

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 02 of 2016

BETWEEN : **VERONICA JANG**

APPELLANT/DEFENDANT

AND : **RAFCO ENTERPRISES LTD.**

RESPONDENT/PLAINTIFF

BEFORE : **His Lordship Hon. Justice Kamal Kumar**

COUNSEL : Mr T. Bukaru for the Appellant/Defendant
Mr V. Prasad for the Respondent/Plaintiff

DATE OF RULING : 24 May 2018

RULING
(Application for Stay of Execution)

1.0 INTRODUCTION

- 1.1 On 26 April 2017, Appellant (Defendant) filed for Stay of Master's decision delivered on 13 April 2017, whereby Applicant was ordered to give vacant possession of property comprised and described in State Lease No. 19559 ("**the Application**").
- 1.2 On 11 May 2017, this Court granted interim Stay until determination of the Application, directed parties to file Affidavits/Submissions and adjourned the Application to 27 June 2017, for hearing.
- 1.3 Parties complied with direction for filing Affidavits/Submissions and the Application was heard on 27 June 2017, and adjourned for Ruling on Notice.
- 1.4 Following Affidavits were filed by the parties:-

For Appellant

- (i) Affidavit in Support of Appellant sworn on 26 April 2017 ("**Appellant's 1st Affidavit**");
- (ii) Affidavit in Reply of Appellant sworn on 25 May 2017 ("**Appellant's 2nd Affidavit**").

For Respondent

Affidavit in Opposition of Akcar Ali also known as Aktar Ali sworn on 17 May 2017 ("**Ali's Affidavit**").

2.0 CHRONOLOGY OF EVENTS

- 2.1 On 7 January 2016, Respondent filed Originating Summons and Affidavit in Support seeking vacant possession of property known as Lot 1 Section 16 on Plan S603A Samabula Indian Settlement Province of Rewa District of Suva

containing 2 Roods 26 Perches comprised and described in State Lease No. 19559 and costs.

- 2.2 On 23 March 2016, Messrs. Muskit Law filed Notice of Appointment of Solicitors for the Appellant.
- 2.3 On 24 March 2016, being returnable date of Originating Summons parties were directed to file Affidavit and the Originating Summons was adjourned to 25 April 2016, for mention and then to 10 May 2016, for hearing in the absence of Affidavits not being filed by the Appellant.
- 2.4 On 10 May 2016, Appellant applied for Leave to file Affidavit and to have hearing date vacated when Master after hearing Submissions vacated hearing date, granted time for Appellant to file Affidavit and adjourned the Originating Summons to 27 May 2016 at 10.00am, for hearing with ruling on adjournment application resolved.
- 2.5 On 24 May 2016, Counsel for the Appellant informed Court that Appellant has filed Application for Stay of proceedings until final determination of Civil Appeal No. 37 of 2016, by Court of Appeal when Master vacated the hearing date and directed that Application for Stay be given returnable date of 8 June 2016, and adjourned the Originating Summons to 8 June 2016.
- 2.6 On 17 May 2016, Appellant filed Notice of Motion for an Order that the action be stayed pending determination of Civil Appeal No. 37 of 2012.
- 2.7 On 8 June 2016, Master directed parties to file Affidavit in respect to Application for Stay of Action and adjourned the matter to 14 July 2016, and then to 1 November 2016, for hearing.
- 2.8 On 21 October 2016, Appellant filed Application for Stay of proceeding until determination of Consolidation Application in respect to this matter and Civil Action No. 158 of 2016.
- 2.9 On 1 November 2016, Consolidation Application and substantive matter was adjourned to 16 November 2016, for hearing.

- 2.10 On 16 November 2016, the Application filed by Appellant on 17 May 2016, was struck out by consent and the Stay Application was heard with substantive matter and adjourned for Ruling on 23 February 2017.
- 2.11 Ruling was delivered on 17 April 2017, whereby Stay was dismissed and Appellant was ordered to deliver vacant possession on or before 13 May 2017.

3.0 BACKGROUND FACTS

- 3.1 Respondent is a limited liability Company having its registered office at 2nd Floor, Narseys Building, 98-100 Ellery Street, Suva.
- 3.2 Pursuant to Transfer registered on 13 January 1987, Respondent became Registered Lessee of all that property known as Lot 1 on Section 16 Samabula Government Settlement Province of Rewa Town of Suva containing two roods and twenty-six perches comprised and described in Crown Lease No. 755 (hereinafter referred to as **“CL 755”**).
- 3.3 CL 755 being a Residential Lease was due to expire on 9 December 2012, seventy-five years from 10 December 1937.
- 3.4 On or about 1st July 2012, Respondent entered into a Tenancy Agreement with Appellant for a period of twelve months commencing from 1 July 2012.
- 3.5 Upon expiry of CL 755, Director of Lands granted new lease to Respondent over property subject to CL 755 for a period of ninety-nine years commencing from 1 January 2013, which is comprised and described in State Lease No. 19559 (**“the Property”**).
- 3.6 Appellant continued to occupy the property as tenant.
- 3.7 On 18 September 2015, Respondent through its Solicitors issued one months’ notice to vacate the property against the Appellant.

3.8 Appellant did not comply with Notice to Vacate which resulted in Respondent filing this proceeding.

4.0 APPLICATION FOR STAY OF EXECUTION

4.1 As per the Summons, Appellant stated that the Application is made pursuant to Order 59 Rule 17(1) and 16(1) of the High Court Rules.

4.2 It is not disputed that this Court has unfettered discretion as to whether to stay execution of the Judgment or not, which discretion however is to be exercised judicially and in the interest of justice depending on circumstances of each case.

4.3 In **Chand v. Lata** [2008] FJHC; Civil Action No. 38 of 2011 (18 July 2008) the Court identified the principles governing stay of execution as follows:-

- “1. *The grant or refusal of a stay is a discretionary matter for the Court: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **AG v. Emberson** (1889) 24 QBVC, at 58, 59;*
2. *The Court does not make a practice of depriving a successful litigant of the fruits of litigation by locking up funds to which prima facie the litigant is entitled, pending an appeal: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing Supreme Court Practice 1979, p.909; **The Annot Lyle** (1886) 11 PD, at 116(CA); **Monk v. Bartram** (1891) 1 QBV346;*
3. *When a party is appealing, exercising an undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **Wilson v. Church** (No. 2)(1879) 12 ChD, at 456, 459 (CA);*
4. *If there is a risk that the appeal will prove abortive if successful and a stay is not granted the Court will ordinarily exercise its discretion in favour of granting a stay: **Fiji Sugar Corporation Limited v. Fiji Sugar &***

General Workers' Union, citing **Scarborough v. Lew's Junction Stores Pty Ltd** (1963) VR 129, at 130;

5. *In exercising its discretion the Court will weigh consideration such as balance of convenience and the competing rights of the parties before it: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **AG v. Emberson**;*
6. *A stay will be granted where the special circumstances of the case so require, that is, they justify departure from the ordinary rule that a successful litigant is entitled to the fruits of the litigation pending the determination of any appeal: **Prasad v. Prasad** [1997] FJHC 30; HBC0307d.96s (6 March 1997), citing **Annot Lyle** (1886) 11 PD 114, at 116; **Scarborough v. Lew's Junction Stores Pty Ltd** (1963) VR 129, at 130; and see also **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**;*
7. *As a general rule, the only ground for a stay of execution is an Affidavit showing that if the damages and the costs were paid there is not reasonable probability of getting them back if the appeal succeeds: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **Atkins v. GW Ry** (1886) 2 TLW 400;*
8. *Where there is a risk that is a stay is granted and the assets of the Applicant will be disposed of, the Court may, in the exercise of its discretion, refuse the application: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**"*

4.4 In **Natural Water of Fiji Limited v. Crystal Clear Mineral Water (Fiji) Limited** [2005] FJCA 13 ABU0011.2004S (18 March 2005) Fiji Court of Appeal stated as follows:-

"The following non-comprehensive list of factors conventionally taken into account by a court in considering a stay emerge from Dymocks Franchise Systems (SW)

Pty Ltd v. Bilgola Enterprises Ltd (1999) 13PRNZ 48, at p.50 and Area One Consortium Ltd v. Treaty of Waitangi Fisheries Commission (1993) 7PRNZ 2000:

- (a) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). Phillip Morris (NZ) Ltd v. Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2NZLR 41 (CA);*
- (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 questions involved;*
- (f) *The public interest in the proceeding;*
- (g) *The overall balance of convenience and the status quo.*

4.5 In **Murthi v. Patel** [2000] FJCA 17; ABU0014.2000S (5 May 2000) his Lordship Justice Ian Thomson JA (as he then was) stated as follows:-

“A number of considerations have to be taken into account by a judge exercising his discretion whether or not to grant a stay of execution. Prima facie the party succeeding in the High Court is entitled to enjoy immediately the fruits of his success. However, if any appellant shows that he has a good arguable case to present on the hearing of the appeal and if refusal of the stay will cause detriment to the appellant which cannot be effectively remedied if his appeal succeeds, so that the appeal will be rendered nugatory, it may be appropriate for the discretion to grant a stay to be exercised in his favor.”

Grounds of Appeal

4.6 The Grounds of Appeal are as follows:-

- “1. The Learned Master erred in law and in fact when he ruled that State Land Instrument No. 19559 was not voidable because the conduct of the Director of Lands and the 2nd Respondent in executing the Lease No. 19559, in the way it was done, amounted to circumscribing the law as stipulated in section 7A (4)(d) of the Land Sales Amendment Act 2014.
2. The Learned Master erred in law and in fact when he ruled that Instrument of Tenancy No. 19559 was not voidable; and that it was issued within the ambit of section 7A of the Land Sales Amendment Act 2014 when in fact it was issued contrary to Section 7A (4)(d).
3. The Learned Master erred in law when he did not order a stay because of the issues raised by him in paragraph 48 of his Judgment.
4. The Appellant reserves the right to add further Grounds of Appeal upon receipt of the full record in this matter.”

Whether Applicant’s Right of Appeal will be rendered nugatory if Stay is not granted

- 4.7 It is not disputed that Appellant is the Registered Lessee of the property.
- 4.8 It is not disputed that State Lease No. 19559 is a residential lease.
- 4.9 Respondent has provided ample evidence that Appellant is utilizing the property for commercial purposes without any permit.
- 4.10 Respondent has been charged for acting in contravention of provision of Town Planning Scheme as appears from Annexure “A7” of Ali’s Affidavit.
- 4.11 Appellant’s ground of Appeal is that the Lease No. 19559 was issued to Respondent in breach of Section 7A of Land Sale Act 1974 (“**LSA**”) and as such is void (hereinafter referred to as the “**Lease**”).
- 4.12 Mere fact that the Lease is void does not give Appellant automatic right to occupy the property.

- 4.13 The validity of the Lease is a matter between Director of Lands and the Respondent.
- 4.14 This Court fails to understand as to how legal issue between Respondent and Director of Lands can make the Appeal nugatory.

Effect on Third Parties

- 4.15 There is no evidence that if Stay is not granted any third parties will be affected.

Novelty and Importance of Question Involved

- 4.16 The Application of Section 7A of LSA, and whether it applies to Lease from registration date even though the commencement date of lease date is prior to commencement of Land Sales (Amendment) Act 2014 is matter of public importance. However whether that question arises in this proceeding or not is questionable.

Public Interest

- 4.17 This Court repeats its comments at paragraph 4.16 of this Ruling.

Prospect of Success

- 4.18 As stated earlier the crux of Appellant's argument is that the Lease was issued by Director of Lands to Respondent in breach of section 7A of LSA.
- 4.19 Section 7A of LSA provides as follows:-

“7A.-(1) Notwithstanding anything contained in sections 6 and 7, any State land or freehold land for residential purposes in any area within the boundary of any town or city declared or extended under the Local Government Act (Cap. 125) shall not be sold, transferred or leased to a non-resident.

- (2) Any State land or freehold land to which subsection (1) applies may only be sold, transferred or leased to a non-resident for the acquisition of strata or unit title.
- (3) Nothing in subsection (1) shall limit or prevent the sale, transfer or lease of any State land or freehold land to a non-resident for—
 - (a) industrial or commercial purposes;
 - (b) residential purposes within an integrated tourism development; or
 - (c) the operation of a hotel licensed under the Hotel and Guest Houses Act (Cap.195).
- (4) Nothing in subsection (1) shall limit or prevent any State land or freehold land to which subsection (1) applies from being —
 - (a) subjected to an agreement for tenancy for a term not exceeding 5 years with a non-resident;
 - (b) sold, transferred or leased to an immediate family member who is a non-resident;
 - (c) given, devised or bequeathed to a non-resident under the Succession, Probate and Administration Act (Cap. 60); or
 - (d) sold, transferred or leased to a non-resident if the agreement for sale and purchase had been executed on or before 21 November 2014 and all necessary documents for the sale, transfer or lease are lodged with the Registrar of Titles on or before 31 March 2015.
- (5) Notwithstanding anything contained in subsection (1), any State land or freehold land for residential purposes beyond the boundaries specified in subsection (1) may be sold, leased or transferred to a non-resident.
- (6) Notwithstanding anything contained in subsection (1), any existing vacant State land or freehold land for residential purposes:-

- (a) beyond the boundaries specified under subsection (1), whether wholly or partially, may only be sold, transferred or leased to a non-resident, provided the non-resident commences and completes construction of a new residential dwelling on the State land or freehold land within 24 months from the date of the sale, transfer or lease; and
 - (b) within or beyond the boundaries specified under subsection (1), whether wholly or partially, and owned by a non-resident, the non-resident must commence and complete construction of a new residential dwelling within 24 months from 31 December 2014.
- (7) Pursuant to subsection (6), if construction is not completed within the prescribed period,—
 - (a) a non-resident to whom the vacant State land or freehold land is sold, or leased, shall be liable to pay to the State a fixed penalty of 10% of the price at which the vacant State land or freehold land was sold or leased; or
 - (b) a non-resident to whom the vacant State land or freehold land is transferred shall be liable to pay to the State a fixed penalty of 10 % of the value of the land,

at six-monthly intervals until construction is complete.
- (8) Any person who contravenes this section shall be liable upon conviction to a fine not exceeding \$100,000.
- (9) For the purposes of this section —

"construction" means the construction of a new residential dwelling which incurs building costs not less than \$250,000;

"immediate family member" means a spouse, child, sibling, parent, grandparent or grandchild;

"integrated tourism development" means the development of a hotel and the subdivision and sale of residential lots and includes

and includes the development of jetties, moorings, recreational facilities and other amenities;

"residential purpose" means the use or occupation of property by any person (including but not limited to the owner of the property) as his or her place of residence for any period of time; and

"strata or unit title" means a form of individual ownership of part of a property called a lot, devised for multi-level apartment blocks and horizontal subdivisions with shared areas."

4.20 **“Resident”** is defined in Section 2 of LSA as follows:-

- “(a) an individual who is a Fiji citizen;
- (b) a company, the controlling interest of which is held by a Fiji citizen or Fiji citizens;
- (c) a trustee of a trust estate who is a Fiji citizen and who holds a substantial interest, being not less than 15% beneficial interest in the income of the trust estate;
- (d) a financial institution licensed by the Reserve Bank of Fiji; or
- (e) a foreign government or, international or multilateral organisation."

4.21 Ali in his Affidavit in Reply sworn on 19 May 2016, and filed on 20 May 2016, stated that he is Fiji citizen and majority shareholder in Respondent Company are Fiji citizens.

4.22 In fact under the headings list of Past and Present Members and Particular of Directors and Secretaries in respect to Respondent Company and as per Annexure “B” of Tuigasiale’s 1st Affidavit it is stated as follows:-

Particulars of Past and Present Members:

<u>Names and Postal addresses</u>	<u>Number of Shares</u>
Abudl Jalil P O Box 12676 Suva	3

Azizun Nisha
P O Box 12676
Suva

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Particulars of Directors and Secretaries

<u>Name</u>	<u>Nationality</u>
Abdul Jalil	Fiji Citizen
Azizun Nisha	New Zealand Citizen
Akcar Ali	Fiji Citizen

- 4.23 It is to be noted that Annexure “B” of Tuigasiale’s 1st Affidavit is Annual Return of Respondent Company upto 14 March 2015, and filed with Registrar of Companies Office.
- 4.24 Abdul Jalil is the majority shareholder in Respondent Company and by him being a Fiji Citizen at the time Lease was issued to him and when Lease was registered makes the Respondent Company a resident Company (Section 2 of LSA).
- 4.25 No evidence was produced of substantive matter before the Master and in respect to this Application to show that Mr Abdul Jalil was not a Fiji Citizen.
- 4.26 It must be noted that breach of provision of Section 7A of LSA makes it an offence as appears in Section 7A(8) of LSA quoted at paragraph 4.19 (page 9) of this Ruling.
- 4.27 No evidence was adduced to show that any one has been charged for contravening provision of Section 7A of LSA in respect to the Lease.
- 4.28 Annexure “A6” of Ali’s Affidavit being letter dated 20 February 2015, from Honorable Mereseini Vuniwaqa the then Minister for Lands and Mineral Resources stated as follows:-

“HAND DELIVERY

20 February 2015

*Ms Veronica Tuigasiale
c/- Hon. Netani Rika (MP)
Government Chambers
Parliament Complex
Government Buildings
Suva.*

Dear Ms Tuigasiale

Crown Lease 755 - Lot 20 Matuki Street, Samabula

We refer to your letter on the above subject which we received on 10 February 2015. We also refer to our meeting at the Minister's Conference Room on the same subject matter last month.

We have had a chance to review the relevant file pertaining to the subject lease and advise that we have made our decision to renew the lease in the name of Rafco Enterprises, the former lessee. The reason for this is that the former lessee has never breached the said lease and had also applied for renewal of the lease prior to expiration. There is no Fijian law which prohibits the owner of a local property from residing overseas.

As such, you may want to start looking at the possibility of leasing another property in your name. We will be advertising a list of properties which are available for leasing, in the final week of March 2015.

Yours sincerely,

signed

Hon. Mereseini Vuniwaqa

Minister for Lands and Mineral Resources"

- 4.29 This Court accepts Respondent's Submission that mere fact another action in relation to the property in question is pending does not of itself is sufficient to

oppose action under Section 169 of Transfer Act 19. The Defendant must show cause as to his/her right to possession.

4.30 The case authorities on the point is stated at paragraph 2.9 of Respondent's Submission which is re-produced here:-

"2.9 In *Bhaskar v Khan [2003] FJHC 260; HBC0043-45j.2002b (August 2003)*, the High Court held:

"Pending action

*The learned counsel for the defendants has raised the point that there is an action pending instituted by the defendants (along with others) being **Civil Action No. 48 of 2001** in which they **seek** order for continued occupation. There the plaintiff's 'counterclaim' is for **vacant possession**.*

*The pendency of an action is no bar to proceedings under s169 of the Act as the plaintiff has done in this case. In this regard **Mishra J.A. in *Dinesh Jamnadas Lalji & Anor v Honson Limited*** FCA Civ. App. 22/85 said:*

"At the hearing, the appellants' main submission was that, as proceedings relating to the same matter were already before the Supreme Court, the application should be dismissed. The learned Judge, quite correctly in our view, held that existence of such proceedings was, by itself, not a cause sufficient to resist an application under section 169 of the Land Transfer Act." (emphasis added)

*Also in **Muthusami s/o Ram Swamy v Nausori Town Council** (Civ. App. No. 23/86 F.C.A.) **Mishra J.A.** expressed the same view as above in the following words:*

"...that mere institution of .. proceedings by Writ did not by itself shut out a claim under section 169 of the Land

Transfer Act in a proper case. It was for the appellant to show, on affidavit evidence, some right to remain in possession which would made the granting of an order under section 169 procedure improper.”

- 4.31 This Court takes note that determination of the issue as to whether issuance of Lease contravened section 7A of LSA is before another Court being Civil Action No. 182 of 2016, and as such it is not appropriate to consider that issue in dealing with the Stay Application. The issue is at what point is the s7A of LSA applicable.
- 4.32 Having considered the Application and Submissions this Court holds that chance of success of appeal is quite slim or grave and Appellant has failed to show cause that she has a right to remain in possession of the property.
- 4.33 It is in the interest of justice that Application for Stay of Execution of Master’s decision delivered on 13 April 2017, be refused.

5.0 MISCELLANEOUS

- 5.1 It is noted the Master in his decision delivered on 13 April 2017, and Appellant in her Submission refers to Section 7A of Land Sales Act 1974 as Section 7A of Land Sales Amendment Act 2014.
- 5.2 Section 7A was incorporated in Land Sales Act 1974 pursuant to Section 3 of Land Sale Amendment Act 2014.
- 5.3 So, when referring to Section 7A it should be referred to as Section 7A of Land Sale Act 1974 and **not** Section 7A of Land Sale Amendment Act 2014.

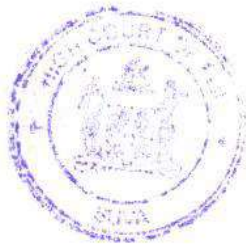
6.0 COSTS


- 6.1 This Court takes into consideration that parties filed Affidavits, Submissions and made Oral Submissions.

7.0 ORDERS

7.1 This Court makes following Orders:-

- (i) Application for Stay of Execution of Master's decision delivered on 13 April 2017, by way of Summons filed on 26 April 2017, is dismissed and struck out;
- (ii) Appellant do pay Respondent's costs assessed in the sum of \$1,000.00 within fourteen days from date of this Ruling.




K. Kumar
JUDGE

At Suva

24 May 2018

Muskits Law for the Appellant/Defendant
Cromptons for the Respondent/Plaintiff