

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 13 OF 2017

IN THE MATTER of an application under Order 113 for an order for immediate vacant possession.

BETWEEN : **AISAKE RAVUTUBANANITU** of Tagitaginatua, Tavua, Businessman.

PLAINTIFF/RESPONDENT

A N D : **BASKARAN NAIR** of Koronisalusalu, Tavua, Driver.

DEFENDANT/APPLICANT

Appearances : Mr N. Padarath for Plaintiff

Non-appearance for Defendant

Date of Hearing : 03 March 2017

Date of Ruling : 03 March 2017

R U L I N G

1. This is an application to stay of the execution of the Master's order of 27 February 2017 delivered *ex parte* in an application made under Order 113 of the High Court Rules for an order for immediate vacant possession. By his order the Master granted vacant possession of the land in question to the plaintiff, the respondent in these proceedings. On the strength of the *ex parte* order, the respondent has served a writ of execution on the Defendant, the applicant in these proceedings.

2. The applicant has filed a setting aside application together with a supporting affidavit. That application is before the Master for hearing and determination.
3. As the writ of execution is served on the defendant, I am satisfied that there is urgency in this matter.
4. In the affidavit in support, the applicant explains the circumstances which led to his default on the day (27 February 2017) when the matter was first called on. He states that he was 10 minutes late to arrive at the court due to the traffic he encountered from Drasa to Lautoka City. He further states that he and his wife left Tavua at 6.45am in express Bus to reach Lautoka on time and that by the time he reached the court house the case was called on and an *ex parte* order made against him.
5. The applicant, as part of his proposed defence to the application for vacant possession, states that he has been living on the land for the past 59 years, which is even before the lease was issued to the respondent. It is also one of the proposed defences that the applicant is occupying on a different land, and not on the plaintiff's land and that his right of occupation came through an agreement.
6. The appeal court also has a discretion to suspend an order for possession pending the appeal (see: *Admiral Taverns (Cygnet) Ltd v Daniel* [2008] EWHC 1688 (QB), [2008] NPC 86).
7. The court has an unfettered discretion to impose a stay of execution if the justice of the case so demands (see: *BMW AG v Commissioners of HM Revenue and Customs* [2008] EWCA Civ 1028, LTL 7/10/2008).
8. Apparently, the court has a discretion to impose a stay on enforcement of an *ex parte* order pending the setting aside application.

9. It is to be noted that there is no third party involved in these proceedings.
10. I find that evidence in support of the application for stay to be full, frank and clear. The applicant is in occupation of the land for more than 59 years. If a stay is not granted, the setting aside application will be stifled. The balance of convenience favours the grant of a stay of execution and the respondent will not be prejudiced by the stay given the long occupation of the applicant.
11. I therefore, having considered the application, the supporting affidavit, the documents annexed to the affidavit and submissions advanced in court by counsel for the applicant, grant a stay of the execution of the Master's *ex parte* order made on 27 February 2017 pending determination of the setting aside application.

M H Mohamed Ajmeer
..... 3/3/17

M H Mohamed Ajmeer

JUDGE

At Lautoka

3 March 2017

