

**IN THE HIGH COURT OF FIJI**  
**IN THE WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. 232 of 2017**

**BETWEEN** : **FOUR R ELECTRICAL AND GENERAL CONTRACTORS LIMITED**, a limited liability company having its registered office at Yalalevu, Ba.

**PLAINTIFF**

**A N D** : **NALESH NAND** of Yalalevu, Ba.

**DEFENDANT**

**Appearances** : **Mr. Nilesh Virendra Kumar for the plaintiff.**  
**The defendant in person.**

**Hearing** : **Thursday, 15<sup>th</sup> August, 2019**

**Ruling** : **Friday, 27<sup>th</sup> September, 2019**

**RULING**

**(A) INTRODUCTION**

- (01) On 21.06.2019, the learned Master granted an application pursuant to Section 169 of the **Land Transfer Act**, Cap 131, brought by the plaintiff. The learned Master made an Order for vacant possession.
- (02) On 24.06.2019, the defendant lodged an appeal against the decision of the learned Master. This is the application for stay pending the appeal.
- (03) The background to the case is set out in the judgement.

01. *The plaintiff company filed the instant summons supported by an affidavit sworn by its director Rishikendra Kumar pursuant to Section 169 of the Land Transfer Act (Cap 131) against the defendant and all other occupiers of the property comprised in Certificate of Title No. 36513, land known as Valele and Nawaralailai being Lot 1 on DP 8561 in the District of Ba and Island of Viti Levu and sought following orders from the court:*

- 1) ***THAT** the Defendant, NALESH NAND and together with all other occupiers of the subject property do give immediate vacant possession of Certificate of Title No. 36513, all the*

*piece of land on Certificate of Title Number 36513, land known as Valele and Nawaralailai being Lot 1 on DP 8561 in the District of Ba and Island of Vitilevu.*

- 2) *THAT the Defendant do pay costs to the plaintiff for this application to be assessed on a Solicitor/Client basis; and*
  - 3) *THAT such further or other relief as this Honourable Court may deem just and fair.*
- 08) *The plaintiff company invoked the jurisdiction of this court under the Section 169 (a) of the Land Transfer Act, being the last registered proprietor of the subject property. The annexure "RK 1" is the true copy of the Certificate of Title certified by the Registrar of Titles. It is evident from the said Instrument of Title and the averments of both affidavits filed on behalf of the plaintiff company that, it became the proprietor of the subject property through Mortgagee's sale registered on 14.12.2015. However, the defendant in paragraph 4 of his affidavit states that, his late mother Champa Wati is the registered proprietor of the subject property. Interestingly, the defendant relies on the same Instrument of Title marked as "RK 1" and tendered by the plaintiff company for his contention. In fact, the late mother of the defendant was the original proprietor of the subject property. However, the title passed to the plaintiff company under and by virtue of Mortgagee's sale and the plaintiff company is the last proprietor of the subject property at the moment.*

**(B) THE NOTICE OF MOTION AND AFFIDAVIT**

- (01) The Notice of Motion for the stay of execution was filed on 28.06.2019, and supported by an affidavit of the defendant on 27.06.2019.
- (02) The application for stay of execution was vigorously opposed by the plaintiff. The plaintiff did not file a reply affidavit. Both parties presented oral submissions on 15.08.2019.
- (03) The defendant did not seek an interim stay pending the ruling regarding the stay application.

**[C] THE JURISDICTION**

- (1) The right of appeal is not a substantive right but one that is conferred by statute rather than common law.

See; \* Attorney – General v Sillem<sup>1</sup>

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<sup>1</sup> (1864) 2 H & C 581 at 608, 609

**\*Victoria Stevedoring and General**

**Contracting Co. Pty Ltd v Digham<sup>2</sup>**

- (2) There is provision in the High Court Rules, 1988, a jurisdiction given to the High Court to stay execution of its judgments pending an appeal.
- (3) Order 45, rule 10 of the High Court Rules, 1988 provides;

*Matters occurring after judgment: stay of execution, etc. (O.45.r10)*  
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.

**(D) THE PRINCIPLES TO BE APPLIED**

- (A) The Court of Appeal of Fiji in **Native Land Trust Board v Shanti Lal<sup>3</sup>** had set out the law on stay pending appeal. His Lordship Chief Justice Gates in the said Court of Appeal case stated that a Court considering a stay should take into account the following questions:
- (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 questions involved.
  - (f) The public interests in the proceeding.
  - (g) The overall balance of convenience and the status quo.
- (B) The principles laid out by the Court of Appeal in the above case is used and cited in various cases for stay application.

The Fiji Court of Appeal in **"Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd<sup>4</sup>"** held thus;

*"The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005): "On a stay application the Court's task is carefully to weight all of 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.*

The following non comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from *Dymocks Franchise Systems (NSW) Pty*

<sup>2</sup> (1931) HCA 34

<sup>3</sup> [CBV 0009.11, January 2010]

<sup>4</sup> (FCA Civil Appeal No. ABU0011 of 2004S)

*Ltd v Bilgola Enterprises Ltd*<sup>5</sup> and *Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission*<sup>6</sup>;

- a) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd 1977 2 NZLR 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 interests in the proceeding.*
- g) *The overall balance of convenience and the status quo.*

The basic factors are summarised below;

- (a). The basic rule is that a litigant is entitled to enjoy the fruits of its success but however the Court has unfettered discretion to impose a stay of execution if the justice of the case so demands (**BMW AG v Commissioner of HM Revenue and Customs**)<sup>7</sup>.
- (b). A stay of the proceedings will be granted to protect the status quo and not to render the appeal nugatory.

**(E) DISCUSSION**

- (01) The granting of a stay of execution of any judgment pending an appeal is always a matter for discretion of the Court and can be given either absolutely or for such period and subject to such conditions as the Court thinks fit.

**Will the appeal be rendered nugatory? (This is not determinative)**

- (02) The defendant carries the burden of establishing **by affidavit evidence** that if a stay is not granted his appeal would be rendered nugatory. I bear in mind the general rule that the Court does not "make a practise of depriving a successful litigant, the fruits of litigation and locking up funds to which prima facie he is entitled" pending appeal. [The Annot Lyle (1886) 11 PD, 114, 116 CA; Monk v Bertram (1891) 1 QB, 346]. The Court may grant a stay of execution where the defendant demonstrates that his appeal will be rendered nugatory or substantially so if a stay is not granted. The defendant has not adverted to these questions in his affidavit in support. In my view, he should have. The defendant presented oral submissions to Court on 15.08.2019. **The submissions presented to court are not evidence.** There is virtually no evidence in **affidavit form** to support that the appeal would be rendered nugatory, if a stay is not granted.

Therefore, I will proceed on the assumption that declining a stay would not render the appeal nugatory.

<sup>5</sup> (1999) 13 PRNC 48, at p50

<sup>6</sup> (1993) 7 PRNZ 200

<sup>7</sup> [2008] EWCA Civ 1028

### **The bona-fides of the application**

- (03) The judgment was delivered on 21.06.2019. The notice of motion for the stay of execution was issued on 28.06.2019 and the defendant has applied for an urgent hearing of his application for stay of execution.

### **The effect on third parties**

- (04) There are no third parties involved in the matter.

### **The novelty and importance of questions involved**

In my view, there is no novelty in this matter. It is hard to perceive any novel and important questions to be decided in this matter. The plaintiff company invoked the jurisdiction of the Court under Section 169 (a) of the Land Transfer Act, being the last registered proprietor of the subject property. It is evident from the instrument of Title (annexure RK – 1), the plaintiff company became the proprietor of the subject property through mortgagee sale registered on 14.12.2015. The defendant in his grounds of appeal states that his mother, late Champa Wati, is the last registered proprietor of the subject property. It was submitted by the defendant that his mother secured a loan by mortgaging the property to ‘Australia and New Zealand Banking Group Limited’. It was next submitted that the mortgage was not discharged since it was not paid off. The defendant relying on Certificate of Title 36513 submitted that his mother, late Champa Wati is still the last registered proprietor of the subject land. It was next submitted that the defendant has the right to possess or use the property because he is the beneficiary of the estate of late Champa Wati. Both the plaintiff and the defendant referred to Certificate of Title No. 36513 as evidence of ownership. The Certificate of Title 36513 (Plaintiff’s exhibit RK-1) shows that the mortgage on the subject property has been discharged and the lender, ie, ‘Australia and New-Zealand Banking Group Ltd’ has been removed from the title. The certificate of title further shows that the property has been re-mortgaged to ‘Westpac Banking Corporation’ by Champa Wati and since the mortgagor began defaulting under the terms of her mortgage, the ‘Westpac Banking Corporation’ pursuant to its powers under the mortgage instrument, had advertised the property for sale and on 14-12-2005, the subject property has been transferred to the plaintiff by mortgagee sale. In my view, the Certificate of Title relied on by the defendant has been obtained before the subject property underwent discharge process and second mortgage. The copy of the Certificate of Title 36513 (Defendant’s exhibit -5) submitted by the defendant does not contain all the changes and updates. The Certified copy of the Certificate of Title tendered by the plaintiff is a document that is continually edited and updated. It clearly shows that the last registered proprietor of the subject land is the plaintiff and he had bought the subject property at mortgagee sale while the mortgagor, ie, Champa Wati, was alive. The mortgagor has not applied for an injunction restraining the mortgagee’s, ie, Westpac Banking Corporation’s power of sale. The defendant in this case has not challenged before the Master the validity of the second mortgage or Bank’s power of sale granted pursuant to the mortgage. The defendant has not specifically alleged corruption, collusion or fraud against the purchaser (the plaintiff) and the mortgagee (the Westpac Banking Corporation). There is no prior mortgage security in the form of an equitable mortgage. Thus, the doctrine of proprietary or

equitable estoppel does not apply. Therefore, it is equitable for the “Westpac Banking Corporation” to assert its right of mortgagee sale.

Therefore, it is hard to perceive any novel and important questions to be decided in this matter.

**The public interest in the proceedings**

- (05) The present case is between two parties and would affect only them. The grounds of appeal lack novelty and importance other than to the respective parties. The grounds do not fit into the category of ‘far reaching questions of law’ or ‘a matter of great general public importance’.

(06) **The balance of convenience**

The test here is a determination of which of the two parties will suffer greater harm from granting or refusal of an interim stay pending a determination of the appeal on merits, balancing of conflicting consideration is required, between the underlying principle that a litigant, is entitled to the fruits of his judgment forthwith and the obvious injustice in refusing a stay where such a refusal will render the appeal nugatory or substantially nugatory.

In **Stephen Patrick Ward v. Yogesh Chandra**<sup>8</sup> it was stated:

*“[25] In Atul Kumar Ambalal Patel v. Krishna Murti (unreported) Civil Action HBC 022.99L in ruling against the grant of a stay, the High Court stated at pages 2-3;*

*“Once successful, the litigant should not lightly be deprived of the fruits of his successful litigation: The Annot Lyle (1886) 11P.D. 114 at 116 CA; Monk v. Bartram (1891) 1 AB 346. The Power of the Court to grant a stay is discretionary. The Attorney-General v. Emerson and Others (1890) 24 QB 56; and it is “an unfettered discretion” Winchester Cigarette Machinery Ltd v. Payne and Anor (No.2) (1993) TLR 647 and 648.*

*If a stay was not granted by the Court at the time of making the order now appealed against, the applicant must show that special circumstances exist as to why a stay should now be imposed, and the successful litigant in effect held back from his remedy Tuck v Southern Countries Deposit Bank (1889) 2 TLR 400; Barker v. Lavery (1885) 14 QBD 760. In the Winchester Cigarette Case (supra) at 648 Lord Justice Hobhouse put it “The Appellant has to show some special circumstances which took the case out of the ordinary.”*

*[26] That summary was cited with approval by this Court in Prem Singh v. Krishna Prasad and Anor. CBV0001.02S, 25<sup>th</sup> April, 2002.*

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<sup>8</sup> CBV 0010 (20-04-2010)

- (07) **Barker v. Lavery**<sup>9</sup> was in a property dispute. The defendant against whom a costs order had been made appealed to the House of Lords. He then applied to the Court of Appeal for a stay in respect of the costs order. He offered payments into Court of the full amount and expected a stay to be granted on these terms. The Lord Chancellor, the Earl of Selborne at page 769 asked in argument:

*“.....Are there any circumstances in evidence to show that the plaintiff, if he is defeated in the House of Lords, will be unable to pay back the money levied by execution against the defendant?”*

Then Lord Selborne gave a succinct judgment at page 770:

*“.....the defendant is not entitled to have the application granted as a matter of course. Evidence ought to have been adduced to show, that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords. As to the request for time to make an affidavit about the plaintiff's means, we cannot accede to it; those, who apply for a stay of execution, must come before us prepared with all necessary materials.”*

- (08) **Atkins v. Great Western Railway**<sup>10</sup> was most likely was a personal injury case. A civil jury had awarded the plaintiff 350 pounds against **The Great Western Railway**.

Counsel for the railway company's grounds for a stay were:

*“that a great deal of prejudice had been imported into the case and that these were the strongest grounds of appeal.”*

Lord Esher M.R. dismissed the application, followed **Barker v. Lavery** and dismissed the applications robustly (at page 400):

*“The Master of the Rolls said that he would not undertake to say that the Court of Appeal would never listen to what happened at the trial in order to see whether they would grant a stay of execution, but, as a general rule, the only ground for such a stay was an affidavit showing that if the damages and costs were paid there was not reasonable probability of getting them back even if the appeal succeeded. He would not say that the Court would not interfere for some other reason, but that there were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds for doing so. In **Barker v. Lavery** (14 QBD, 769) the Court enunciated that rule when Lord Selborne, then Lord Chancellor, was present, and he was precisely of the same opinion. The application should be refused.”*

- (09) As noted in paragraph (2) above, I proceed on the assumption that declining a stay would not render the appeal nugatory. There is virtually no evidence in **affidavit form** to show that if a stay is not granted the defendant would face **irretrievable loss**. The consequences for the defendant if a stay is not granted are not set out in detail in the supporting affidavit, sworn on 27/06/2019. The defendant had worked towards the growth of his mother's business and he was continuing the hierarchical business.

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<sup>9</sup> (1885) 14 QBD 760

<sup>10</sup> (1885 – 86) 2 Times Law Reports at page 400

If stay is declined, he has to yield vacant possession and his family business operations will come to a halt. However, I am far from satisfied that the grounds of appeal raise an arguable issue (para 4 above) and so, even if a stay is granted, the defendant will still lose his premises and business. I also note that he has, by his actions, been able to hold up execution of this judgment for some time already.

- (10) On the other hand, the plaintiff points out that it has waited for a number of years to enjoy the occupation of the subject property and to do a development work. The defendant has been in occupation of the premises for many months, carrying on his business without paying rent to the plaintiff. The plaintiff faces grave financial hardships. In my view, the overall balance of convenience favours the plaintiff. The Court finds that the factor of the degree of prejudice to the plaintiff does count against the defendant's application for stay.
- (11) The defendant states in his supporting affidavit that he is unemployed since 03/08/2016. He further states in his affidavit that to meet the daily needs of the family, his wife bakes cakes and sells from home. On the other hand, the plaintiff is a limited liability company.
- (12) It is apparent that, if the appeal fails, the defendant will have no realistic chance of providing any financial recompense to the plaintiff. On the other hand, if the appeal does succeed, the plaintiff is clearly able to cover any order for damages that may be made. Any delays, in obtaining the fruits of judgment are prejudicial. I do not consider that the plaintiff after already having waited for four (4) years to obtain vacant possession of the property should be required to wait for another year. There will be substantial loss of income to the plaintiff which cannot be recovered. I have come to the clear conclusion that the plaintiff will suffer greater prejudice (if the application is allowed) than the defendant (if the application is refused).

#### **Grounds of appeal**

- (13) The defendant says that he has a good case on appeal. Counsel for the plaintiff takes issue on this point and says that the defendant has no meritorious grounds and the appeal is designed to delay the plaintiff in enjoying the fruits of the judgment.
- (14) It is not my function to assess the actual merits of the appeal. This Court is required to consider the bona fides of the defendant in the prosecution of the appeal and whether the appeal involves a novel question of some importance. It would be wrong for this Court, on this application, to say anything that indicates any view on to the merits of the appeal, because the judgment is the subject of appeal to the Court and will have to be heard and dealt with. The issue of 'novelty' is not crucial. I have formed my view in para (4) above that it is hard to perceive any novel and important questions to be decided in the matter.
- (15) In the illuminating judgment of Resident Justice of Appeal, *William Marshall, in A.G. of Fiji and Ministry of Health v Loraina Dre, Miscellaneous Action No. 13 of 2010*, decision 17/02/2011, contained the very significant passage following;

*The heading of note 59/13/1 is "When will a stay of execution be granted".*



*I set out only the parts of this note that are relevant to the present discussion.*

*“An appeal does not operate as a stay on the order appealed against, except to the extent that the Court below, or the Court of Appeal (or a single Judge of the Court of Appeal otherwise directs (O.59, r.13(1) 9a); see also World Trade Centre Group Ltd & Another v. Resourceful River Ltd & Another [1993] H.K.L.Y. 847; and Re Schindler Lifts (H.K.) Ltd v. Dickson Construction Co. Ltd [1993] H.K.L.R. 45). It follows that service of notice of appeal and setting down the appeal does not, by itself, have any effect on the right of the successful party to act on the decision in his favour and to enforce the order of the Court below. If an appellant wishes to have a stay of execution, he must make an express application for one (see further Para. 59/13/5 (below)). **The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal.** World Trade Centre Group Ltd & Another v. Resourceful River Ltd & Another; Civ. App No. 70 of 1993, May 12, 1993. **That hurdle is higher than that of chances of success for considering whether leave to appeal should be granted.** See also Asha Harskishin Premsingh v. Harskishin Isarsingh Premsingh Kishinani M.P. No. 3436 of 2000, November 12, 2000, unreported. Neither the Court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. Unless a stay can be justified by good reasons, one will not be ordered (Star Play Development Ltd v. Bess Fashion Management Co. Ltd, unreported, HCA No. 4726 of 2001, May 28, 2002; and see Wenden Engineering Service Co. Ltd v. Lee Shing Yue Constructions Co. Ltd, unreported, HCCT No. 90 of 1999, July 17, 2002, [2002] H.K.E.C. 1059). The Court does not “make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled”, pending an appeal (The Annot Lyle (1886) 11 P.114 at 116, CA; Monk v. Bartram [1891] 1 Q.B.346)....”*

*.....Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court, that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding (Atkins v. Great Western Ry Co. (1886) 2 T.L.R. 400, following Barker v. Lavery (1885) 14 Q.B.D. 760, CA; this rule applies equally to Admiralty cases, see: The Annot Lyle, above, at 116). ....”*

(Emphasis added)

- (16) **The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal. That hurdle is higher than that of chances of success for considering whether leave to appeal should be granted.**
- (17) The grounds of appeal upon which the defendant relied on are;
1. *That the Master Judge did not consider all the relevant and detailed documents provided in my Affidavit in Opposition filed on 24<sup>th</sup> January, 2018, some real and demonstrative physical evidences produced by me to the Honourable Court together with my oral*

submission on hearing day 15<sup>th</sup> November, 2018 in addition to Defendant Submissions filed on 23<sup>rd</sup> November, 2018.

2. That under the Land Transfer Act (Cap 131) the Registered Owner of the said property on the Original Title C.T. 13771 is Mrs. Champa Wati (deceased 12<sup>th</sup> June, 2017) as it belonged to her since 27<sup>th</sup> May, 1974, a certified copy of Original Title from register, which I proved to the honourable Court on the hearing day. As per the original title page request for new CT was cancelled on 30<sup>th</sup> October, 2006.
3. That some real and demonstrative physical evidence was provided to the honourable Court on Hearing day that Deceased Champa Wati is the registered owner of that piece and parcel of land comprised in certificate title number CT 36513 and drawing showing two other lots CT 36514 and CT 36515 as per annexure marked RK-1 in Affidavit in Support of Plaintiff filed on 7<sup>th</sup> November, 2017 contains only one front page with the drawing and the land proprietor indicating proofs of the name Champa Wati is the owner of the land and nothing is on that page to confirm that the Plaintiff is the owner of the said land. I have proved that Mrs. Champa Wati Deceased is the registered owner till to date. As you open that RK-1 in Affidavit In Support of Plaintiff the title page with only one front page, on the left hand corner its written Reference to previous Title C.T. 13771. To know the truth open previous Title CT 13771 and it shows the said property under Land Transfer Act (Cap 131) transferred to Mrs. Champa Wati on 27<sup>th</sup> May, 1974. And the mortgage with ANZ Bank Ba Branch on 27<sup>th</sup> March, 2002 is not discharged.

As per Will of Deceased Champa Wati it is clearly stated that "I have secured first charge mortgage to ANZ Bank Ba Brnach in favor of Mr Rishikendra Kumar's business".

As per the content of the Judgment page 4 of 11 Paragraph 8 on the hearing day before the Master Judge and in presence of Plaintiffs lawyers in Chambers of Master Judge to clear the doubt I showed to the honourable court that there is no second page to prove that Plaintiff is the owner of the property. And in my affidavit in opposition filed on 24<sup>th</sup> January, 2018 paragraph 4 read as follows that Late Mrs. Champa (who died on 12<sup>th</sup> June 2017) is the registered proprietor of all that piece and parcel of land comprised in Certificate of title Number 36513 reference to previous CT 13771 as plaintiff and his lawyer has already annexed RK – 1 a certified copy of the said title consisting of one page that confirms Champa Wati is the owner.

I consider this case is conspiracy case. It's a predetermined matter and a plot to torture my family since 2016 and my mother late Mrs. Champa Wati who died a slow death due to lack of hope in life.

Exhibited hereto Affidavit In Support of Plaintiff served by Bailiff on Page 3

4. That the Will of Deceased Champa Wati was also produced to the honourable Court on Hearing as a Physical Evidence subject to the demand made by the Honourable Master Judge. I did confirmed to

*the honourable Court that Will of Deceased is in process and progress as the advertisement in regards to the Estate of Deceased Champa Wati was published in the Fiji Sun and the Plaintiff never contested the Will.*

5. *That more than \$10,000 (Ten Thousand Dollars) in EFL Bills consisting of 4 Meter Bills, Water Bills consisting of two meter Bills and Town Rates registered under Late MRs Champa Wati are paid by me till to date despite the Plaintiff forcefully using the property since 3<sup>rd</sup> August, 2016 as no notice was served to any of the individual proprietors and since then I am unemployed, also I have three kids who are schooling, with eldest in Year 13, second in Year 7 and youngest in year 5.*

*Therefore as per 2013 Constitution the Supreme Law of Fiji Chapter 2 sub heading Right to life Section – 8. Every person has the right to life, ad a person must not be arbitrarily deprived of life.*

6. *That Proprietary estoppel of the said property Nitya Nand and sons Arcade consisted of three business on the said property of Late Mrs. Champa Wati, who died on 12<sup>th</sup> June, 2017. All the renovation works on the said property was carried out by each individual proprietor as per approved plan dated 14th September, 2007 approved by Ba Town Council, OHS and National Fire Authority and renovation completed on 30<sup>th</sup> April, 2008. In this matter no Notice was served to me and to any of the business proprietors and forcefully closing our business and forcefully removing items from our business outlets since 3<sup>rd</sup> August, 2016 by the Plaintiff. In this case each individual business proprietors should have been compensated. Each individual proprietors was investor in the said property and they were late Mrs Champa Wati – Proprietor of Nitya Nand and Sons and National Construction Company, Mrs Yogita Nand – Proprietor of ENS Quantity Surveyors and Management Services. Proprietors own a part of Nitya Nand & Sons Arcade that has value. In other words proprietors have acclaim on portion of the assets owned in the Nitya Nand & Sons Arcade belonging to Deceased Champa Wati.*

*“Proprietary estoppel is one of four principal mechanisms to acquire rights over property, seen particularly in the case of land. A legal claim, especially connected to English land law, which may arise in relation to rights to use the property.”*

*However Proprietary Estoppel was not considered by the Honourable Master Judge.*

7. *That my Affidavit in Opposition is clearly summarised on property issues, analysed and detailed on true facts of mental torture, punishment in a sense no sufficient ventilation as it is not good for healthy environment, no privacy for me and my family, trespass of the land and building, house arrest for me and my family, forcefully and illegally closing and removing of items from each business proprietors area who all invested in their own business and property within the Nitya Nand & Sons Arcade in the property of Deceased Champa Wati since 3<sup>rd</sup> August, 2016. However Honourable Master Judge finds it*

*irrelevant to the proceedings and failed to consider the physical evidence, which was provided on the Hearing day.*

*In the language of business environment, no individual can perform to his or her full capacity unless they are free of all personal inhibitions.*

*Therefore as per 2013 Constitution the Supreme Law of Fiji CHAPTER 2 under sub heading Heading Freedom from cruel and degrading treatment Section 11 – Paragraph (1) every person has the right to freedom from torture of any kind whether physical, mental or emotional and from cruel, inhumane, degrading or disproportionate severe treatment or punishment.*

8. *That the Plaintiff documents filed by a qualified lawyer in regards to the Affidavit in Reply filed on 7<sup>th</sup> February, 2018 in Paragraph 7 as it clearly states that "I am advised by my solicitor Messrs Krishna & Co and believe that the Affidavit in Reply is scandalous and vexatious and should be struck out of abuse of process." In this case which documents Plaintiff is proving.*
9. *That the Plaintiff documents is invalid filed by a qualified lawyer in regards to the Affidavit in Support of Rishikendra Kumar sworn on 6<sup>th</sup> November, 2017 and filed on 7<sup>th</sup> November, 2017. The second page of sworn in documents do not carry stamp of Commissioner of Oaths and there is no proper signature.*

*Exhibited hereto Affidavit in Support filed on 7<sup>th</sup> November, 2017 on Page 3*

10. *That no mortgage was carried out by the defendant on the said registered property of Deceased Champa Wati.*
11. *That on hearing day Plaintiffs' lawyer Mr. Krishna said to the honourable court that he will finish this case in ten minutes time.*
12. *That I do not agree on Final Orders in the Judgment made by the Honourable Master Judge.*

*However as per 2013 Constitution the Supreme Law of Fiji CHAPTER 2 under heading Freedom from Arbitrary Evictions Section 39 Paragraph (2) No Law may permit arbitrary evictions.*

*Therefore as per 2013 Constitution the Supreme Law of Fiji CHAPTER 2 under sub heading Application section – 6 paragraph (7) subject to the provisions to this constitution, laws made, and administrative and judicial actions taken, after the commencement of this constitution are subject to the provisions of this chapter.*

- (18) In seeking a stay in the present case, the defendant relies primarily on two grounds; (1) His late mother, Champa Wati is the last registered proprietor of the subject land till today. (2) The proprietary estoppel was not considered by the learned Master. I have adverted to above in paragraph (4) of this ruling. For the reasons stated earlier in paragraph (4) in this ruling, I am far from satisfied that the grounds of appeal raise an arguable issue. I am mystified how Mr Nalesh Nand could state that (1) the first


mortgage is not paid off and not discharged by his mother (2) His mother did not take out the second mortgage. If so, who paid off the first mortgage? Why did not she obtain an injunction stopping the Westpac banking Corporation from proceeding with the mortgagee sale?

- (19) In this case, for the reasons I have given, I am not satisfied that the execution of the judgment should be stayed. In the circumstances, the application is refused.

(F) **ORDERS**

1. Stay refused.
2. There will be no order as to costs.



  
27/09/2019  
.....  
Jude Nanayakkara  
Judge

At Lautoka  
Friday, 27<sup>th</sup> September 2019