [10] The application made *ex parte* is seeking a stay of execution of the judgment delivered on 14 November 2016. There are no averments in the supporting affidavit in respect of urgency. The defendant did not sufficiently explain how the appeal will be rendered nugatory if a stay on *ex parte* basis is not granted. I find that there are no compelling reasons why I should issue an *ex parte* stay of execution, pending appeal. I would accordingly decline to issue an *ex parte* stay but without costs.

The Results

1. Application for ex-parte stay of execution pending appeal is refused.
2. No order as to costs.

M.H. Mohamed Ajmeer
25/4/18

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M.H. Mohamed Ajmeer

JUDGE

At Lautoka

25 April 2018

Solicitors:

For the defendant: M/s Iqbal Khan & Associates, Barristers & Solicitor

