

IN THE HIGH COURT OF FIJIAT SUVA
CIVIL JURISDICTION

Civil Action No.HBC 116 of 2003

BETWEEN : **NASINU LAND PURCHASE AND HOUSING CO-
OPERATIVE SOCIETY LIMITED**

PLAINTIFF/RESPONDENT

AND : **SATYA NAND**

DEFENDANT/APPLICANT

BEFORE : **His Lordship Hon. Justice Kamal Kumar**

COUNSEL : Ms. R. Naidu for the Plaintiff/Respondent
Mr. R. Charan for the Defendant/Applicant

DATE OF JUDGMENT : 29 April 2016

RULING
(Application for Stay of Execution)

1.0 INTRODUCTION

- 1.1 On 21 May 2015, Applicant (Defendant) filed Notice of Motion for Stay of Execution of Judgment delivered on 27 March 2015, pending determination of Civil Appeal No. ABU0024 of 2015 (“**the Application**”).
- 1.2 The Application was called on 3 July 2015, when parties were directed to file Affidavits and the Application was adjourned to 23 July 2015 at 2.30pm, for hearing.
- 1.3 Hearing date of 23 July 2015, was vacated by Court and the Application was listed for hearing on 12 August 2015 at 9.30am.
- 1.4 On 6 August 2015, Notice of Change of Solicitors was filed on behalf of the Applicant.
- 1.5 On 12 August 2015, Applicant’s Counsel applied for adjournment and for leave to file Affidavit in Reply on the grounds that he has to pick Applicant’s file and documents from his previous Solicitor.
- 1.6 Application for adjournment was objected to by Respondent’s Counsel.
- 1.7 Court adjourned the hearing of the Application to 24 September 2015, at 2.30pm, granted Applicant leave to file Affidavit in Reply by 26 August 2015, and directed parties to file Submissions by 16 September 2015.
- 1.8 On 24 September 2015, another Counsel from Applicant’s Solicitors firm appeared and applied for adjournment on the ground that his office is yet to receive Applicant’s file from his previous Solicitors, which application was objected to by the Respondent’s Counsel.
- 1.9 After much deliberation it was agreed by Counsel that hearing date be vacated and ruling be delivered on the basis of Submissions to be filed by the parties.
- 1.10 Applicant was then directed to file and serve Affidavit in Reply and Submissions by 8 October 2015, whilst Respondent was directed to file and serve Submissions by 16 October 2015, with Applicant having right to file Submission in Reply by 23 October 2015.
- 1.11 Applicant and Respondent filed Submissions on 8 October 2015, and 14 October 2015, respectively.

1.12 Following Affidavits were filed by the parties:-

For Applicant

- (i) Affidavit in Support of Applicant sworn on 19 May 2015 (“**Applicant’s 1st Affidavit**”);
- (ii) Affidavit in Reply of Applicant sworn on 8 October 2015 (“**Applicant’s 2nd Affidavit**”).

For Respondent

Affidavit in Opposition of Muni Deo sworn on 20 July 2015 (“**Deo’s Affidavit**”).

2.0 CHRONOLOGY OF EVENTS

2.1 On 25 March 2003, Plaintiff filed Writ of Summon and Statement of Claim seeking vacant possession of property known as Lot 10 on DP 5069 comprised and described in Certificate of Title No. 31375 and costs.

2.2 By Amended Statement of Defence and Counter-claim filed by Defendant on 31 October 2007, Defendant sought following relief:-

- “(a) That the Plaintiff’s claim for Vacant Possession from Lot 10 on DP 5069 contained in Certificate of Title No. 31375 against the Defendant be Dismissed forthwith;*
- (b) An Order that the Plaintiff does convey and complete transfer of Lot 10 on DP 5069 contained in Certificate of Title No. 31375 to Raj Pati absolutely;*
- (c) That the defendant has a right to possession, occupation and usage of the subject property;*
- (d) Costs on an indemnity basis;*
- (e) Any other or such relief that this Honorable Court may deem Just and expedient.”*

2.3 This matter was first set down for trial on 3rd and 4th August 2009, before his Lordship Justice Inoke (as he then was).

- 2.4 The trial dates were vacated and this matter was next called on 18 February 2011, before his Lordship Justice Calanchini when this matter was adjourned to 4th to 6th July 2011, for trial.
- 2.5 Trial dates were vacated on Defendant's application.
- 2.6 Thereafter, nothing eventuated and on 10 February 2012, Plaintiff's Solicitors filed Notice of Intention to Proceed after they were served with Show Cause Notice under Order 25 Rule 9 of High Court Rules.
- 2.7 There is no file note as to the outcome of Show Cause Notice but on 9 August 2012, Plaintiff filed Order 34 Summons which was called on 21 September 2012, before his Lordship Justice Balapatabendi (as he then was) when this matter was adjourned to 28 September 2012, and then to 8 October 2012, due to non-appearance of Defendant's Counsel on both occasions.
- 2.8 On 8 October 2012, this matter was listed for trial on 27, 28 and 29 May 2013 before his Lordship Justice Balapatabendi (as he then was).
- 2.9 Above trial dates were vacated and on 10 May 2013, this matter was set down for trial on 25 and 26 September 2013.
- 2.10 This matter was called before me on 8 August 2013 when trial dates of 25 and 26 September 2013 were confirmed.
- 2.11 On 25 September 2013, Mr. Ram Chand, Counsel for the Defendant informed Court that he is no longer acting for the Defendant and Mr. Anand K. Singh has taken over the brief for the Defendant.
- 2.12 Mr. Singh then informed Court that the Notice of Change of Solicitors is ready for filing and that when he took over the brief he had another criminal matter listed for trial on this day and also he was sick and applied for adjournment. The letter produced from the hospital only stated that he was admitted for tests and check.
- 2.13 I refused Application for adjournment on following grounds:-
- (i) Mr. Singh should not have agreed to appear for the Defendant when he knew that he will not be able to conduct the trial because of prior engagement;

- (ii) The reason for Mr. Singh's admission at the hospital for tests and checks only was not sufficient to grant an adjournment.
- 2.14 This matter was then stood down for an hour for Counsel to get prepared for the trial.
- 2.15 When this matter resumed at 11.15am Mr. Singh had not filed Notice of Change of Solicitors but handed it to Court.
- 2.16 Mr. Singh informed the Court that after perusing the documents he had spoken to Plaintiff's Counsel as he was of the view that this matter should be settled which was confirmed by Plaintiff's Counsel.
- 2.17 This matter was then adjourned to 14 and 15 October 2013, for trial if it was not settled by then.
- 2.18 On 14 October 2013, Defendant's Counsel again applied for adjournment on the pretext of settlement which application was refused and trial proceeded at 11.30am.
- 2.19 At completion of trial, both parties were directed to file their submissions, which they did.

3.0 BACKGROUND FACTS

- 3.1 Respondent is a Co-operative Society.
- 3.2 Respondent was the registered proprietor of all that land comprised in Certificate of Title No. 12648.
- 3.3 Land subject to Certificate of Title No. 12648 was subdivided by Respondent for the benefit of its members and individual lots were to be transferred to individual members upon payment of their shares.
- 3.4 The subdivided lots were subject to Deposited Plan No. 5069.
- 3.5 Mr. Deo Dutt Bidesi was a shareholder and member of the Co-operative Society as at 31st day of December 1984 and by virtue of that membership, the lot 10 was allotted to him. Mr Deo Dutt Bidesi died on the 8th day of October 1971.

- 3.6 The Respondent was advised by Messrs Maharaj Chandra & Associates that Mani Ram Bidesi son of late Deo Dutt Bidesi inherited all the properties of the deceased.
- 3.7 Ms. Sumintra Devi wife of Mani Ram Bidesi occupied the subject property prior to migrating to Canada. By virtue of her residence in Canada she did not qualify to become a member of the Respondent.
- 3.8 Applicant was duly appointed Attorney of Raj Pati by virtue of Power of Attorney No. 47723 which lapsed on death of Raj Pati in the year 2011.
- 3.9 Respondent was at all material time and still is the registered proprietor of that land known as Lot 10 on Deposited Plan No. 5069 comprised and described in Certificate of Title No. 31375.

4.0 APPLICATION FOR STAY OF EXECUTION

- 4.1 As per the Notice of Motion, Applicant stated that the Application is made pursuant to Order 26 Rule 3 of the Fiji Court of Appeal Rules and Order 59 Rule 8 of the High Court Rules.
- 4.2 Order 59 Rule 8 of High Court Rules deals with Appeals from Master of the Court to a single judge of the High Court.
- 4.3 The judgment in this matter was not delivered by the Master of the Court and as such Order 59 Rule 8 of High Court Rules does not apply.
- 4.4 It is noted with regret that Legal Practitioners fail to read and understand the rules before filing applications in Court.
- 4.5 Court of Appeal Act and Rules deal with appeals from Judges decision to Fiji Court of Appeal.
- 4.6 It is not disputed that this Court has unfettered discretion as to whether to stay execution of the Judgment or not, which discretion however is to be exercised judicially and in the interest of justice depending on circumstances of each case.
- 4.7 In **Chand v. Lata** [2008] FJHC; Civil Action No. 38 of 2011 (18 July 2008) the Court identified the principles governing stay of execution as follows:-

- “1. The grant or refusal of a stay is a discretionary matter for the Court: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **AG v. Emberson** (1889) 24 QBVC, at 58, 59;
2. The Court does not make a practice of depriving a successful litigant of the fruits of litigation by locking up funds to which prima facie the litigant is entitled, pending an appeal: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing Supreme Court Practice 1979, p.909; **The Annot Lyle** (1886) 11 PD, at 116(CA); **Monk v. Bartram** (1891) 1 QBV346;
3. When a party is appealing, exercising an undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **Wilson v. Church** (No. 2)(1879) 12 ChD, at 456, 459 (CA);
4. If there is a risk that the appeal will prove abortive if successful and a stay is not granted the Court will ordinarily exercise its discretion in favour of granting a stay: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **Scarborough v. Lew’s Junction Stores Pty Ltd** (1963) VR 129, at 130;
5. In exercising its discretion the Court will weigh consideration such as balance of convenience and the competing rights of the parties before it: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **AG v. Emberson**;
6. A stay will be granted where the special circumstances of the case so require, that is, they justify departure from the ordinary rule that a successful litigant is entitled to the fruits of the litigation pending the determination of any appeal: **Prasad v. Prasad** [1997] FJHC 30; HBC0307d.96s (6 March 1997), citing **Annot Lyle** (1886) 11 PD 114, at 116; **Scarborough v. Lew’s Junction Stores Pty Ltd** (1963) VR 129, at 130; and see also **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**;

7. *As a general rule, the only ground for a stay of execution is an Affidavit showing that if the damages and the costs were paid there is not reasonable probability of getting them back if the appeal succeeds: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **Atkins v. GW Ry** (1886) 2 TLW 400;*
8. *Where there is a risk that a stay is granted and the assets of the Applicant will be disposed of, the Court may, in the exercise of its discretion, refuse the application: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**”*

4.8 In **Natural Water of Fiji Limited v. Crystal Clear Mineral Water (Fiji) Limited** [2005] FJCA 13 ABU0011.2004S (18 March 2005) Fiji Court of Appeal stated as follows:-

*“The following non-comprehensive list of factors conventionally taken into account by a court in considering a stay emerge from **Dymocks Franchise Systems (SW) Pty Ltd v. Bilgola Enterprises Ltd** (1999) 13PRNZ 48, at p.50 and **Area One Consortium Ltd v. Treaty of Waitangi Fisheries Commission** (1993) 7PRNZ 2000:*

- (a) *Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). **Phillip Morris (NZ) Ltd v. Liggett & Myers Tobacco Co (NZ) Ltd** [1977] 2NZLR 41 (CA);*
- (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.*

4.9 In **Murthi v. Patel** [2000] FJCA 17; ABU0014.2000S (5 May 2000) his Lordship Justice Ian Thomson JA (as he then was) stated as follows:-

“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 any 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 succeeds, so that the appeal will be rendered nugatory, it may be appropriate for the discretion to grant a stay to be exercised in his favor.”

- 4.10 Before I proceed any further, I take note of Respondent’s Submission that Applicant has failed to annex the Grounds of Appeal filed in Fiji Court of Appeal to the Affidavit in Support.
- 4.11 I fail to understand, as to why the Applicant has failed to do so when he filed two Affidavits in respect to the Application.
- 4.12 Failure to annex Grounds of Appeal affects the Court’s ability to exercise its discretion justifiably. I will proceed to deal with the Application because the grounds of appeal had been filed and Respondent will not be prejudiced in any way.

Whether Applicant’s Right of Appeal will be rendered nugatory if Stay is not granted

- 4.13 It is not disputed that Applicant is in occupation of the subject property and if Stay is not granted the Respondent may evict Respondent and deal with the property as it wishes.
- 4.14 However, since Respondent commenced proceeding in 2003, which was determined only last year, I do not think it will be that seriously affected if the appeal is heard during the Court of Appeal session this year.

Bona fides of Applicant as to Prosecution of Appeal

- 4.15 I have perused Court of Appeal file and note that the Applicant so far has prosecuted the Appeal diligently having paid security for costs and is currently waiting for Court transcript to attend to copy records.

Effect on Third Parties

4.16 There is no evidence that if Stay is not granted any third parties will be affected.

Novelty and Importance of Question Involved

4.17 I agree with Respondent's Submission that the question determined by this Court and to be determined by Fiji Court of Appeal is not novel.

Public Interest

4.18 I also agree with Respondent's Submission that there is no public interest in this matter.

Balance of Convenience and Status Quo

4.19 In assessing balance of convenience I take following factors into consideration:-

- (i) Respondent is a Co-operative Society and is registered proprietor of the subject property;
- (ii) Deo Dutt Bidesi ("Bidesi") was a member of Respondent but did not fully pay his share as a member as stated at paragraph 6.1(ix) of the Judgment and as such the subject property was not transferred to him;
This answers ground 4 of the Appeal in that if subject property was not transferred to Bidesi because he did not pay his share, then how the subject property could be transferred to Raj Pati, the Administratrix of Bidesi.
- (iii) After Bidesi died his son Mani Ram and Mani Ram's wife Sumintra Devi occupied the subject property;
- (iv) After Mani Ram (son) died his wife Sumintra occupied the property and subsequently migrated;
- (v) Applicant gave evidence that he purchased the property from Sumintra but no evidence was provided to Court;
- (vi) Respondent provided evidence that it paid Sumintra \$21,000.00 as compensation for the improvements on the subject property in consideration of which Sumintra renounced her interest in the subject property in favor of the Respondent;

- (vii) Applicant was never a member of the Respondent society;
- (viii) Applicant in his evidence in chief during trial (15 October 2015) stated that he spent \$120,000.00 on the subject property (paragraph 6.2(iv) of the Judgment);
- (ix) However at paragraph 7(E) of Applicant's 1st Affidavit he states that upto swearing date of the Affidavit he spent \$235,000.00 without any evidence;
- (x) I have no doubt that Respondent will be able to compensate Applicant if stay is not granted and Applicant succeeds in his appeal but am doubtful if Applicant will be able to compensate Respondent for any loss suffered by the Respondent if Applicant's appeal will be unsuccessful.
- (xi) Applicant was at the date of trial and still is in occupation of the subject property.

4.20 Applicant is challenging the finding of facts in the Judgment which was based on evidence produced in Court both Oral and documentary and demeanor of witness.

5.0 CONCLUSION

5.1 Even though most factors including balance of convenience favour the Respondent, I will grant stay of execution of the Judgment to maintain the status quo which is that Applicant is currently in occupation of the subject property.

Costs


5.2 I have taken into consideration that the Stay Application was set down for hearing twice, and on both occasions Applicant was not ready to proceed. Parties should take note that when any matter is set down for hearing the Counsel for the parties prepare for the hearing. I do take into consideration that parties filed Submissions.

Orders

5.3 I make following Orders:-

- (i) Execution of Judgment delivered on 27 March 2015, be stayed pending determination of the Civil Appeal No. 24 of 2015 by Fiji Court of Appeal or the said Appeal being withdrawn or abandoned;
- (ii) Applicant do pay Respondent's costs assessed in the sum of \$1,500.00 within fourteen (14) days of this Ruling.




K. Kumar
JUDGE

At Suva

29 April 2016

Aman Ravindra Singh Lawyers for the Applicant/Defendant
Sherani & Co. for the Respondent/Plaintiff