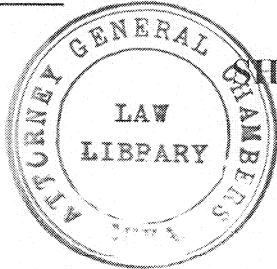


IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0017 OF 2006S
[High Court Civil Action N0: HBC.485 of 2005]

BETWEEN:



SHIU LAL f/n Chotu

Appellant

AND:

JOSEPH RAKESHWAR BHIKAM SINGH
f/n Bhikam Singh

Respondent

A. Singh for the Appellant
V. Maharaj for the Respondent

Hearing: 29 March 2006

Ruling: 5 April 2006

RULING

On 16 December 2005, Coventry J granted an application pursuant to section 169 of the Land Transfer Act, Cap 131 brought by the present respondent. The learned judge made an order for vacant possession and stayed execution until midday on 17 February 2006.

In January 2006, the applicant lodged an appeal against that decision. It was deemed abandoned on 23 February 2006 and reinstated by a fresh notice of appeal on 1 March 2006.

On 10 March 2006, an application for stay pending appeal was heard by Coventry J and, in a ruling on 13 March 2006, he pointed out that, although the earlier stay had expired,

both counsel had agreed that, if the application for a stay were to be refused, the stay should be extended to 22 March in any event to allow an appeal. He concluded:

“Accordingly, I stay the order for vacant possession until 3.00pm on Wednesday 22nd of March. If no appeal has been lodged or all formalities of an appeal complied with, then the stay is removed. If an appeal against this decision had been lodged and the necessary formalities complied with then I order the stay continues until the decision of the appeal court upon this stay application.”

This is the application for a stay pending appeal.

The background to the case is set out in the Judgment.

“The defendant Shiu Lal states that he has been resident on the land since 1942 when he was 4 years old. He is now aged 67 years. His father had been asked by one Ram Singh to farm the property and in exchange he and his family would be entitled to a piece of land on the property which would be 2 of the 24 acres. Since 1953, the defendant says, he has farmed the property. After the death of Ram Singh in or around 1958 he said he does not know what happened to the ownership of the property. He says family members continued to visit the farm ... No one had objected to his presence. ... Shiu Lal states that in 2005 the plaintiff apparently bought the 24 acres. He says that on 30 May in the presence of others the plaintiff agreed to give him a block of land out of the two acres that Ram Singh had promised him.”

The learned judge refused the application to extend the stay because he considered that, “being as objective as I can the chances of appeal being successful are not high”.

The grounds of appeal from the principal order are that the judge did not adequately consider the equitable claims of the appellant to the continued possession of the land, that

he failed to consider the application of ALTA and that he failed to consider the inappropriateness of the summary procedure in such a case.

It appears that the applicant could only assert an oral agreement including the suggested promise to transfer two acres. Although the parties to the original agreement have both since died there has been no attempt to enter a caveat. Without it, the respondent has a good claim to be a bona fide purchaser for value without notice of any other interest. The applicant claims that, as the purchaser is part of the family and received the land in a testamentary settlement, the purchaser clearly would have known of his interest. He further points to the fact that he has built a dwelling on the land with the full knowledge of the owners.

The matters which need to be considered by a judge in deciding whether to grant an application for a stay pending appeal were stated by Thompson J in Krishna Murthi v Atul Patel [2000] Civ App ABU 14 of 2000, 5 May 2000:

“A number of considerations have to be taken into account by a judge exercising his discretion whether or not to grant a stay of execution. Prima facie the party succeeding in the High Court is entitled to enjoy immediately the fruits of his success. However, if an appellant shows that he has a good arguable case to present on the hearing of the appeal and if refusal of the stay will cause detriment to the appellant which cannot be effectively remedied if his appeal succeeded, so that the appeal will be rendered nugatory, it may be appropriate for the discretion to grant a stay of it to be exercised in his favour.”

Mr Maharaj for the respondent points out that the respondent has started to subdivide the land and, if a stay is granted, he will lose financially. If he is then successful in the appeal the applicant will not be able to pay any damages.

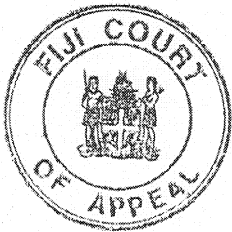
On the other hand, the applicant has built his family home on the land and, if he has to yield vacant possession, will lose that home. However, I am far from satisfied that the

grounds of appeal raise an arguable issue and so, even if a further stay is granted, the applicant will still lose his home. I also note that he has, by his actions been able to hold up execution of this judgment for some time already. It is also apparent that, if the appeal fails, the applicant, on his own account, will have no realistic chance of providing any financial recompense to the respondent. On the other had, if the appeal does succeed, the respondent is clearly able to cover any order for damages that may be made.

In those circumstances, I refuse the application for a stay of execution pending appeal.

The previous order expired on 22 March 2006. I order that the applicant shall surrender vacant possession by noon on Friday 14 April 2006.

I make no order for costs.



Gordon Ward

[GORDON WARD]
President
FIJI COURT OF APPEAL

5th APRIL, 2006