

IN THE FIJI COURT OF APPEAL  
ON APPEAL FROM THE HIGH COURT OF FIJI AT SUVA

Civil Appeal No: ABU0058 of 2000S

Between: EDWARD RAJENDRA NAGAIYA; and  
SWADESH WATI

Appellants

And: AUSTRALIA & NEW ZEALAND BANKING GROUP LTD.  
Respondent

In Chambers: The Honourable Madam Justice Nazhat Shameem

Hearing: 2<sup>nd</sup> May 2001

Counsel: Mr W. Clarke for Appellants  
No appearance for Respondent

Date of Decision: Friday 4<sup>th</sup> May 2001

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D E C I S I O N

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This is an application for stay of execution of the judgment of Madraiwiwi J of 26<sup>th</sup> April 2001, ordering vacant possession of property at Lease No. 295359, on an application under Order 88 of the High Court Rules. The application is made under section 20(b) and (e) of the Court of Appeal Act Cap 12. An application made by stay of execution of the judgment was made in the High Court before Pathik J on 23<sup>rd</sup> January 2001, and was refused on the same day.

The supporting affidavit of Edward Rajendra Nagaiya sworn on the 12<sup>th</sup> of March 2001, states that he is currently in occupation of the leasehold, that "if the order is executed before the hearing of the appeal then the Plaintiff will immediately complete a sale and purchase of the lease and we will have lost the house totally", and that a refusal of the stay application would render his appeal nugatory. He states further that he has good grounds of appeal and that the appeal is meritorious.

The grounds of appeal are:

1. That the learned Judge erred in law and in fact in holding that the application presented to the court by the Respondent was
  - (a) proper, or
  - (b) complied with the mandatory requirements of the Rules.
2. That the learned Judge erred in law and in fact in holding that the Respondent had the power or authority to bring the application.
3. That the learned Judge erred in law and in fact in holding that the Respondent's application disclosed the proper circumstances giving rise to a right (if the Respondent had one) to possession of the said land.

The principles governing an application for stay of execution of judgment pending appeal are well-settled. The matter is discretionary, and the successful litigant should not lightly be deprived of his success.

Further, the court may consider whether a refusal of the application would render the appeal nugatory, and whether the Appellant would be ruined if the judgment was executed. Finally,

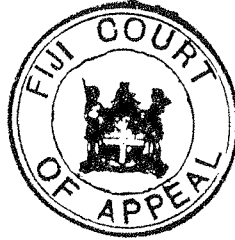
a stay should be refused where the appeal lacks any prospect of success.

The grounds of appeal do not specify which provision of Order 88 was not complied with in the application for vacant possession. However the affidavit of Narendra Kumar sworn on the 18<sup>th</sup> of January 2000 shows that the ANZ Banking Group holds a mortgage (No. 402663 dated 2<sup>nd</sup> September 1996) over the leasehold in question. It shows that the money secured was payable on demand, that demand notices were sent to the Applicant, and that particulars of the accounts as of 15<sup>th</sup> November 1999 for the total sum due of \$54,120.18 as at 18<sup>th</sup> January 2000 was annexed to the affidavit. The affidavit states that the Applicants were in default of payment, and that the rights of the ANZ Bank under the mortgage had become exercisable. The learned judge found that Order 88 had been complied with. On the stay application in the High Court, Pathik J agreed.

In the circumstances I find that there appears to be no merit in this appeal. The grounds are general and uninformative. The affidavit filed by the Applicant, both in the High Court and the Court of Appeal, enlighten me no further.

Even if the appeal appeared to have some merit, this application would have been refused. The Applicant is unable to pay any sum of money into court to protect the rights of the Respondent. He does not deny owing the Respondent money under the mortgage, and despite being given time by Pathik J until the end of February 2001, has not been able to arrange for alternative finance.

For these reasons, this application for stay is refused.



*Nazhat Shameem*  
.....  
Nazhat Shameem  
JUDGE

At Suva  
4<sup>th</sup> May 2001

Solicitors:

Messrs. Jamnadas Clarke & Associates  
Messrs. Kohli & Singh