

IN THE HIGH COURT OF FIJI.
AT LAUTOKA.
[CIVIL JURISDICTION]

Civil Action No-HBC: 126 of 2018.

BETWEEN : **DAYA WATI of Wairuku, Rakiraki. Domestic Duties.**
DEFENDANT/APPELLANT

AND
: **BIR CHAND of Waikuru, RAKIRAKI- Taxi Operator.**
PLAINTIFF /RESPONDENT

BEFORE : Mr. A.M. Mohamed Mackie.

COUNSEL : Ms. A. Chand.

: Ms. Y. Sagar

DATE OF HEARING : 9th April 2024.

DATE OF RULING : 28th November 2024.

RULING

A. INTRODUCTION:

1. This Ruling concerns with an Application for Leave to Appeal preferred by the Defendant- Appellant (“the Appellant”).
2. By an inter-partes summons dated 8th September 2023 filed on 6th September 2023, the Appellant seeks the following orders:
 - i. That the above named Appellant be given leave to appeal the decision of his Lordship Mr. Justice Mackie delivered herein on the 16th of August 2023;
 - ii. That the Appellant be given 21 days to file and serve the Notice and Grounds of Appeal from the date of the granting leave;
 - iii. That there be a Stay of these proceedings pending the determination of the Appeal by the Fiji Court of Appeal;
 - iv. The cost of this application be costs in the cause.

- v. Any other Orders this Court may deem just and equitable
3. In support of the Application, the Appellant , DAYA WATI, reads and relies on her Affidavit in support sworn and filed on 6th September 2023 along with annexures marked as “DW-1” to “DW-18” , and her Affidavit in reply sworn on 12th March 2024 and filed on 21st March 2024 along with an annexure marked as “DW-1”.
 4. The Plaintiff-Respondent (“the Respondent”) opposing the Application has sworn an Affidavit in opposition on 16th November 2023 and filed on 17th November 2023 along with annexures marked as “BC-1” to “BC-3”.
 5. At the hearing, both counsel made oral submissions. In addition to their oral submissions they also tendered written submissions, which were of great use in drawing up this ruling. I am grateful for both counsel for their efforts.
 6. The Application is made under to section 12(2)(f) of the Court of Appeal Act 1949; Rule 16(a) , Rule 29 and Rule 26(3) of the Court of Appeal Rules 1949; Order 59 Rule 16 of the High Court Rules 1988 , and to the inherent Jurisdiction of this Court.

B. BACKGROUND TO THE APPLICATION:

7. The factual background as to how the Respondent became the Registered proprietor of a property in total extent of 8.3224 Hectares as per the Certificate of Title No- 32667 marked as “DW-4”, out of which ¼ acre is said to be in dispute, and what the actual dispute between the parties that led them to the Court, have been fully described from paragraphs 9 to 28 of her Affidavit in support. I do not endeavor to reproduce it in detail in order to avoid the verbosity.
8. On the 21st of June 2018, the Respondent filed an Originating Summons for Summary Eviction of the Appellant under section 169 of the Land Transfer Act 1971 from the CT 32667 , being lot 2 on Deposited Plan No- 7583, which is referred to as “the Subject Property”.
9. On 24th September 2018, due to the non-appearance of the Appellant’s Solicitor, the learned Master entered a Default- Judgment against the Appellant. On 3rd of April 2019, the Appellant’s current Solicitors filed an Application to set aside the Default judgment.
10. The learned Master (the Master), by his Ruling dated 21st October 2020, dismissed the Appellant’s Application to set aside on the ground that she had not demonstrated a “cause” to remain in the property.

11. The above Ruling being appealed against , with the leave being granted by my Order dated 8th February 2023, after hearing the Appeal , this Court by my Judgment dated 16th August 2023 dismissed the Appeal and affirmed the decision of the Master. Vide (“DW-3”).
12. It is against the said Judgment the Appellant is before this Court now seeking leave to Appeal to the Court of Appeal and the Stay of proceedings pending the Court of Appeal judgment in the intended Appeal.

C. THE ISSUES:

13. The issues before the Court are: WHETHER;
 - a. The Appellant ought to be granted leave to appeal my Judgment dated 16th August 2023?
 - b. The Appellant to be given 21 days to file and serve the Notice and Grounds of appeal from the date of the Order granting leave by this Court?
 - c. There should be a Stay of these proceedings pending the determination of the Fiji court of Appeal,
 - d. The Appellant is entitled for costs on this Application?

D. RELEVANT LEGAL PRINCIPLES:

(a) Leave to Appeal

14. Section 12(2) (f) of the Court of Appeal Act [Cap 12] (as amended) (CAA) reads, as far as material:

“12 (2) No appeal shall lie –

 - a.*
 - b.*
 - c.*
 - ...*
 - (f) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court, except in the following cases, namely:-*
 - ...”*
15. Rule 26(3) of the Court of Appeal Rules (CAR) reads:

“Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.”

(b) Stay Pending Appeal & Principles:

16. Rule 34(1) of the CAR reads:

“34. (1) Except so far as the court below or the Court of Appeal may otherwise direct-

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal.”

16. In ***New world Ltd v Vanualevu Hardware (Fiji) Ltd [2015] FJCA 172; ABU76.2015 (17 December 2015)***, Fiji Court of Appeal observed:

“[14] The factors that should be exercised by this Court in an application such as is presently before the Court were identified in Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd (ABU 11 of 2004 delivered on 18 March 2005). Generally a successfully party is entitled to the fruits of the judgment which has been obtained in the court below. For this Court to interfere with that right the onus is on the Appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are taken into account by a court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay.”

17. The Supreme Court of Fiji in ***Ward v Chandra [2011] FJSC 8, CBV0010 (20 April 2011)*** set out the principles governing a stay Application.

18. In arriving at a decision as to whether the Petitioner’s circumstances are sufficiently exceptional for the grant of stay relief pending appeal, it is necessary to consider the relevant principles set out in the Court of Appeal in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd Civil Appeal ABU0011.04S, 18th March 2005*. They were;

“(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.”

E. GROUNDS OF APPEAL:

19. The Appellant has adduced following 7 grounds of Appeal , reserving her right to add further grounds of Appeal; They are:

1. *The learned Judge erred in law in failing to identify the Respondent's substantive claim ought not to have been decided by Summary proceedings given the factual background of the case.*
2. *The learned judge erred in law in failing to apply the principle established by the Fiji Court of Appeal in **Prasad v Samy [2009] FJCA 100; Civil Appeal No- ABU 118 of 2017** of the Land Transfer , that , mere possession of land for more than 20 years qualifies the Defendant to seek protection under section 172 of the Land Transfer Act.*
3. *The learned judge erred in Law by misinterpreting and/ or misapplying the principle of law laid down by a superior Court in Prasad v Samy [2009] FJCA 100; Civil Appeal No- ABU 118 of 2017.*
4. *The learned Judge erred in Law in refusing to set –aside the default judgment entered by the Master when the said default judgment could not be maintained at Law under section 172 of the Land Transfer Act and the judgment of the Fiji Court of Appeal in Prasad v Samy [2009] FJCA 100; Civil Appeal No- ABU 118 of 2017.*
5. *The learned judge erred in law in paragraph 22 (d) of the judgment where his Lordship stated; That;*

*“The principle that the mere occupation is not sufficient to recognise a party's right of possession to land is well founded as per the decision in **Deo v Ali [2016/FJHC 503; HBC 201/2015, and Wati v Raju [1996] FJHC 105”.***
6. *The learned judge erred in Law in finding that the default judgment against the Appellant was a regularly entered Default judgment for which the Appellant was required to demonstrate a meritorious defence for the default judgment to be set aside.*
7. *That the learned judge erred in Law in holding that the unregistered Transfer document dated 18th June 1993 did not meet the threshold of an allegation of fraud , sufficient to resist an application under section 169 of the Land Transfer Act.*

F. DISCUSSION:

a) Leave to Appeal.

20. The primary issue raised in this Application is that whether the Appellant ought to be given leave to Appeal the 16th August 2023 judgment delivered by this Court.

21. By the 16th August 2023 judgment, this court dismissed the Appeal preferred by the Appellant and affirmed the Ruling pronounced by the Master on 21st October 2020, by

which the Master refused to set aside his default judgment dated 24th September 2018 .

22. Leave to appeal an interlocutory order may be given by the judge or by the Court of Appeal (see CAA, 12 (2) (f)). Furthermore, an Application may be made either to this court (the court that made the order) or to the Court of Appeal. The Application must be made in the first instance to the Court below (see CAR, 26 (3)).
23. It is not my duty here to delve into the merits of the Grounds of Appeal raised hereof.
24. Counsel for the Appellant advances argument that the proposed grounds of Appeal raises questions of law, particularly pertaining to the judicial construction of sections 169 and 172 of the Land Transfer Act.
25. Counsel submits that the Appellant's Grounds of Appeal may be summarised in the following questions of Law; -
 - a. *Whether the uninterrupted occupation of property for more than 20 years renders Summary Proceedings for vacant possession under section 169 of the Act untenable?*
 - b. *Whether the uninterrupted occupation of a piece of property for more than 20 years is sufficient to constitute 'cause' as per section 172 of the Land Transfer Act 1971?*
 - c. *Whether the mere uninterrupted occupation of a piece of property for more than 20 years permits the Defendant to resist an Application for Ejectment made pursuant to section 169 of the Land Transfer Act 1971?*
 - d. *Whether the Eviction Orders pursuant to section 169 of the Act ought to be granted by way of Summary Proceedings, when the Defendant has been in occupation of the subject property for more than 20 years?*
 - e. *What is the 'threshold of evidence' to be satisfied for the Defendant to allege 'fraud' in response to an application for summary eviction under section 169 of the Land Transfer Act.*
26. In ***Hussain v National Bank of Fiji [1995] FJHC 188; [1995] 41 FLR 130 (1 June 1995)*** the High Court held that as a general rule there is a strong presumption against Granting leave to appeal from interlocutory orders or judgments, which do not either directly or by their practical effect finally determine any substantive rights of either party.
27. Fiji Court of Appeal in ***Habib Bank Ltd v Ali's Civil Engineering Ltd [2015] FJCA 47; ABU7.2014 (20 March 2015)*** granted leave to appeal having satisfied with the summary of grounds that raises appealable issues that should be considered by the Court of Appeal.

28. The Appellant's Counsel submits that the grounds of Appeal raises some question of general importance to be determined by the Court of Appeal. Counsel heavily relies of the decision of Fiji Court of Appeal , wherein the Defence of possession over 20 years has been favorably considered in ***Prasad v Sami [2019] FJCA 100; Civil Appeal No-ABU 118 of 2017.***
29. The Appellant states , inter alia, that as per the legal advice received from her Solicitors that since she has been in occupation of the land for more than 25 years , the Eviction Orders ought not to have been granted via Summary proceedings and the matter ought to be decided through a writ action.
30. In **Prasad's case (Supra)**, the Court of Appeal unequivocally has laid down the principle the "mere possession of land for more than 20 years itself would qualify the respondent under section 172 of the LTA". In paragraph 11 of the judgment the Court stated;-
- "I am of the view that mere possession for more than 20 years self would qualify the respondent to seek protection under section 172 of the LTA. The application for a vesting order will give an additional boost. Therefore, **whether the application for a vesting order amounts to a current right or a future right is immaterial**".*
- (Emphasis added)***
31. **Lord Woolf MR said in Swain v Hillman [2001] 1 All ER 91** that a 'real' prospect of success means that prospect of success must be realistic rather than fanciful.
32. In **Beedell v West Ferry Printers Ltd [2001] EWCA Civ 400; [2001] ICR 962**, it was said that even hopeless appeal may be allowed to proceed where the area of law in question is the subject of considerable controversy.
33. In my impugned judgment dated 16th August 2023, when dealing with the ground of Appeal 3 thereof, which involved the length of time that the Appellant claimed to have been in occupation, and the Ground of Appeal 4, which dealt with the Court of Appeal Decision in **Prasad's Case Supra**, in paragraphs 22 and 23 thereof respectively, I have taken different view on the arguments advanced by the Counsel for the Appellant.
34. My judgment dated 16th August 2023 has finally determined the substantive rights of the parties. The presumption against granting leave to Appeal from an interlocutory order is applicable where such an order or judgment does not determine any substantive right of either party. In this case, the judgment delivered on 16th August 2023 has the effect of finally determining the substantive right of the Defendant, for

the Defendant's Application to set aside Master's Judgment was dismissed. Therefore, the presumption against granting leave to appeal an interlocutory order has no application herein.

35. Where the interlocutory order or judgment decides the substantive rights, as in this case, the test for granting leave should not be strictly applied.
36. It was submitted on behalf of the Respondent, inter alia, that the authority in **Prasad v Sami** Supra, cannot stand because if one says that the mere possession for more than 20 years qualifies the Defendant to seek protection under section 172 of the LTA 1971, it is an attempt to re-write the legislation regarding adverse possession.
37. It was also submitted that the said Prasad's Case (supra) was the one where the Court of Appeal decided on the Appeal in the absence of any argument by the Respondent therein as they did not appear on the date of the hearing, and the Court of Appeal did not analyze the provisions in relation to the concept of adverse possession under section 77 and 78 of LTA and instead came to the conclusion that mere occupation of 20 years or more is sufficient to qualify as a right of possession.
38. I am satisfied that the summary of grounds of Appeal raises question of general importance shown in paragraph 25 above and the area of law in question seems to be the subject of considerable controversy and obtaining clarification on the law is needed. As stated in Beedell's case, even hopeless appeal may be allowed to proceed where the area of law in question is the subject of considerable controversy. I therefore grant leave to the plaintiff to Appeal the judgment dated 16th August 2023. It follows that leave to Appeal is granted under section 12 (2) (f) of the CAA.

(b). Stay pending Appeal:
39. Let me now decide the second issue that whether there ought to be a stay pending the Appeal of the 16th August 2023 judgment.
40. The basic rule is that a litigant is entitled to enjoy the fruits of his success (see **BMW AG v Commissioners of HM Revenue and Customs [2008] EWCA Civ 1028 and Chand v Lata [2008] FJHC 162**).
41. Unless the court below or the Court of Appeal otherwise directs, an Appeal will not operate as a stay of execution or of proceedings under the decision of the court below (see CAR, 34-(1)).

42. The court has an unfettered discretion to impose a stay of execution if the justice of the case so demands (see BMW AG (above)). In so doing, the court will take into consideration the principles governing a stay application as set out in ***Ward v Chandra [2011] FJSC 8; CBV0010 (20 April 2011) and Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13; ABU 0011.2004S (18 March 2005)***.
43. In order to obtain a stay the Appellant must establish that she has sufficiently exceptional circumstances as stated in Ward's case (above).
44. The Appellant submits that she will suffer irreparable harm should the Respondent enforce the Order by way of writ of possession. I also take into consideration the Appellant's undisputed claim that she is residing in the land in dispute for over a period of 25 years since her marriage.
45. The Appellant would be gravely prejudiced if stay is refused and is vital for the protection of the status quo; the prejudice to the Appellant is greater than to the Respondent: whereas the Respondent could be compensated by costs for any delay; The Appellant has acted diligently.
46. The questions raised by the Appellant in the proposed Appeal is of general importance and also novel. The balance of convenience and the protection of the status quo is in favour of the Appellant.
47. In ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 1915, LTL 18/12/2001***, the Court identified three questions as relevant to be asked when considering an application for stay of execution, which includes:
- (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 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?
48. The plaintiff made an application in this court seeking a stay of execution of my judgment dated 16th August 2023. The Appellant pleads that if stay is refused and the judgment is executed, the appeal would be rendered nugatory.
49. The Appeal arose out of the default judgment pronounced by the Master on 24th September, Ruling of the Master dated 21st October 2020 refusing to set aside his Default judgment and my subsequent judgment dated 16th August 2023 affirming the

Master's Rulings. It follows that there is no substantive action for the plaintiff to rely upon. I am of the view that there are risks of the Appeal being stifled if a stay is refused.

50. I am unable to find any risks the Respondent will be unable to enforce the judgment if a stay is granted and the Appeal fails. The risk is that the Respondent would not be able to enforce the judgment if a stay is granted.

51. The prejudice that may be caused to the Respondent, if a stay is granted and appeal fails could be compensated by an order of costs. Therefore, in my view, balance of convenience and the maintenance of status quo favour the Appellant.

52. For all these reasons, I grant a stay of execution of my judgment dated 16th August 2023 pending the outcome of the intended Appeal. It follows the stay is granted under CAR, Rule 34 (1).


53. With regards to costs, considering the circumstances, I decide not to award costs and order the parties to bear their own costs.

54. For the reasons given above , I make the following Orders;

G. FINAL ORDERS:

- a. Leave is granted to the Appellant to appeal the Judgment dated 16th August 2023.
- b. There will be a stay of execution of the 16th August 2023 judgment pending Appeal.
- c. The Appellant shall file and serve the Notice and Grounds of Appeal within 21 days.
- d. No order for costs made and the parties shall bear their own costs.

On this 28th Day of November 2024 at the High Court of Lautoka.


A.M. Mohamed Mackie
 Judge
 High Court- Lautoka.



SOLICITORS:

Messrs. Anishini Chand Lawyers- Barristers & Solicitors- For the Defendant- Appellant.

Messrs. Samuel K. Ram Lawyers- Barristers & Solicitors – for the Plaintiff- Respondent.