

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

**CIVIL APPEAL NO. ABU 0074 of 2016**  
**High Court No. HBC 149 of 2014**

**BETWEEN** : **EMOSI SILIKIWAI**

*Appellant*

**AND** : **THE ATTORNEY-GENERAL OF FIJI**

*Respondent*

**Coram** : Almeida Guneratne, JA

**Counsel** : Mr K. Maisamoa for the Appellant

Ms S. Ali for the Respondent

**Date of Hearing** : 13 October, 2020

**Date of Ruling** : 6 November, 2020

## **RULING**

- [1] This is a renewed application within time (per Paragraph 1 of Practice Direction No.3 of 2018) for a stay of proceedings, (to be specific), stay of execution of the judgment of the High Court dated 25 April, 2016 pending appeal before the (full) Court of Appeal in pursuance of the jurisdiction vested in me as a Single Judge under Section 20(1)(e) of the Court of Appeal Act (Cap 12).
- [2] At the commencement of the hearing, Ms. Ali raised a preliminary objection to the maintenance of the Appellant's application for the said stay of execution of the High Court Judgment in which regard Ms. Ali for the Respondent drew attention of Court to her written submissions dated 16 September, 2020. Consequently, I granted Ms. Ali pre-audience to be heard.
- [3] Ms. Ali submitted that:- in the present appeal (No. 74/2016) Appellant has failed to have the appeal records lodged and certified by the Registrar and therefore the present appeal must be regarded as "an abandoned appeal" for which Ms. Ali relied on Practice Direction No. 1 of 2019 paragraph 6(1) thereof for the purpose of the present application. I do not think it necessary to refer to the initial appeal bearing No.39/2016 which had been "deemed abandoned."
- [4] As against Ms. Ali's submission, Counsel for the Appellant submitted that, he was awaiting the Judge's notes which was the reason why the records could not be prepared and certified. Counsel was apparently relying on Rule 18(1)(b) of the Act.

### **Determination on the preliminary objection**

- [5] Although the Appellant filed his initial appeal on 3 May, 2016 and therefore well within the period envisaged in Rule 16 of the Court of Appeal Rules, Ms Ali apparently was relying on the provisions of Section 16 read with Rule 17(1)(a)(i) of the Rules, read further with Paragraph 6 of Practice Direction No.1 of 2019.

- [6] I inquired from Learned Counsel for the Appellant whether he had requested the Registrar to give an extension to file the Copy Records. His response thereto was that such a request was made verbally which I found to be anodyne but unacceptable (*vide*: Paragraphs 3 to 6 of Practice Direction No. 5 of 2019).
- [7] In such situations Appellants are well advised to comply with the time limits as referred to at paragraph [5] above and then apply to Court for extension of time to furnish a supplementary record. (See in this connection what I said in **Mohammed Yasad Ali v. Mohammed Wahid Khan & Attorney General**, ABU 102 of 2017, 16 October, 2020.
- [8] In that background I looked at the affidavit dated 26 June, 2019 of Thomas Fesau filed on behalf of the Respondent in opposing the application for a stay. At paragraph 52 thereof it is averred that, *“the appeal application has yet to be put on the Court of Appeal cause list and may be deemed to be abandoned.”*
- [9] That averment does not appear to have considered Section 17 of the Act, that,  
*“Notwithstanding anything hereinbefore contained, the Court of Appeal may entertain an appeal made under the provisions of this Part on any terms which it thinks just.”*
- [10] Apart from the fact that there is an apparent contradiction between the terms of Section 16 (“the Court of Appeal shall not ...”) and Section 17 (“the Court of Appeal may ...”, which is the basis on which the appellant’s appeal has been entertained and I made order on 2<sup>nd</sup> September, 2020 granting him time to file the copy records within two months thereof with whatever documents available with him at the time.
- [11] For the aforesaid reasons I hold that there is a pending appeal before the full Court, the only reason why it has not been placed in the list of appeals being on account of logistical factors that is, not being able to fix dates for hearing before the full Court. Accordingly, I overrule the preliminary objection raised on behalf of the Respondent.

[12] Consequently, I proceed to make my determination as to whether the Appellant has shown sufficient reasons to obtain a stay of execution of the High Court Judgment pending appeal before the full Court.

**Are there sufficient reasons to grant a stay of execution of the impugned judgment of the High Court pending appeal before the full Court?**

[13] Both Mr Maisamoa for the Appellant and Ms Ali for the Respondent relied on virtually the same precedents in their respective efforts. (vide: List of authorities tendered by the respondent and the authorities cited by the Appellant in his written submissions filed on 18 August, 2020.

[14] For my own part, I myself surveyed some other past precedents as well.

**Main principles enunciated and established in past precedents**

[15] The applicable principles have been succinctly enunciated *inter alia* in the Supreme Court decision of **Stephen Patrick Ward v. Yogesh Chandra** CBV 10 of 2010, 20<sup>th</sup> April, 2011 per Gates CJ, **Natural Waters of Viti Ltd v. Crystal Clear Mineral Water** (Fiji) Ltd, ABU 11 of 2004, 18<sup>th</sup> March, 2005 per Calanchini J and **New World Ltd v. Vanualevu Hardware (Fiji) Ltd.** ABU 0076 of 2015, 17<sup>th</sup> December, 2015 per Calanchini, P.

[16] The principles and factors to be considered in regard to the granting of “a stay” I extract with some of my own modifications as follows:

- (i) Whether the appeal would be rendered nugatory if the stay is not granted.
- (ii) Whether the balance of convenience and the competing rights of the parties point to the granting of the stay.
- (iii) The effect on third parties.
- (iv) The novelty and importance of questions in the appeal and having grounds constituting reasonable prospects of success in the “public interest”.

- (v) Having regard to the “status quo” of parties at the point of time “a stay” is sought, the relevance of the conduct of parties through the passage of the antecedent court proceedings which principle I have formulated modified to an extent of what was held in **Singh v. Singh** [2019] FJCA 165, 16 August 2019.
- (vi) Having regard to the aforesaid principles, the granting of a stay pending appeal being a discretionary matter for the Court, in considering and weighing the pros and cons how should this Court exercise that discretion?

### **Application of the said principles to the instant case**

- [17] In regard to principle (i) referred to in paragraph [16] above, I hold that, given the fact that the appellant is liable to be evicted from the land in question in consequence of the High Court Judgment, his contention being that he has been in the land since the year 1985, payment of compensation (as the Respondent contended) would not be an adequate resolution as far as he is concerned.
- [18] On that view of the matter I hold that principle (ii) too stands in favour of the Appellant.
- [19] In regard to principle (iii) recapped above, the appellant has conceded that, no third party would be affected (vide: the Appellant’s written submissions at page 7 thereof).
- [20] In as far as principle (iv) recapped above is concerned, although I cannot say that, *prima facie*, there is some “novelty and an important question as to public interest” is involved nevertheless, having looked at the grounds of appeal urged, I agree with the Appellant’s submissions that, there is a reasonable prospect of success in appeal in as much as the Appeal involves the interpretation of the provisions of *inter alia* the Property Law Act *vis a vis* the State Lands Act taken together with the Appellant’s continued occupation of the land from the year 1985 and Order 111 (of the High Court Rules) procedure was the correct procedure for the Respondent to have invoked.

[21] For the aforesaid reasons that weighed with me I felt *prima facie* that, the Appellant had made out a case for “a stay”.

[22] However, I say *prima facie* because, to hold the scales even I needed to consider principle (v) as well which I formulated.

[23] In the context of the said Principle (v) I took into consideration the following facts *viz*:

- (a) The Appellant’s application for a stay before this Court is a renewed application.
- (b) Order 2 of the High Court Judgment was for the Appellant to hand over vacant possession of the land in question within 30 days.
- (c) The High Court also ordered Costs in a sum of \$1,000.00 against the Appellant.
- (d) The High Court in its subsequent order refusing stay of execution of its judgment ordered \$1,000.00 as well.
- (e) The Appellant has not complied with those Orders.
- (f) On the Respondent’s part, to date, a matter that has been hanging fire from April, 2016) the Respondent had not moved for execution of the impugned judgment of the High Court or the said Court Orders.
- (g) After a wait of four years, it would appear that the Respondent’s patience has run out, perhaps, due to the uncertainty as to when the full Court would be able to hear the Appeal.

[24] In that background discussion I now proceed to consider some, (what I would like to call) derivative principles based on the main principles referred to at paragraph [16] above.

**Derivative Principles in regard to the grant of “stay”**

[25] These derivative principles are:-

- (i) Whether the Appellant’s circumstances are sufficiently exceptional (**Haroon Ali Shah v. The Chief Registrar** [2012] FJCA 101, 3 December, 2012).

- (ii) Strong grounds of appeal do not constitute special circumstances and exceptional chances of success must be established (**Dorsami Naidu v. The Chief Registrar**, ABU 38 of 2010, 2 March, 2011).
- (iii) Arguable case and detriment to the Appellant which cannot be effectively remedied if the appeal succeeds (**Murthi v. Patel** [2000] FJCA 17, 5 May 2000).

[26] I pause at this point to make a few observations.

### **Some interim observations**

[27] The cases referred to above show that there have been different interpretations placed on the circumstances an appellant was required to establish to obtain a stay. Were they strong grounds? Sufficiently exceptional grounds? An arguable case? Exceptional chances of success equated to special circumstances?

[28] Apart from that issue there is the thinking in **Singh v. Singh** [2019] FJCA 165, 16 August, 2019 (supra) where it was said that,

*“[11] It is of course not always necessary to consider all (the) matters as their relevance will often depend upon the nature of the proceedings and the Orders made by the Court below.”* (per Calanchini P.)

[29] Consequently, that case is seen introducing the criterion of “good reasons”.

[30] I myself add the conduct of parties as a relevant factor (*vide*: paragraph 16(v) above and see paragraph [41] in **Mohammed Yasad Ali v. Mohammed Wahid Khan and Attorney General of Fiji** (supra).

### **Reformulation of the core factors to be applied**

[31] In the final result if all matters need not be considered what specific matters need to be considered? Accordingly in my view there are five core and/or mandatory factors to be considered.

- (i) The impact the refusal of a stay may have on an appellant.
- (ii) The competing interests of the parties.
- (iii) The existence of a reasonably arguable case for unlike in an application seeking leave to appeal or leave for extension of time to appeal, the threshold onus ought to be lesser in an application for a stay pending appeal. For that reason I am unable to agree with the view that there should be “exceptional chances of success” to say that there are special circumstances that justify a stay pending appeal for one could easily seek to construe the dicta in **Dorsami Naidu** (supra) to ground such an argument. If that be the case, if a single judge was to decide the matter on that score, then the Single Judge would be virtually deciding the main appeal which is not his task.
- (iv) The conduct of parties from the time of the impugned judgment up to the time of the order made by the Court in respect of the stay order application.
- (v) Taking the said factors (i) to (iv) cumulatively how should this Court exercise its discretion?

#### **Application of the said core factors to the instant case**

[32] I shall consider the said factors and proceed to apply them *seriatim* as follows.

#### **The Impact of a refusal for a Stay may have on the Appellant and reasonable prospects of success in appeal**

[33] I hark back to what I have said at paragraphs [17] and [18] of this Ruling. The Appellant is facing eviction. I also took into consideration what I have stated at Paragraph 31(iii) above. Once the eviction process is completed the Respondent will be free to deal with the property in any way it chooses to do. If the Appellant succeeds in appeal there would be practical difficulties to regain possession.

[34] As against the Appellant’s interest, even after four years, there is the Respondent’s interest to seek execution of the judgment handed down in its favour for the presumed reason I had articulated at paragraph 23(g) of this Ruling.



**The conduct of Parties from the time of the Judgment of the High Court up to the time of the Court made Order in respect of the Stay Order application**

[35] In that regard I go back to what I said and took note of at paragraphs [22] and [23] (b) to (e) of this Ruling.

[36] Learned Counsel for the Appellant had no explanation or excuse to offer in that regard.

**A Court does not act in vain and its orders must be complied with for failure of which dire consequences must and will follow**

[37] That is a note of caution to parties and their lawyers for the future.

[38] Having said that, I come to the last core factor for consideration.

**How should this Court exercise its discretion?**

[39] That discretion both Counsel acknowledged on the basis of the authorities submitted and their respective written and oral submissions.

[40] Thus, directing my mind to the exercise of (judicial) discretion I asked myself the question as to where does the interest of justice lie? What order would be appropriate to make considering the core factors in granting or refusing a stay?

[41] In that regard, I must say I was greatly influenced by the approach in the **New World Limited** case (supra) where his Lordship Calanchini, P. issued a conditional Stay Order.

**Complain but Comply**

[42] When the Appellant appealed the High Court judgment, that constituted his complaint and he was perfectly within his constitutional cum statutory right at the point.

[43] However, he was obliged to comply with the consequential Orders made by Court for Costs (\$1,000) and (\$1,000).

[44] Those Orders were not complied with which Orders were in the nature of the inveterate principle that “costs follow the event”.

### **Determination**

[45] Accordingly, taking what I have extracted and reformulated as being the core factors in the context of granting or refusing a stay of execution of a judgment I proceed to make my orders as follows.

### **Orders of Court**

1. A stay pending appeal is granted subject to the strict condition that the Appellant pays to the Respondent the sum of \$2,000 ordered by the High Court in the two Orders it made within 21 days of this Ruling.
2. Should the Appellant fail to comply with Order 1 above, the application for “the Stay” shall stand dismissed *ipso facto*.
3. The Registrar is prevailed upon to list the appeal on a priority basis as soon as logistical arrangements are made for the Full Court to sit in session.
4. In so far as the present application is concerned I make no order as to Costs taking into consideration the circumstances of this application and the reasons adduced and the grounds urged for the Appeal.



  
Almeida Guncratne  
JUSTICE OF APPEAL