

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL CASE NO: HBC 79 OF 2006LAB

BETWEEN: FRED WEHREBERG OF NISUSU ISLAND

PLAINTIFF

AND: SEKAIA SULUKA DC 1380 CRIME OFFICER RAKIRAKI

1ST DEFENDANT

TAUVOLI POLICE OFFICER RAKIRAKI

2ND DEFENDANT

EPARAMA CPL 248 POLICE OFFICER RAKIRAKI

3RD DEFENDANT

COMMISSIONER OF POLICE SUVA

4TH DEFENDANT

THE ATTORNEY GENERAL AND MINISTER FOR JUSTICE
OF THE GOVERNMENT OF FIJI, SUVA

5TH DEFENDANT

Appearance : Plaintiff In person
Mr. J Pickering for the Defendants

Hearing : 12 February, 2018

Judgment : 16 February, 2018

JUDGMENT

Introduction

1. The Plaintiff filed a Motion on 21st August, 2017, seeking stay of the proceeding until the final determination of Plaintiff's leave to appeal in Court of Appeal. This leave to appeal was sought from an interlocutory decision of this court delivered on 27th February, 2017. The judge had also refused leave to the Court of Appeal and had also granted a cost to the Defendants, and this

decision was delivered on 3rd August, 2017. The Plaintiff also seeks to stay the said order for costs. At the hearing of this motion seeking stay of the proceedings both parties admitted that the Court of Appeal is yet to assign a date for the hearing of the application seeking leave to appeal against the interlocutory decision of this Court.

Analysis

2. The decision of 27th February, 2017 was an interlocutory decision and leave is needed to appeal to the Court of Appeal. Leave can be granted either from this court or by Court of Appeal.(see . Section 12(1)(f) of Court of Appeal Act, 1949.)
3. The Plaintiff first made an application to this Court, for leave to appeal and stay on 6th March, 2017. It stated as follow:-
 - '1.That leave be granted to the Plaintiff to appeal the Orders in paragraph 34 (c), (d), and (e) and the conclusions in paragraph 15,16,25 to 31 of the interlocutory ruling of the Honorable Mr. Justice Brito –Mutunayagam delivered on 27.2.2017 in which the learned judge declined Plaintiff's 3 interlocutory applications.
 2. That no trial date will be set on the substantive matter until the final determination of the said appeal by the Court of Appeal.
 3. That the cost of this application be cost in the cause.'
4. The judge had refused the leave to appeal from his decision dated 3rd August, 2017. Since there is no leave granted, the relief sought in the Motion of 6th March, 2017 for stay contained in relief 2 above had not arisen, though not specifically stated in the decision .
5. The Plaintiff, had renewed his application before Court of Appeal and again seeking identical orders for stay of proceedings from this court.
6. The renewed application in Court of Appeal, is not an appeal against the refusal of the leave to appeal delivered on 3rd August,2017, but a renewed application seeking leave against the decision of the judge delivered on 27th February,2017.

7. The Plaintiff filed a Motion dated 21st August, 2017 in this court and it sought following orders:-
- '1. That no trial date will be set on the substantial matter of this civil action until the final determination of the Plaintiff's appeal by the Court of Appeal.
 2. That the order made by Justice Mr. Brito-Mutunayagam in his ruling dated 3.8.2017 that the Plaintiff shall pay the Defendants, costs of \$750 be stayed until the final determination of Plaintiff's appeal by the Court of Appeal.
 3. That the costs of this application be costs in the cause.'
8. There is no appeal before Court of Appeal. There is only an application seeking leave to appeal before Court of Appeal. Both parties await hearing of the matter by single judge of Court of Appeal. Leave to appeal against an interlocutory decision of High Court, is granted by single judge of the Court of Appeal and if leave is granted the matter will be fixed for hearing before full court of Court of Appeal.
9. At the moment this court had refused to grant leave to appeal. I have not been shown any provision of law that allows this court to grant stay of the proceedings when this court had already refused leave to appeal. The basis of this application for stay of proceeding is renewed application for leave to appeal in Court of Appeal.
10. In my judgment this court had decided that leave to appeal should not be granted to the Plaintiff and it had also ordered a costs against the Plaintiff, for the said application. In such a scenario stay of proceedings is not justified. It is a discretionary remedy. Interlocutory applications and decision on that should not stay the proceedings, when the leave is refused by this court.
11. Even as a matter of practice this application should fail in limine as the application before Court of Appeal is not an appeal against the refusal to grant leave but exercise of concurrent jurisdiction of seeking leave to appeal from a interlocutory decision. This court had already refused leave and with that refusal this court had given a final decision as to the merits of his application and that operates as refusal for a stay.

12. Fiji Supreme Court in *Word v Chandra* (decided on 20.04.2011) unexported) at paragraph 20 held,(Per Gates CJ)

[20] In considering stay principle (c) above, I have no doubt that the Petitioner is bona fide in making up this appeal and will prosecute it with sufficient expedition. Though appeals do interrupt the remedies a successful litigant has achieved, **nowadays appeal courts will be vigilant to guard against delay, whether deliberate or negligent. Appeal courts have moved towards a system of case management.** Though Fiji personally has a shortage of judges at the appellate level, that situation will gradually improve as more judges are appointed to the panels. The appeal courts will be careful to ensure that an appellant or **petitioner does not 'park' his litigation in the appeal court, without prosecution, for purposes of delay** or for the avoidance of confirmed indebtedness.(emphasis is mine)

13. The Plaintiff has only filed an application in Court of Appeal for renewal of its application seeking leave to appeal against an interlocutory decision of this court. This is an action instituted in 2006 and case management also supports proceeding with the matter rather than awaiting determination by Court of Appeal.
14. An identical order for stay of proceedings, was sought in the motion filed on 6th March,2017 along with the application for leave to appeal in this court . Since the judge in his decision delivered on 3rd August,2017, had declined the leave to appeal, the issue of stay had not arisen. This position remains unchanged, despite Plaintiff filing a renewed application seeking leave to appeal to the Court of Appeal. This is not an appeal against refusal to grant leave to appeal by this Court. It is an exercise of concurrent jurisdiction so no Stay application can be made so this Summons for Stay is dismissed in limine.
15. Even if I am wrong, the merits of the application is considered below and that analysis also supports refusal of stay.
16. Though the Plaintiff had strenuously argued and also submitted local as well as foreign cases, that his affidavit in support of the summons is not contradicted, that does not qualify for a stay of proceedings.

Affidavit in Support of Motion for Stay (filed on 21st August 2017)

17. The burden of proof for a stay of proceedings is with the Plaintiff. In the affidavit in support filed for the motion filed on 21st August, 2017 first paragraph needs no reply as it only reiterates the orders sought in the summons. Paragraph 2 and 3 of the affidavit in support, needs no reply as facts stated therein are self-evident on the record of this action and legal provisions stated in the said two paragraphs need no reply. (See Order 41 rule 5 of High Court Rules of 1988)
18. The paragraph 4 in affidavit in support Plaintiff alleges that no less than 9 High Court Judges had dealt with this action, and this is not a reason for stay of proceedings but rather a reason for not allowing any postponements or stay of proceedings. The rest of that paragraph contains some allegations and accusations which are irrelevant to the application before me.
19. The paragraph 5 states that the Plaintiff had suffered costs surpassing \$30,000 and if so that is another reason to prosecute his claim which was filed 12 years ago, rather than seeking a stay of the proceedings. By staying the proceedings and further delaying he will not gain anything, but will lose further.
20. The paragraph 6 again deals with facts that can be ascertained from the record and needed no reply and paragraph 7 deals with the order for costs awarded against him for \$750. I do not consider it unfair considering the circumstances of the case even though in certain instances of this matter, costs were deferred. This is a discretion of the judge and rarely interfered in appeal. The general rule is that cost will follow the event. So the cost ordered should be paid considering the amount of cost the payment will not prejudice determination in Court of Appeal.
21. The paragraph 8 states that Court of Appeal needs to determine the issue of joinder of a party, before proceeding to the trial. The application for joinder made after the period for Limitation had lapsed, needs strict compliance to the High Court Rules and the judge had discussed this issue in his rulings. The Plaintiff is unable to state why such joinder should be allowed. So, the fact that refusal to join is an issue raised in the leave to appeal filed in the Court of Appeal is not sufficient to grant stay of proceedings.

22. There is no rule that when there is no affidavit in opposition filed in an application for stay, that it should be granted. The Plaintiff needs to satisfy the requirements for stay and he had failed to do so.
23. The factors that is needed for consideration of a stay is stated in the Court of Appeal in Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd Civil Appeal ABU0011.04S, 18th March 2005. These are applied in Fiji Supreme Court in Ward v Chandra [2011] FJSC 8; CBV0010 (decided 20 April 2011) (Per Gates CJ). These principles were;
- "(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."
24. The decision delivered on 27th February, 2017 dealt several interlocutory applications. And the final orders were as follows:-
- (a) I decline the defendants application to strike out the affidavits filed by the plaintiff.
 - (b) I direct that all witnesses be available to give evidence at the trial.
 - (c) The plaintiff's notice of motion filed on 10th May, 2016, is declined.
 - (d) The plaintiff's application to join his wife as a plaintiff is declined.
 - (e) The plaintiff's application to subpoena the former court clerk is declined.

- (f) The defendants shall pay the plaintiff costs in the sum of \$500.
- (g) I order costs in the cause in respect of the four applications I have determined.
- (h) This case will be called before the Master of the High Court of Labasa on 3rd March, 2017, at 9a.m. to fix for hearing.

25. The orders (a) and (b) will not be prejudiced by not granting a stay as they are in favour of the Plaintiff. The Plaintiff's motion filed on 10th May, 2016 was regarding use of 'combined affidavit' of Plaintiff and Walburga Wehrenberg filed on 4.11.2011 and a supplementary affidavit filed by the said deponents filed on 2.8.2012.

26. In Kelton Investment Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr [1995] FJCA 15; Abu0034d.95s (18 July 1995) it was held:

The Courts have thrown their weight against appeals from **interlocutory orders** or decisions for very good reasons and **hence leave to appeal are not readily given**. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted. (emphasis added)

27. In Niemann v. Electronic Industries Ltd. [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

"...leave should only be granted to appeal from an interlocutory judgment or order, in **cases where substantial injustice is done by the judgment or order itself**. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.

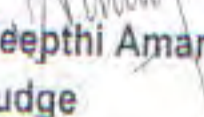
28. Overall balance of convenience supports refusal of the application for stay of proceedings as well as the award of costs. Even on case management perspective, this case is 12 years old and trial had not started and priority should be given. An application for leave to appeal is not a

reason to delay this matter further. At the same time there is no public interest in the issues raised in leave to appeal application and that also does not involve any novel issue from the affidavit in support.

29. Even though I do not have doubts about the bona fide of the Plaintiff for the leave to appeal, it should not be sole criterion for the grant of stay. The Plaintiff is entitled the due process of the law, but at the same time, there should be an end to 12 year old litigation, which is perhaps the oldest matter in Labasa Court. Oral evidence of witnesses are vital in an action of this nature and fading a memory of an event for last 12 years is also a factor that needs consideration in an application for stay of proceedings.
30. If stay is not granted the matter will proceed to trial subject to any order of Court of Appeal. The alleged prejudice to the Plaintiff is the claim of the intended party whose joinder was refused. There will be a prejudice if Court of Appeal grants joinder and the matter proceeds to trial. This is not the determinative factor. The overall effect of the factors that had considered determine the discretion of the court to grant a stay of proceedings. In this case the discretion should be exercised to refusal of the stay for the reasons given above. The cost of this application is summarily assessed at \$500.

Final Orders

- a. The Motion filed on 21st August, 2017 is struck off.
- b. The cost of this application is summarily assessed at \$500.
- c. Matter to be mention before Master for further directions.


Deepthi Amaratunga
Judge

16th February 2018

