

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CIVIL JURISDICTION**  
**CIVIL ACTION NO. HBC 60 OF 2019**

**BETWEEN:** RAMESH CHAND SHARMA AND RAJENDRA SHARMA

**PLAINTIFFS**

**AND:** MOHAMMED SADIQ

**DEFENDANT**

**Appearance:** Plaintiffs - Mr. Nair D.  
Defendant - Mr. Kholi A.

**Date of Hearing** : 10.11. 2020

**Date of Judgment** : 13.11. 2020

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**JUDGMENT**

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**Introduction**

[1] This is Defendant's application seeking stay of execution of eviction orders granted by Master. Plaintiff filed this action in terms of Section 169 of Land Transfer Act 1971 on 11.12.2019. It was served to Defendant on 31.12.2019 and an affidavit in opposition was filed on 9.3.2020 and action was fixed for hearing on 15.6.2020 and parties were directed to file written submissions by 11.6.2020. Defendant had filed written

submissions but did not appear for hearing on 15.6.2020. Master had delivered decision on 1.9.2020. A notice of appeal was filed on 15.9.2020. This application is filed on 22.9.2020 seeking stay of execution.

### **Analysis**

- [2] This application is made in terms of Order 59 rule 16(1) of High Court Rules 1988.
- [3] Accordingly, filing of an appeal is not to be considered as stay of execution. When a court directs a stay of execution there must be grounds for that. Without sufficient grounds stay cannot be granted against execution.
- [4] It is the Defendant who is seeking stay of execution that needs to satisfy the court in order to obtain a stay.
- [5] In Singh v Goundar's Western Coach Builders [2002] FJHC 304; HBA004.2001 (26 July 2002) (per Gates J)

“The burden of proving the necessity for stay lies on the Applicant: Barker v Lavery (1885) 14 QBD 769. The principles to be considered for imposing stay have undergone little change over the years. Normally the successful litigant is to keep his success unless special circumstances are shown. In Atul Kumar Ambala Patel v Krishna Murti (unreported) Civil Action HBC0225.99L 8 March 2000 in ruling against stay, I said (at pp 2-3):

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

- [6] 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 Counties Deposit Bank (1889)42 Ch/D. 471 at 478 per Kay J; Atkins v G.W. Railway (1886) 2 TLR 400; Barker v Lavery (1885) 14 QBD 769. In the Winchester Cigarette case (supra) at 648 Lord Justice Hobhouse put it “The appellant had to show some special circumstances which took the case out of the ordinary.”

What are Special Circumstances for stay of execution?

- [7] Plaintiff had filed this action almost 11 months ago, filing this action in terms of Section 169 of Land Transfer Act 1971. This is special jurisdiction granted for a registered proprietor to exercise rights derived from Torrens System, under Chapter 24 of Land Transfer Act 1971.
- [8] Defendant had not stated any special ground to remain in possession but had stated facts relating to another action for eviction which is irrelevant to this application.
- [9] Defendant had taken more than two months to file an affidavit in opposition but failed to state a right in terms of Section 172 of Land Transfer Act 1971.
- [10] There are six grounds of appeal and they are discussed briefly below for this application.

### **Ground 1**

- [11] This is wrong. There is no ‘arguable case’ requirement in eviction proceeding, and Defendant’s burden is statutorily determined in Section 172 of Land Transfer Act 1971.

‘172. If the person summoned appears he may show cause why he refuses to give possession of such land and, **if he proves to the satisfaction of the judge a right to the possession of the land**, the judge shall dismiss the summons with costs against the proprietor, mortgagee

or lessor or he may make any order and impose any terms he may think fit;" (emphasis added).

[12] So long terms possession of premises for rent does not create a right under Torrens System and does not elevate to a 'right to possession'.

### **Ground 2**

[13] This is irrelevant. Indefeasibility of title and procedure for eviction under Chapter 24 of Land Transfer Act 1971 is consistent with Bill of Rights, under Constitution of Fiji.

### **Ground 3**

[14] This matter was filed for hearing when Defendant was represented by a solicitor in court. So there is no merits in this ground.

### **Ground 4**

[15] Master had applied law correctly and Defendant had failed to establish a right to possession in terms of Section 172 of Land Transfer Act 1971.

[16] This was a clear case as the memorials to title indicate the proprietors of the property clearly.

### **Ground 5 and 6**

[17] There is no need to take another eviction along with this case. It was a separate case filed by Plaintiff for separate premises.

[18] In the circumstances, Defendant had not shown special grounds to grant stay. Long period of stay is not a ground for stay. Summons for stay is struck off. Cost of this application is summarily assessed at \$1,500 to be paid within 21 days.

**Final Orders**

- a. Summons for stay of execution filed on 22.9.2020 is struck off.
- b. Cost is summarily assessed at \$1,500.

  
Deepthi Amaratunga  
Judge

