

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

CIVIL ACTION NO. HBC 139 OF 2018

BETWEEN : **PUSHPA KARAN NADAN NAICKER** also known as **PUSHP KARAN NAICKER** of Votualevu, Nadi
PLAINTIFF

AND : **MUNESHWAR GOUNDER** trading as **SUNRISE RENTALS TAXI & TOURS** of Malolo, Nadi
DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. E. Dass, for the Defendant- Applicant
Mr. Z. Mohammed, for the Plaintiff-Respondent.

DATE OF DECISION : 17th October 2022

RULING

[On stay pending appeal]

A. Introduction:

1. This is an Application by the Defendant for a stay pending appeal.
2. By Notice of Motion dated and filed on 7th January, 2021 (Not in the year 2020 as per the seal by the Registry), supported by his Affidavit sworn on 5th January, 2021, the Defendant, MUNESHWAR GOUNDAR, seeks stay of execution of the judgment delivered by Mr. A.G. Stuart- J on 18th November, 2020, awarding the plaintiff \$63,500.00, together with summarily assessed costs in a sum of \$7,000.00 totaling to \$70,500.00.
3. The plaintiff opposes this Application by his Affidavit in opposition sworn on 19th March, 2021 and filed on 22nd March, 2021, which was replied by the Defendant by his Affidavit in reply sworn on 20th October, 2021 and filed on 21st October, 2021.
4. This Application, on perusal of the contents thereof, appears to have been made pursuant to R 26 (3) and R 34 of the Court of Appeal Rules ("CAR") and O 45, R 10 and O 47 (1) of the High Court Rules 1988, as amended ("HCR"). The alleged failure on the part of the Defendant to specify the relevant Order and Rules, under which the Application is made, has been taken up as a preliminary objection on behalf of the Plaintiff, which I shall deal in this ruling later.
5. At the hearing on 12th August, 2022, counsel representing the parties, while orally arguing the matter, tendered written submission as well. Additionally, a supplementary

written submission on behalf of the Defendant was filed on 17th August, 2022 to counter the preliminary objection raised by the Counsel for the Plaintiff at the hearing.

B. **Background:**

6. The Plaintiff took out writ of summons against the Defendant claiming, *inter-alia*, refund of the sum of \$68,250.00 being the cash lent and advanced to the Defendant time to time commencing from January, 2013 till May, 2017, which included a further sum of \$3,750.00 claiming to be the charges for Video recording and Photography of the Defendant's Wedding held on or about April, 2017.
7. Notably, no documentary evidence, of any kind, was adduced by the Plaintiff to substantiate his claim that he in fact did pay the Defendant and provided the Video and Photography services to the Defendant as he claimed. The Plaintiff maintained that he and the Defendant are related, in that the Defendant is the nephew of the Plaintiff.
8. The Defendant initially by appearing in person filed his Statement of defence on 1st August, 2018, with a Counter Claim in a sum of \$580,002.85, in response to which the Plaintiff filed his reply to defence and defence to counter claim on 14th August, 2018.
9. However, the Defendant, by appearing through a Lawyer, subsequently filed an amended Statement of Defence on 24th June, 2019, which was a mere denial and limited only to 3 short paragraphs, whereby he moved for the dismissal of the plaintiff's action with costs in his favor.
10. The trial proceeded, with no agreed facts, but on 3 agreed issues, wherein 5 witnesses, including the plaintiff, testified on behalf of the plaintiff by marking exhibits "PE-1" to "PE-7".
11. Though the Defendant, in his statement of Defence, had denied the receipt of money from the Plaintiff, under his cross examination had repeatedly stated that the "Plaintiff helped me". Further, he had not adduced any evidence as to how he financed his Rental Car business. It is not clear from the Statement of Defence whether his denial is based on an assertion that he did not receive money at all or whether it is based on a contention that any money received was NOT a loan, but a gift. This was the exact issue; the learned trial judge was called upon to decide. However, it is not my duty here to assess or comment on the evidence adduced.
12. At the end, the learned trial judge in his impugned judgment, having recognized the transaction between them as a loan, ordered the Defendant to pay the Plaintiff a sum of \$63,500.00, together with a further sum of \$7,000.00 as the cost. The amount claimed by the Plaintiff on account of the alleged Video and Photograph services was declined.
13. The Defendant has appealed the impugned judgment dated 18th November, 2020 to the Court of Appeal. That appeal is pending in the Court of Appeal. In the meantime, the Defendant seeks a stay of execution of the judgment pending appeal.

C. Grounds of Appeal

14. The purported grounds of Appeal (a) to (e) are found in the “Notice and Grounds of Appeal” annexed as “MG-2” to the Affidavit in support, which are reproduced for the sake of easy reference.
- a. *THAT his Lordship erred in law and in fact in not considering whether the contract between the applicant and respondent embody all the essential requirement of a valid agreement , that is, there must be an offer , an acceptance, consideration , and an intention to create legal relations;*
 - b. *THAT the trial judge failed to consider that the Respondent and the applicant’s Mother were in a defacto relationship and the trial judge has erred in failing to draw the correct inference and has unfairly dismissed the Applicant’s evidence that the respondent never lent money to the Applicant;*
 - c. *THAT his Lordship erred in law and in fact in holding that the Respondent’s money was used by the Applicant to expand his rental company when there was no such evidence before the trial judge.*
 - d. *His Lordship erred in law and in fact in failing to assess the credibility of the two witnesses for the Respondent and further His lordship failed to consider that the said two witnesses may have had a ulterior motive to testify in favor of the respondent.*
 - e. *THAT the Appellant reserves the right to add further grounds of appeal upon receipt of the Court record.*
15. I do not wish to assess each and every ground stated above, as it amounts to an assessment of the merits of the appeal. However, what is required in a Stay Application for the consideration of the Court will be dealt with, in this decision.
16. The issue for the Court’s determination is whether the Stay of Execution ought to be granted in all the circumstances of this case or not.

D. Legislative framework :

17. The HCR, O 45, R 10 says:

“Matters occurring after judgment stay of execution etc (O45, 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.”

18. The HCR, O 47 (1) states:

“Power to stay execution by writ of fieri facias (O47, R1)

(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or

order, or at any time thereafter, by the judgment debtor or other party liable to execution-

(a) that there are special circumstances which render it inexpedient to enforce the judgment or order, or

(b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in Rule 2, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit."

Legal principles

19. The principles governing the application for stay pending appeal were summarized in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (18 March 2005) as follows:

"(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 interest in the proceeding.

(g) The overall balance of convenience and the status quo."

20. The court must ask the following questions when considering an Application for stay of execution pending appeal:

(a) If a stay is refused, what are the risks of the appeal being stifled?

(b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?

(c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?

(See Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 1915, LTL 18/12/2001)

E. Discussion:

21. The Defendant applies to this court for a stay of execution pending appeal. An Application for a stay pending appeal may be made either to the court below (High Court) or to the Court of Appeal. However, it must be made to the court below in the first instance (see CAR, R 26 (3)).

22. Though, the Defendant in his Notice of Motion did not mention the relevant Order & Rule/s that he relies on for this Application, on careful reading, it is obvious that the Defendant, in support of his Application for a stay pending appeal, squarely relies on the HCR, O45, R10, which empowers the court to grant stay of execution on the ground of matters which have occurred since the date of the judgment or order. However, in my opinion, reliance on O45, R10 is not necessarily needed for the Defendant can apply for a stay pending appeal under the CAR, R 34 (1).

The Preliminary Objection:

23. The preliminary objection raised on behalf of the Plaintiff on the ground that the Defendant had not pleaded the relevant Order and Rule under which he relies for his Application need not necessarily inhibit the right of the Defendant to file and proceed with this Application. The Plaintiff has not in any manner been prejudiced or misdirected in advancing his position against this Application. Further, it is observed that at the initial stage of this Stay Application, the plaintiff's Counsel has agreed for a temporary stay pending the disposal of this Application. The plaintiff could very well have raised this objection, at the initial stages, by filing a formal Application under Order 2 Rule 2 of the HCR 988. Thus, the preliminary objection will not hold water and same is hereby overruled.
24. Generally, an appeal does not operate as a stay of execution or of proceedings under the decision of the court below (see CAR, R 34 (1) (a)). Since the Defendant has made an Application to a stay pending appeal, I intend to apply the legal principles enunciated in *Natural Waters*, above.

Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory

25. The appeal is against the monetary judgment. In that case, the court must ask the following questions when considering an Application for stay of execution pending appeal:
- a. If a stay is refused, what are the risks of the appeal being stifled?
 - b. If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?
 - c. If a stay is refused and the appeal succeeds, and the judgment is enforced in the Meantime, what are the risks of the appellant being able to recover what has been paid to the respondent? (See *Hammond Suddard Solicitors*, above).
26. During the course of the argument, counsel for the Defendant mainly submitted that the grounds of appeal are meritorious and those grounds have prospect of success. Counsel for the Defendant also addressed the Court on the issue of the risks of the appeal being nugatory, if a stay is refused. Further, by alluding to paragraph 11 of the Affidavit in support, counsel stressed that in the event the Appeal is successful, it will be difficult to recover the money. He says that the prospect of success at the Court of Appeal are high on consideration of the fact that the Defendant and the plaintiff are in

close family relationship and in that instance the plaintiff had to prove that there was an intention to create legal relation if he advanced any monies to the Defendant. It is submitted that in the even the Appellant is successful, then the Plaintiff has no means to repay the money.

27. It is to be observed that to the averments in paragraphs 9 and 11 of the Defendant's Affidavit is support of the Notice of motion, on the difficulty for the recovery of the money, if the Appellant becomes victorious, the plaintiff in his Affidavit in opposition has not duly responded thereto and has simply evaded.
28. The real question to be asked here, as stay is sought in respect of a monetary judgment, is: If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?
29. The Plaintiff has not adduced any evidence or given any assurance to suggest that there are no risks of defendant being unable to recover what has been paid, if a stay is refused and the Appeal succeeds, and the judgment is enforced in the meantime.
30. Conversely, the Plaintiff on 11th March, 2021, by way of an Ex-parte Notice of Motion, has obtained an injunction Order restraining the Defendant, his agents, servants or whosoever expressly from selling, transferring, dealing, gifting and disposing of 7 Motor Vehicles said to be owned by the Defendant, however, with liberty for the Defendant to continue to operate his Taxi car Renting business and further liberty to have the said orders set aside with notice to the plaintiff. The Defendant while admitting the existence of this injunction order has not so far applied to the Court to have the said order varied or vacated.
31. This means that the Plaintiff has an assurance that he can recover the amount due at any point of time he wishes after the disposal of the Appeal and if the outcome is in his favor on the Appeal being unsuccessful and dismissed. However, since he had not prayed for interest in his Statement of claim, he has lost the prospect of receiving interest on the adjudged sum for the period of pendency of Appeal.
32. Further, careful perusal of the impugned judgment shows that the learned Trial judge appears to have arrived at his final decision mainly relying on two foreign judgments (from Australia and New Zealand)¹ wherein the issues were similar to the issue he had to address in this action, namely, whether the monetary transactions that the Plaintiff claimed to have had with the Defendant was a loan or gift. Learned judge has come to the finding that the monies received by the Defendant time to time from the plaintiff was nothing but a loan facility .
33. None of the Counsel for the parties at the hearing before me alluded to or submitted any local case law authority that had addressed the similar issue. The lack of local

¹Berghan & Anor V Berghan [2017] QCA 236 (Australian Case)
Terry Schwass Compant Ltd V Marsh [2017] NZHC 1382.(New Zealand Case)

judgments on the very issue, in my view, involves the issue of novelty, though it was not pleaded and argued before me.

34. The issue of overall balance of convenience needs to be assessed. The Defendant has in his Affidavit in support of this Application had raised the issue of recovery of money if the appeal is successful. The Plaintiff had not at all replied to the said allegation in his Affidavit in opposition.
35. So, in my opinion, there is an unexplained issue as to the recovery of money if the Appeal is successful. This, among other grounds stated above, favors the Defendant's Application to grant a stay. So balance of convenience favors granting of stay considering the circumstances of the case and also on issue of novelty involved due to lack of local judgments on the issue.
36. The Court has to balance the competing positions and make decision that will not cause injustice or that will cause least injustice. As the plaintiff is not addressing the issue of recovery of the adjudged sum in the even the Appeal succeeds, it convinces me that least injustice is caused by granting the stay in this matter.
37. I have deliberated the legal principles that were argued before me. The rest of the legal principles were not argued or put in dispute. Therefore, further deliberation on the legal principles that were not in dispute is not necessary.

F. Conclusion

38. For the reasons given, I decide to grant a stay pending appeal. The stay Application is accordingly allowed. Considering the circumstances no order for costs made. Parties shall bear their own costs.

G. Outcome:

- a. The Defendant's Application for Stay pending Appeal succeeds.
- b. Stay pending Appeal granted as prayed for.
- c. No costs ordered and the parties shall bear their own costs.



A.M. Mohamed Mackie
A.M. Mohamed Mackie
Judge

At High Court Lautoka this 17th day of October, 2022.

SOLICITORS:

For the Defendant/ Applicant: Messrs Pillai Naidu Associates
For the Plaintiff/ Respondent: Zoyab Shafi Mohammed Legal