

IN THE SUPREME COURT OF FIJI
ON APPEAL FROM COURT OF APPEAL, FIJI

CIVIL PETITION NO. CBV 019 OF 2018
(Court of Appeal No. ABU 0029 of 2017)

BETWEEN : **BYEONG RAK KWON**
EUI TAE KIM

Petitioners

AND : **PHUL WATI**
NAZIR HUSSAIN
ACTING REGISTRAR OF TITLES
ATTORNEY-GENERAL OF FIJI

Respondents

Coram : **Chandra, RJA**

Counsel : **Mr D P Sharma for the Petitioners**
Mr A Singh and Mr P Niubalavu for 1st Respondent
Mr J Sherani for 3rd and 4th Respondents

Date of Hearing : **20 June, 2019**

Date of Ruling : **30 August, 2019**

RULING

- [1] Pursuant to Section 9, 11 and 14 of the Supreme Court Act, 1998 the Appellants filed a Summons for stay of proceedings and stay of execution pending determination of special leave to appeal on 10th of January 2019.

- [2] The Summons was accompanied by an affidavit in support sworn by Byeong Rak Kwon on 10th January 2019.
- [3] The 1st Respondent filed an answering affidavit sworn on 1st February 2019 to which an affidavit in response sworn by Byeong Rak Kwon on 25th February 2019 was filed on behalf of the Appellants.
- [4] A grant of stay is within the jurisdiction and powers of a single judge to hear and determine (Section 11) of the Supreme Court Act.

The Facts

- [5] The 1st Respondent became the registered owner of the property which is the subject matter of the appeal on the death of her husband in 2000.
- [6] By Power of Attorney No.38808 dated 27th November 2001 1st Respondent appointed her daughter Shabnam Suliman as her Attorney.
- [7] After her husband's death, the 1st Respondent had proceeded to live in New Zealand with her daughter Shabnam.
- [8] The 2nd Respondent had moved to Australia but used to travel to Fiji.
- [9] On 27th March 2006 the 1st Respondent had executed Power of Attorney No.41575 dated 27 March 2006 appointing the 2nd Respondent as her Attorney. The said Power of attorney had been registered on 4 April 2006.
- [10] The 2nd Respondent had entered into a Sale and Purchase Agreement dated 28th April 2006 with the Appellants.
- [11] The Appellants had paid the full price of \$130,000.00 to the 2nd Respondent.
- [12] The 1st Respondent took steps to revoke the Power of Attorney given to the 2nd Respondent by executing a Revocation of the Power of Attorney on 24 April 2006. It had been dated 2 May 2006 the date on which it was lodged with the Registrar of Titles. Since it had some defects it had been returned without registration to the Solicitor Mr. Chandra who attested same.

- [13] On or about the 22 June 2006 the Appellants attempted to register a transfer pursuant to the Power of Attorney in favour of the 2nd Respondent.
- [14] The 3rd Respondent had been advised by the 1st Respondent not to proceed further with the registration.
- [15] The Revocation of Power of Attorney had not been served on the 2nd Respondent.
- [16] The 1st Respondent instituted action to have the transfer of the property to the Appellants declared null and void and for mesne profits of \$1000.00 per month.
- [17] The High Court after trial gave judgment in favour of the Appellants and held that the sale to the Appellant was a valid sale.

Appeal to the Court of Appeal

- [18] On appeal to the Court of Appeal, the High Court Judgment was overturned allowing the appeal, declaring the Power of Attorney No.41575 null and void, the sale and Purchase Agreement and Deed of Transfer in favour of the Appellants null and void, the Appellants to vacate the subject property within three months from the date of the judgment, to pay mesne profits in a sum of \$1000.00 per month from 1st June 2006 until the date on which the property is vacated and costs in a sum of \$5000 and \$2500 as costs in the court below.

Appeal to the Supreme Court

- [19] The Appellants in their application seeking leave to appeal against the judgment of the Court of Appeal set out the following grounds of appeal:

- “(i) That the Order for Mesne Profits made by the Court of Appeal was a serious error of fact and law that the First Respondent was only seeking an Order for the property to remain in her ownership;*
- (ii) The findings of the Court of Appeal relating to the Power of Attorney was contrary to the evidence before the High Court. At the time when the Sale and Purchase Agreement was signed and the transaction completed the 2nd Respondent held a valid power*

of attorney. The Trial Judge in the High Court had made a finding of fact that even as late as 8 September 2006 the 2nd Respondent had still not received any notice of the Revocation of the Power of Attorney. This was confirmed by the fact that the 1st Respondent's letter to the Registrar of Titles had confirmed that they were unable to directly communicate with the 2nd Respondent. However by this time the Petitioners had already paid the purchase price to the 2nd Respondent.

- (iii) The finding of fraud by the Court of Appeal cannot be sustained in this case because Mr. Chandra the Solicitor for the 1st Respondent had prepared the Power of Attorney and admitted that he had acted on her instructions and explained the terms and conditions of the power of attorney to her. In fact it was completely erroneous for the Court of Appeal to hold that the Power of Attorney was fraudulently obtained when in fact it was prepared by the 1st Respondent's own Solicitor on her instructions.*
- (iv) The Court of Appeal erred in fact and in law in impeaching the sale to the Petitioners because if Mr. Chandra was negligent in preparing a general power of attorney then the right of recourse lay with against Mr. Chandra and if the 2nd Respondent had acted contrary to his discussions with the 1st Respondent and had sold the property at an undervalued price then recourse lay against the 2nd Respondent.*
- (v) The Petitioners are innocent victims here in that they purchased the property for value, they paid the money and they have spent thousands of dollars in renovating and repairing the property only to have the Court of Appeal give ownership back to the 1st Respondent. The Petitioners have no right of recourse against the 2nd Respondent who has absconded from Fiji and lives in Australia.*

Application for Stay

- [20] At the hearing of the application for stay, an interim stay was granted pending the ruling regarding the stay application.
- [21] The principles upon which a stay is granted in the Supreme Court were set out in **Stephen Patrick Ward v. Yogesh Chandra** CBV0010 (20 April 2010) by Gates P :

"[4] *The issue for determination is whether the Petitioner's case prior to the hearing is sufficiently exceptional to allow for some interlocutory relief. For at the Supreme Court, that is at final Court of Appeal stage, the hurdles to be overcome for a petitioner seeking special leave are formidable. Sufficiently exceptional may be a stronger test than that favoured in New South Wales where the hurdle was said to be overcome if "the applicant could demonstrate a reason or an appropriate case to warrant the exercise of discretion in its favour": Alexander v. Cambridge Credit Corporation Ltd (1985) 2 NSWLR 685 at p.694; applied in Penrith Whitwater Stadium Ltd & Anor v. Lesvos Pty Ltd & Anor [2007] NSWCA 103."*

[22] In arriving at a decision as to whether the Appellant'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 ABU 0011.04S, 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 [1972] 2 NZLR 41(CA) l.*
- (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."*

[23] It was argued by Counsel for the Appellant:

- "(1) *That there is a far reaching question of law in this case in that the sale of the property was undertaken and completed by a person who held a valid power of attorney at the relevant material when the Sale and Purchase Agreement and Transfer was executed and who had no notice of any revocation of power of attorney.*
- (2) *The Court of Appeal judgment amounted to changing the law to the extent that even though a person may enter into a transaction based on a valid power of attorney that transaction can be set aside just because the person giving the power of attorney comes to court subsequently and says that her instructions to the Attorney were to*

only maintain the property and not sell the same whereas the law in Fiji is set out clearly in s.114 and 115 of the Property Law Act.

- (3) *That there is a further far reaching question of law in this case in that a bona fide purchaser for value against whom there was no finding of fraud by the Trial Court and who has paid the purchase price and spent thousands of dollars to renovate and repair the house is deprived of ownership of the property whilst the person who sold the property under a valid Power of Attorney and the Solicitor who prepared the Power of Attorney are allowed to walk away with total impunity. That such finding of the Court of Appeal goes against statutory law in Fiji, i.e. s.53 of the Property Law Act and s.40 of the Land Transfer Act.*
- (4) *That there has been substantial miscarriage of justice which is contrary to the administration of civil justice in Fiji.*
- (5) *That if the First Respondent had any recourse in this case it ought to have been against her own son and not against the Appellants.*
- (6) *That there would be public interest in this case as it does affect the administration of civil justice in Fiji when a bona fide purchaser is deprived of ownership in a property as was done in this case by the Court of Appeal judgment.*
- (7) *That though there was a claim for mesne profits in the statement of claim of the 1st Respondent when the matter was before the High Court, that claim had been ruled at the summons for directions. The Court of Appeal in spite of this position had ordered the payment of mesne profits."*

[24] Counsel for the Respondent refuted these arguments of the Counsel for the Appellants.

[25] These grounds of appeal will be considered by the Supreme Court when it comes up for consideration of the granting of special leave.

[26] The main consideration in the present application is whether a stay should be granted on the facts deposed in the affidavit of the Appellant which have been challenged by the 1st Respondent.

[27] Considering the principles in **Viti Limited** to consider a stay, firstly whether if stay is not granted whether the Appellant's right of appeal will be rendered nugatory.

- [28] The judgment of the Court of Appeal has granted the 1st Respondent the opportunity of having the Appellants evicted from the property where they have been in occupation since 2006 and which they claim to have renovated over the years at considerable expense. On the other hand the 1st Respondent is residing in New Zealand with her daughter and has been doing so since the death of her husband on or about the year 2000.
- [29] The 1st Respondent has already taken steps to execute the judgment of the Court of Appeal to have the Appellants evicted and to claim the mesne profits granted to her.
- [30] In those circumstances, the Appellants submit that if the execution of the judgment of the Court of Appeal is not stayed and the Appellant is made to pay the mesne profits and also evicted from the premises, it would have the effect of rendering the appeal nugatory.
- [31] It has been submitted on behalf of the 1st Respondent that the none of the grounds adduced by the Appellants would meet the threshold required for the grant of special leave which is fairly high.
- [32] As to whether the grounds of appeal adduced on behalf of the Appellants would reach the high threshold required for special leave cannot be conclusively determined at this stage. This has been an instance where the findings on the primary facts of the High Court have been overturned by the Court of Appeal. As to whether the grounds of appeal meet the threshold required for special leave is a matter that would be decided by the full court of the Supreme Court. What would determine the present application would be the principles set out in the **Viti Limited** decision regarding the granting of a stay.
- [33] It has been submitted on behalf of the Respondents that the 1st Respondent being old and sickly is being denied of the enjoyment of her properties. That the only way to avoid the prejudice to the 1st Respondent is for the Appellants to deposit in Court \$1000.00 per month from 1st May 2006 till the final judgment of the Supreme Court.
- [34] One of the main grounds of appeal urged on behalf of the Appellants is the order regarding the payment of mesne profits. There has been no discussion in the Court of Appeal judgment regarding this aspect and it is only in the orders of the Court it is set out. Although

it has been submitted on behalf of the 1st Respondent that the claim for mesne profits was in the statement of claim, and also deposed to in the affidavit of opposition of the 1st Respondent, it has been pointed out in the submissions of the Appellants, that the claim for mesne profits had been abandoned in the High Court as evidenced by the fact that in the judgment of the High Court, the relief for mesne profits was ruled out at the Summons for directions and that in the judgment of the High Court at paragraph 38 it is stated that the Plaintiff (1st Respondent) is asking for the property to remain in her ownership and a declaration that the transfer by Nazir (2nd Respondent) is null and void.

- [35] The issue therefore regarding the order for mesne profits would be a substantive matter for consideration before the Supreme Court.
- [36] Further, the issues relating to the transfer by the 2nd Respondent as Attorney of the 1st Respondent by virtue of the Power of Attorney given to him and the subsequent revocation of the Power of Attorney are substantive matters that have to be considered by the Supreme Court.
- [37] In view of this position there is a possibility of the appeal being rendered nugatory if a stay of the execution of the judgment of the Court of Appeal is not stayed.
- [38] As to the second principle as to whether the 1st Respondent would be injuriously affected by the stay, the consideration would be the time that would be taken to get the final adjudication from the Supreme Court after the appeal is heard.
- [39] The 1st Respondent has deposed that she has been deprived of occupying the property while at the same it is apparent that she still resides in Auckland as stated in her opposing affidavit. The parties have been adjudicating upon these matters since 2006, and the Appellants have deposed that they would take steps to expedite the appeal and bring it to a hearing as soon as possible.
- [40] In the above circumstances it cannot be said that the 1st Respondent would be injuriously affected by the grant of a stay. I would make an appropriate order regarding the upkeep and maintenance of the property.

- [41] The bona fides of the applicants as to the prosecution of the appeal is the next principle to be considered.
- [42] The Appellants have taken the necessary steps to prosecute their appeal and have also given an undertaking to expedite the hearing of the appeal, therefore the bona fides do not appear to be in doubt.
- [43] As to the next principle relating to the novelty and importance of questions involved, the grounds of appeal adduced on behalf of the Appellants urge that there are far reaching questions of law which arise from the consideration of the granting of powers of Attorney, their revocation and effectiveness of such revocation specially relating to property transactions.
- [44] These questions would necessarily involve the Supreme Court in considering them which may involve far reaching questions of law.
- [45] In as much as the questions raised being far reaching questions of law, they would necessarily be coupled with public interest.
- [46] As to the overall balance of convenience and the status quo, the concerns raised by the Appellants of the danger of their being evicted pending the hearing of the appeal specially when they have been in occupation of the property since 2006 and said to have effected repairs and maintained it in proper condition, while the 1st Respondent is presently living in Auckland with her daughter which she has done since the year 2000, it would not be appropriate to disturb the present position of the parties pending the final outcome in the Supreme Court.
- [47] On an overall consideration of the matters deposed to in the affidavits of the Appellants and the 1st Respondent, the grounds of appeal adduced and the submissions made by both parties and the principles in **Viti Limited** regarding the granting of a stay it is my decision to grant a stay of the execution of the judgment of the Court of Appeal pending the final determination of the appeal by the Supreme Court.

Orders of Court:

- (1) *The application of the Appellants seeking a stay of execution of the Court of Appeal judgment is granted.*
- (2) *The application of the Respondents to have the execution of the judgment of the Court of Appeal is stayed pending the final determination of the appeal by the Supreme Court.*
- (3) *The Appellants are ordered to expedite the hearing of the appeal by taking the necessary steps;*
- (4) *The Appellants are ordered to maintain the property in good order and condition and to refrain from causing any damage to the property that is the subject matter of this action.*
- (5) *Costs in the appeal.*



Suresh Chandra

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL