

IN THE HIGH COURT OF FIJI  
AT LABASA  
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 21 OF 2013

BETWEEN: MOHAMMED WAHID KHAN

PLAINTIFF

AND: MOHAMMED YASAD ALI

DEFENDANT

Appearance : Mr. A .Sen for the Plaintiff  
Mr. K. Ratule for the Defendant

Date of Hearing : 9<sup>th</sup> June, 2016

Date of Judgment : 10<sup>th</sup> June, 2016

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## JUDGMENT

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### Introduction

[1] This is the application of the Defendant for a stay of the proceedings pending determination of preliminary issue of limitation on an intentional harm in terms of the

Limitation Act (Cap 35) by the Fiji Court of Appeal. The preliminary issue was determined prior to the trial, in terms of Order 33 of the High Court Rules of 1988 before the Master. Though there is summons for directions filed as far as 22<sup>nd</sup> November, 2013 there are no steps taken on that directions due to filing of Order 33 summons to determine the preliminary matter. The Master held the issue in favour of the Defendant and held that the matter was already outside the time period in the Limitation Act (Cap 35). This was appealed to the judge and the appeal was allowed by the judge. The Defendant had filed a purported appeal against that decision to the Court of Appeal. I used the words purported as no leave was sought for the said appeal.

### Analysis

[2] In *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (18 March 2005) the Fiji Court of Appeal held the factors for determination of the stay in the following manner;

#### *'Principles on a stay application*

*[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005):*

*"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful": Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.*

*The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13 PRNZ 48, at p 50 and Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200:*

*(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 [1977] 2 NZLR 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.”*

- [3] The above list is not comprehensive and in granting a stay the court should also consider factors that are peculiar to a particular matter. The grant of stay is a discretionary remedy and though case law provide some guidance each case has to be assessed individually and overall balance of convenience should consider these factors.
- [4] The Defendant is seeking a stay of the action till the final determination of the purported appeal filed in the Court of Appeal, without seeking leave.
- [5] The decision of the Master was relating to an application made in terms of Order 33 of the High Court , made by the Defendant regarding interpretation of Section 4 (1)(i)of the Limitation Act (Cap 35).
- [6] So this is an appeal from an interlocutory decision. This position was admitted by the parties by their conduct in Ruling delivered on 14<sup>th</sup> October, 2014 where the appeal which was filed against the Master was dismissed for want of seeking leave of this court, on that basis that it was an interlocutory decision. Subsequently, the Plaintiff sought extension of time and leave, on the basis that the appeal was interlocutory and this decision was delivered on 11<sup>th</sup> June, 2015. So, by conduct, both parties are estopped from deviating that the decision which is the subject of the purported Appeal is interlocutory matter.

- [7] Surprisingly, the Defendant had taken the position that the Appeal was not interlocutory and had referred a recent decision of the Court of Appeal, which I would deal later. It is settled law in Fiji that the approach is the 'Application Approach' and that in this case the application was by way of summons for determination of a preliminary issue of interpretation, hence the decision of the Master was an interlocutory decision and this would not change its character in the appeal before the judge.
- [8] So, the Defendant was required to obtain leave to appeal and there is no right of appeal. There is no issue in this case that the said determinations by Master as well as the judge on appeal are interlocutory.
- [9] In Fiji Court of Appeal decision Lakshman v Estate Management Services Ltd [2015] FJCA 26; ABU14.2012 (decided on 27 February 2015)(unreported) Calanchini P held,

*'[5] The Appellant, being dissatisfied with the decision of the single judge of the High Court sought to appeal that decision to the Court of Appeal. The Appellant filed its notice of appeal on 13 March 2012 and was as a result within the time required by Rule 16 (a) of the Court of Appeal Rules (the Rules) (i.e. 21 days from the date of pronouncement). The appeal activated two requirements that are specified in section 12 of the Act. The first is that because the judgment in the High Court is interlocutory, leave is required under section 12 (2) (f). The second is that since the decision of the High Court judge was given in the exercise of the appellate jurisdiction of the High Court, the right to appeal to the Court of Appeal is restricted to any ground of appeal that involves a question of law only. In Kaur -v- Singh (unreported ABU 11 of 1998; 13 August 1999) this Court observed that:*

*"Section 12(1) (c) of the Court of Appeal Act confers a right to appeal to this Court from a decision of the High Court in the exercise of its appellate jurisdiction on grounds which involve a question of law only but this right is subject to subsection (2). Section 12 (2) (f) provides that, subject to presently irrelevant exceptions, there shall be no appeal from an interlocutory order of the High Court except by leave."*

*[6] The effect of these two provisions is that there is no right to appeal against an interlocutory judgment of the High Court unless leave is obtained and one of the matters that must be determined when*

*considering leave, in the case of any judgment given by the High Court in the exercise of its appellate jurisdiction, is whether any ground of appeal involves a question of law only.'*

- [10] The Defendant had filed an appeal without seeking leave. Fiji Court of Appeal in appropriate cases where the Appeals were filed without seeking leave, considered leave and the appeal together. (See the Fiji Court of Appeal cases *Lakshman v Estate Management Services Ltd* [2015] FJCA 26; ABU14.2012 (27 February 2015); *Kaur -v- Singh* (unreported ABU 11 of 1998; 13 August 1999).
- [11] So, merely because the Defendant had failed to obtain leave would not be determinative factor in the grant or refusal of stay.
- [12] The Defendant had relied on single judge decision of the Fiji Court of Appeal in *Stephens v Nunnink* [2016] FJCA 11; ABU75.2014 (26 February 2016). It should be noted that none of the Fiji Court of Appeal cases cited above were mentioned in that case. (i.e. *Lakshman v Estate Management Services Ltd* [2015] FJCA 26; ABU14.2012 (27 February 2015); *Kaur -v- Singh* (unreported ABU 11 of 1998; 13 August 1999). In any event I am bound by the three judge decision of Fiji Court of Appeal in *Gounder v Minister of Health* [2008] FJCA 40 which was also affirmed as recently as in *Lakshman v Estate Management Services Ltd* [2015] FJCA 26; ABU14.2012 (27 February 2015)
- [13] The Plaintiff filed the action claiming damages for intentional assault and admittedly it was outside 3 year limitation period that applies to causes of action relating to negligence, nuisance etc. The interpretation of the Section 4 (1) (i) of the Limitation Act had created some confusion among the legal fraternity. A similar provision, though not identical, found in UK had also created much confusion in UK and perhaps in the commonwealth jurisdictions where the UK laws have a persuasive power, but it is the courts structure in Fiji that we are bound to follow.

- [14] Though the provision of law is not identical the language and the meaning of the said provision in UK law and Fiji the counsel could not distinguish them to give a deferent meaning. The counsel for the Plaintiff said the Stubblings v. Webb[1993] A.C. 498 had considered extrinsic materials hence should not be followed in Fiji. In my judgment the issue is not what was considered or whether we should follow Stubblings v. Webb[1993] A.C. 498 but more importantly, what is the legal meaning that Court of Appeal would give after consideration of the said cases, and this had already being considered in Fiji Court of Appeal.
- [15] In Fiji the Court of Appeal in Maloney v Tam [1997] FJCA 34; Abu0002u.97s (27 August 1997) having considered two of the conflicting UK decisions namely, Letang v. Cooper[1965] 1 QB 232 and Stubblings v. Webb[1993] A.C. 498 held that:

*'We have come to the conclusion, therefore, that we must interpret proviso (i) to section 4(1) using Letang and Stubblings (to the extent that the judgment does not depend on the use of extrinsic materials) as assistance but without being bound to follow either. We must also take into account the inclusion in the Act of section 3 and the reference in it to "certain actions in respect of personal injuries".*

*Mr Greenwood submitted that "certain" in section 3 of the Act bears the meaning which it does in the phrase "a certain John Doe". We do not agree. In our view it clearly means "some" as distinct from "all". That being so, it is not possible to interpret "breach of duty" in proviso (i) to section 4(1) in a way which results in the proviso applying to all actions for damages for personal injuries, as was done in Letang. We readily accept that the phrase should be construed as bearing its natural meaning, if that is possible and does not result in absurdity or conflict with another provision of the Act. However, the natural meaning of any expression used in a statute is to be ascertained by reference to the context in which it is used. In proviso (i) it is used in a context in which clearly it cannot bear its broadest meaning of breach of any possible duty, as that would lead to all actions for damages in respect of personal injuries coming within its terms. That is a meaning which it cannot bear in the context*

- [16] The Plaintiff has filed this action on the basis of the prevailing law as stated in the Court of Appeal decision and the decision of the Master did not follow the prevailing position, but the judge of the High Court allowed the appeal and in the said decision, Fiji Court of Appeal decision Maloney v Tam [1997] FJCA 34; Abu0002u.97s (27 August 1997) was followed.
- [17] The one grievance of the Defendant is that the judge did not remit the matter to Court of Appeal directly without any determination as the High Court is bound by a decision of the Court of Appeal. But my duty is not to see the appropriateness of the actions of the judge. The Court of Appeal in Maloney (supra) had considered both decisions and had come to a decision. The Defendant is not precluded from arguing his case in the Court of Appeal, but he cannot prevent the Plaintiff from proceeding with his case on the prevailing settled law in Fiji, on the basis that he preferred a different meaning.
- [18] The contention of the Defendant is that said Court of Appeal decision should not be followed for determination of limitation in terms of Section 4 of the Limitation Act. The determination of limitation is an important issue that finally determines rights of the parties to redress to court. So any uncertainty in this regard is not a healthy situation and it is also not proper to delay litigation, because there is a different interpretation given elsewhere when that that contention had already been considered by the Fiji Court of Appeal.

**Whether, if stay is not granted, the applicant's right of appeal will be rendered nugatory?**

- [19] There is no right of appeal in this case matter to the Court of Appeal and the right of appeal is subject to obtaining leave. The leave had not been obtained, but more importantly if no stay is granted his rights are not violated as the matter will proceed to trial. The Defendant has to face the trial and his purported appeal would not be a nugatory as decision of it could be applied to the said case at any stage.

**Whether the successful party will be injuriously affected by the stay**

- [20] The Plaintiff had filed this action seeking damages on the prevailing law. In the appeal before the judge he was successful. He is entitled to proceed with his action without inordinate delay. This action was instituted in 2013 and already 3 years had lapsed. He is over 60 years of age and the incident happened in 2008 and with advancing age and also with time his memory can fade. So there is an injury to the Plaintiff if the stay is granted.

**The Bona fides of the application as to the prosecution of the appeal**

- [21] Though there is a different opinion in other jurisdiction, when that is already considered by Fiji Court of Appeal arguing the same matter further in lower court is not strictly prohibited, and cannot be considered as lack of bona fide. By the same token, it should not be an obstacle to the proceedings of the court as due process will always take care of such arguments. So, I am not inclined to say the Appeal lacked bona fide, but I would not grant a stay on that ground in the Defendant's favour considering that the law is settled in Fiji and there is no proper Appeal as no leave was sought.

**Effect on third parties- the effect is less in this matter**

- [22] The novelty and importance of questions involved - there is no novelty as Fiji Court of Appeal had already considered this judgment that the Defendant is relying.
- [23] The Public interest in the proceeding - there is no public interest in this proceeding as the parties are individuals, but there will be an impact on others, as this relate to limitation of actions.



### The overall balance of convenience and status quo

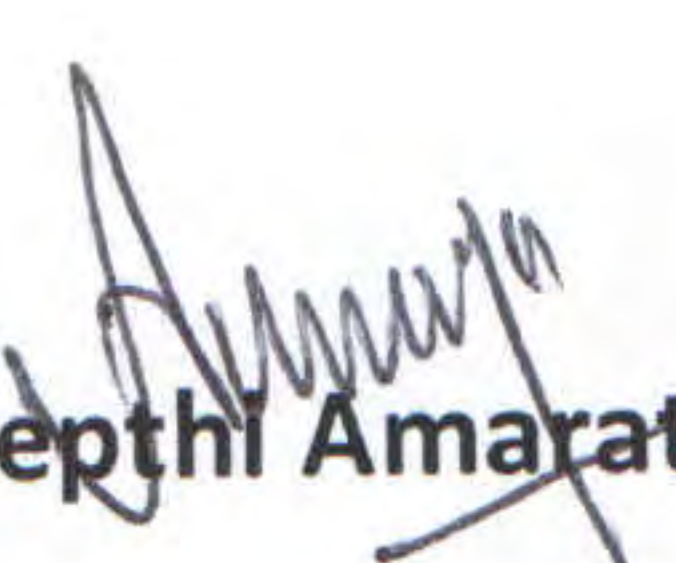
[24] The balance of convenience lies with the Plaintiff as he awaits determination of his rights by the court. He had filed the summons for direction in 2013 and awaits for hearing. This is fairly an old matter for determination considering the progress of case management, too. There is less inconvenience to the Defendant as the proceeding to action cannot be considered as inconvenience. The Plaintiff is waiting for his trial but nothing had progressed since 2013 as regards to his summons seeking for directions. The Defendant seeks to change the existing law and the Plaintiff cannot be asked to wait till he exhaust all his avenues up to the Supreme Court.

### Conclusion

[25] Considering all the factors in the exercise of my discretion, I refuse to grant stay of the proceedings in this matter. The matter is adjourned before the Master for directions. The cost of this application is summarily assessed at \$500.

### Final Orders

- [26] a. The Notice of Motion seeking stay of proceeding is struck off.  
b. The cost of this application is summarily assessed as \$500.

  
Deepthi Amaratunga  
Judge

