

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

ABU Action No. 70 of 2024

Civil Action No. HBC 11 of 2015

- BETWEEN** : **MANOJ KUMAR** of Buca, Savusavu, in the Republic of Fiji Island.
1ST PLAINTIFF/APPELLANT
- AND** : **ADI NARAYAN** of Buca, Savusavu, in the Republic of Fiji Island.
2ND PLAINTIFF
- AND** : **PREM CHAND** of Buca, Savusavu, in the Republic of Fiji Island.
3RD PLAINTIFF
- AND** : **AMAR DEO** of Buca, Savusavu, in the Republic of Fiji Island.
4TH PLAINTIFF
- AND** : **JAMUNA PRASAD** of Buca, Savusavu, in the Republic of Fiji Island.
5TH PLAINTIFF
- AND** : **PRATAP CHAND** of Buca, Savusavu, in the Republic of Fiji Island.
6TH PLAINTIFF
- AND** : **SATYA WATI** as Administratrix in the Estate of Moti Lal, late of Buca,
Savusavu.
7TH PLAINTIFF
- AND** : **ANAND PRASAD** of Buca, Savusavu, in the Republic of Fiji Island.
8TH PLAINTIFF
- AND** : **DINESH CHAND** of Buca, Savusavu, in the Republic of Fiji Island.
9TH PLAINTIFF
- AND** : **SUMITRA WATI aka SUMITRA** as the Administratrix in the Estate of
Sugrim Singh, late of Buca, Savusavu.
10TH PLAINTIFF

AND : **BAL RAM** of Buca, Savusavu, in the Republic of Fiji Island.
11TH PLAINTIFF

AND : **VIMAL CHAND** of Buca, Savusavu, in the Republic of Fiji Island.
12TH PLAINTIFF

AND : **SANT RAM AND SHIU RAM** as Executor and trustee of the Estate of
Ram Baram, late of Savusavu.
DEFENDANTS/RESPONDENTS

BEFORE : **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Robinson H. o/i Sushil Sharma Lawyers** for the 12th Plaintiff/Appellant(s)

Mr. Rao H. o/i Tikoisuva Law for the Defendants/Respondents.

DATE OF DECISION: 24th January, 2025

DECISION

[Summon by the Appellant/ Respondents for Setting Aside and Stay pending Appeal; Injunction Orders to remain in force, Restraining Respondents from disposition of property AND Summons by Defendant/Respondent for Leave for Extension of time to file affidavit in Oppositions]

A. Introduction

1. Following are Two [2] Summons filed in this action seeking for certain orders, subsequent to the disposition and delivery of Judgment in the Substantive Action on 13th February 2024.

(i) Summons by 12th named Appellant/Plaintiff [22/03/2024]:

- (a) That the orders granted by Hon. Justice Vishwa Datt Sharma on 13th February, 2024 be set aside or stayed pending the outcome of the Appeal.
- (b) That the permanent injunctive orders granted by Honorable Justice Kumar in Labasa High Court Civil Action 11 of 2015 on the 10th day of June, 2020 to remain in force until the determination of the appeal and the orders of Honorable Justice Kumar are as follows:
 - b) Respondents (Defendants) are restrained whether by themselves, their agents or servants or whosoever from disposing, or selling or further encumbering or dealing with property comprised and described in Certificate of Title No. 41523 until final determination of the appeal or further order of this Court.
- (c) That the orders granted by Justice Mansoor on 20th day of October, 2020 to remain in force until the determination of the appeal.
- (d) Alternatively, a fresh order to be granted restraining the Respondents whether by themselves, their agents or servants or whosoever from disposing, or selling or further encumbering or dealing with property comprised and described in Certificate of Title No. 41523 until final determination of this appeal.
- (e) Any further orders the court seems just and fair.

2. The Summons is filed in support of an affidavit deposed by Vimal Chand.

(ii) Summons by Defendants/Respondents [12/07/2024]:

- (a) That leave be granted to the Defendants/ Respondents' for extension of time to file their Affidavit in Opposition.
- (b) That leave be granted to the Defendants/ Respondents to defend the within action unconditionally.
- (c) That leave be granted to the Defendants/Respondents for abridgement of time for service of this application.
- (d) That the costs of this action be costs in cause.

(e) Any other order that this Honourable court deems just and expedient.

3. The Summons is filed in Support of the affidavit deposed by Mataca Coalala.

Background to Substantive Action [HBC 11 of 2015]

4. South Seas Limited transferred the subject land in Certificate of Title No. 21230 to one **Ram Jas and Ram Baran as Joint Tenants**.

5. Ram Jas and Ram Baran in their lifetime entered into a Provisional Boundary Agreement for subdivision of the land into two (2) equal lots.

6. During their lifetime, they performed part of their responsibilities to divide Certificate of Title No. 21230 into two equal Lots.

7. Ram Jas divided individual Lots and sold it to the Appellants. The parties entered into Sale and Purchase Agreement to purchase different lots offered for sale.

8. Ram Jas took demise on 02 August 2000, before finalizing the subdivision of his half portion of the land in Certificate of Title No. 21230 pursuant to Provisional Boundary Agreement for subdivision.

9. The question arose 'whether there was an intention on the part of the two, **Ram Jas and Ram Baran** to sever the **Joint Tenancy** during their lifetime or had in fact **severed the joint tenancy** by way of executing Provisional Boundary Agreement.

10. **Labasa High Court Civil Action No. 34 of 2014 and HBC 18 of 2015** are relevant and has nexus to this substantive action wherein orders were sought for **severance of joint tenancy into Tenancy in Common**.

11. However, both above action HBC 34 of 2014 and HBC 18 of 2015 were accordingly dismissed by the Court.

12. This Court upon hearing the Substantive Civil Action No. 11 of 2015 deliberated upon and delivered its Judgment on 13th February 2024 and made the following orders:

(i) The Appellants Amended Writ of Summons and the Statement of Claim filed on 11th April 2016 is hereby dismissed in its entirety.

(ii) The Appellant is hereby ordered to pay the Defendants a sum of \$3,000 as summarily assessed costs within 14 days timeframe.

13. Hence, the Appellants [12th Named Plaintiff] by his summons seeks the orders as enumerated at paragraph [1] (i) hereinabove in my Decision accordingly.

14. Further, the Summons of the Defendants/Respondents seeking for orders hereinabove at paragraph [2] (ii) of my Decision.

15. The Summons of the Appellants was served onto the Defendants/Respondent's City Agent Lawyers on 25th March 2024 returnable before Court on 09th April 2024.
16. Defendant was granted 21 days to file/serve his affidavit in opposition and returnable date scheduled for 29th May 2024.
17. On 29th May 2024, the Defendant/Respondent informed Court that he could not file/serve his affidavit in opposition. The Court granted further 14 days for the Defendant/Respondent to file/serve his affidavit in opposition and scheduled the hearing of the same on 22nd July 2024.
18. However, on 12th July 2024, the Defendants/Respondent filed a summons seeking for Extension of time to file his affidavit in opposition to the Appellant/Plaintiff's Summons.
19. It is noted that neither party filed any affidavit in opposition to the impending summons filed by either by the Appellant/Plaintiff and/or Defendants/Respondents.
20. Both parties sought for Court to proceed with both summons and determine the orders sought on the two (2) summons on the written submissions to be furnished to Court within 7 days' timeframe simultaneously.
21. This Court has perused both parties' written submissions and will now proceed to deliver its Decision accordingly.

The Defendants/Appellants Summons of 12th July 2024:

22. Should an Extension of time be given for the Defendants/Respondents to file/serve their Affidavit Response to the 12th Appellant/Plaintiff's **Summons filed on 22 March 2024?**
23. The Appellant/ Plaintiff's Summons filed on 22 March 2024 was assigned with a returnable date of 09 April 2024.
24. The Defendants sought for 28 days to file and serve their affidavit Response and 14 days for their Appellant/Plaintiff's to file and serve their reply and compliance to be carried out by 29 May 2024.
25. By 29 May 2024 the Defendants failed to fulfil the requirements of filing and serving the affidavit in Response. However, in absence of any objection from the Appellant/Plaintiff, the Court granted an Extension for the Defendants to file and serve their Affidavit in Response within 14 days and hearing fixed for 22 July 2024.
26. On 12 July 2024, the Defendants filed a summons and sought for extension of time to file an affidavit in opposition returnable on 22 July 2024 which was the hearing date already assigned for the substantive pending matter to be heard and determined accordingly.
27. Further, the parties were ordered to file their written submissions.

28. This Court on the Hearing date of 22 July 2024 noted that no written submissions were filed by both parties to the proceedings.
29. Both applications were heard together and parties were then directed to file their written submissions to allow this Court to deliver the Decision on the Defendants Summons seeking for leave to extend time to file opposition to the Appellants application on notice.
30. The parties filed their respective written submission on 30 July 2024.
31. In absence of any affidavit in opposition to the application although time and again given further time to file and serve, miserably failed to do so. This meant that the Appellant's Summons seeking for Setting Aside, Stay pending Appeal and other orders went unchallenged.
32. In **Ratnam v Cumarasamy and Another** [1964]:

"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation...."

33. The quote, in **Ratnam vs Cumarasamy and Another [1964] 3 All ER 935** although did not prohibit the enlargement of time, however, enlargement could not be readily granted without any reason, and there must be some material on which the Court can exercise its Discretion. In the current case before me, the Defendant was time and again upon application granted the Extension of time to file and serve their respective Affidavit in Opposition, however, failed to adhere to the Extension granted on at least 3 occasions, rather unnecessarily delaying the Petitioner's Summons to be heard and a decisions delivered. Further, the rules of the Court and the associated rules of practice are there and devised in the public interest to promote the expeditious dispatch of the litigation, and therefore must be seen to be observed and adhered to.
34. On the Defendant's failure to adhere and comply with the Court's directions to file and serve the Defendant's Affidavit in Opposition after 3 extensions and occasions is sufficient reason for this Court to refuse the grant of Extension to file and serve their affidavit in opposition to the Petitioner's Summons of 22 March 2024.
35. For the aforesaid rational, the Defendant's/Appellant's Summons of 12 July 2024 is accordingly dismissed.

The 12th Appellant's/ Plaintiff's Summons of 22 March 2024.

36. Should the Appellants/ Plaintiffs Summons seeking for Setting Aside and/or stay pending the outcome of the Appeal together with other orders enumerated therein be allowed and/or dismissed?

37. The premise on which the Appellant/ Plaintiffs has based his **grounds of Appeal** are summarily as follows:-

- The Question of Law on the Grounds and rational that lead to the Course of Severance of Joint Tenancy to tenancy in common by Common intentions of Defendants, Ram Jas and Ram Baran.
- Creation of Constructive Trust between the Appellants and the Respondents and whether Certificate of Title 21230 was held on Trust? and
- Whether the facts and circumstances together with the conduct of Ram Jas and Ram Baran establishes 'Joint Tenancy' and/or 'a common tenancy'?

The Law

38. *Order 45 Rule 10 of the High Court Rules 1988* deals with stay of execution pending appeal.
39. It empowers this Court to grant stay of execution. However, it is also a Trite Law that an Appeal does not operate as a stay of execution on the decision of the Court below.
40. The duty is on the Appellant to establish that if stay is not granted, the Appeal would be rendered nugatory.
41. The principle relating to stay application is well settled in the case of **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005).
42. The Court of Appeal established the guidelines as to what factors the Court to take into consideration when deciding whether to grant and/or refuse the Stay orders. The Court stated as follows:-
- "On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgement 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 refers.
43. Following are the **list of factors** that ought to be taken into consideration when making a determination on stay of execution of orders-
- (a) Whether if no stay is granted, the Applicants' 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 interest in the proceeding.
- (g) The overall balance of convenience and the status quo.

Factors (a)

44. The Plaintiffs contention is that they have purchased Lot 2 in Certificate of Title No. 21230 and have resided thereon for the past 20 years. According to the Provisional Boundary Agreement for subdivision of Certificate of Title No 21230 whether it constituted a Constructive Trust since Ram Jas's actions has enriched him by monetary value. Whether there was a constructive trust and if it had been forged between the Applicants /Plaintiffs and late Ram Jas is a Legal question for the Court of Appeal to determine. Taking above into consideration, it is only fair that I accede to the grant of Stay of Execution.

Factors (b)

45. The Respondents are the current owners under the Right of survivorship and Section 37 of the Land Transfer Act. The order for stay granted will not in any way deprive the Respondents from enjoying their rights over the lots of their father, Ram Baran. Therefore, the Respondents will not be injuriously affected if stay is granted.

Factors (c)

46. The Appellants Contention is that they have lived on the property (Lot) for about 30 years or so and they have purchased and have developed the property further by carrying out Construction work on the property. Vimal Chand in his affidavit deposed and filed confirms that the Appellant had constructed a four Bedroom large dwelling on the Lot belonging to Late Ram Jas. After completion of the subdivision Lot 2, it was defined as Lot 8, Certificate of Title No. 41523 which is occupied by him and other named Appellants.
47. The question arises whether the Lots allegedly purchased by the Appellants are held in Trust by the Defendants, Sant Ram and Shiu Ram?

Factor (d)

48. The question is whether third parties have been denied and/or deprived of the rights over the property owned by late Ram Jas. I understand that there is an ongoing appeal matter at the Court of Appeal. It is fair that I remain mute on this pending Appeal matter at the current time.

Factor (e)

49. The novelty and importance of questions raised by the Appellants are legal and it will be now appropriate and fair that the Court of Appeal deals with the legality of it since my Judgment has already been delivered in the substantive matter accordingly.

In Conclusion

50. I have considered the Appellants Summons filed on 22 March 2024 coupled with the Written Submissions of both parties to the proceedings seeking for the orders as enumerated at paragraph 1 (i) (a - e) inclusive hereinabove in my judgment.
51. There are legal questions raised herein in the Appellants Grounds of Appeal against the Judgement delivered on 13 February 2024 and are asking for Stay of Execution pending appeal.
52. Taking into consideration the Principal dealing with '**Stay of Execution pending Appeal**' as appeared in the case of **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005), it is only just and fair that I holistically accede to the Appellant's Summons and grant the Orders sought for therein accordingly.

Costs

53. On the issue of costs, I have taken note of the fact that the substantive action was filed on 2015 bearing Case No. HBC 11 of 2015 and due to Interlocutory applications, the substantive matter took some time to be heard and determined on 13 February 2024. All these time, for some 9 - 10 years that the Litigants waited the outcome and the finality of the substantive matter.
54. It is therefore, fair that each party bears their own costs of the proceedings at the discretion of this Honourable Court accordingly.
55. Following are the orders of this Court:

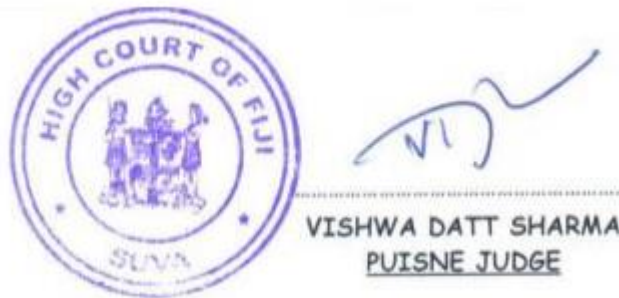
Orders

- (i) The Defendants/ Respondents Summons filed on 12 July 2024 is dismissed in its entirety.
- (ii) The Appellants Summons filed on 22 March 2024 seeking the orders therein are accordingly granted as follows-
 - (a) Stay pending Appeal is hereby granted until the finalization of the Appeal matter.
 - (b) Permanent Injunctive Orders in HBC No. 11 of 2015 of 10th June 2020 to remain in full force until the determination of the Appeal and Respondents (Defendants) are restrained whether by themselves, their agents or servants or whosoever from disposing, or selling or further encumbering or dealing with property comprised and described in Certificate of Title No.

41523 until final determination of the appeal or further order of this Court.

- (c) Orders granted on 20th day of October, 2020 to remain in full force until the determination of the appeal are accordingly granted and to remain intact until finalization of the Appeal.
- (iii) The Respondents (Defendants) are restrained whether by themselves, their agents or servants or whosoever from disposing, or selling or further encumbering or dealing with property comprised and described in Certificate of Title No. 41523 until the final determination of this appeal.
- (iv) Each party to bear their own costs of the proceedings at the discretion of this Honourable Court.

Dated at Suva this 24th day of January ,2025.



cc. Sushil Sharma Lawyers, Labasa
Tikoisuva Law, Suva.