

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 380 of 2018

BETWEEN : **HEAVEN ON EARTH IN KADAVU LIMITED** **PLAINTIFF**

AND : **ITAUKEI LAND TRUST BOARD** **DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms R Lal [Lal/Patel/Bale Lawyers]

DEFENDANT : Ms. Vakanavanua [Legal Department, iTaukei Land Trust Board]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 29 May 2019

INTERLOCUTORY RULING

[Stay of Execution of Judgment]

1. The Defendant seeks orders for stay of execution pending the determination of their summons dated 14 March 2019 for setting aside the Default Judgment.

According to them, the Plaintiff will not be prejudice by stay Order. The Defendant will be adversely affected if stay is not granted. The amount demanded by Plaintiff is quite substantial.

The Defendant is a statutory body mandated to administer all iTaukei land within the Fiji Islands for benefit of the iTaukei land owning units.

If stay is not granted, its finances will be impacted to the extent of affecting its operation and meeting its administrative and financial commitments.

The Default Judgment was obtained irregularly as the claim was for \$1,375,000.00 claiming for loss of hotel operation without pleading the breakdown of the loss.

If stay is not granted, the Defendant's application to set aside the Default Judgment will be rendered nugatory.

2. Ms. Lal counsel for the Plaintiff stated the application is opposed.

The proposed Statement of Defence puts the burden on the Plaintiff stating its Plaintiff's faults. There is a no defence in the Statement of Defence.

The claim of loss arises from a Court of Appeal Judgment. The Plaintiff had a resort on the property the lease for which was cancelled by the Defendant.

3. Order 45 rule 10 of the High Court Rules reads:

"Without prejudice to Order 47, Rule 1 a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since which have occurred since the date of judgment or order and the Court may by order grant such relief, and in such terms, as it thinks just".

4. Kamal J (as he was then) in **Naidu v Fiji Forest Industries Limited a Labasa High Court Civil Action No. HBC 39 of 2011 (delivered on 13 October 2014)** had outlined the Law in relation to stay of execution.

He held that *"it is well established and undisputed that the Courts have unfettered discretion to either grant or refuse stay of execution. However, the discretion should be exercised judicially and in the interest of justice depending on circumstances of excess case"*.

He cited the case of **Chand vv. Lata a Labasa High Court Civil Action No. 38 of 2001 (delivered on 18 July 2008)** which identified the principles of governing stay of execution:

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 QBV 346*
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 considerations 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** (18886) 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. *In exercising its discretion the Court will weigh considerations 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***
8. *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 no 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 TLR 400*
9. *Where there is a risk that if 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***

His Lordship also cited the case of **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** a Fiji Court of Appeal, Civil Appeal No. ABU 0011 of 2004S (delivered on 18 March 2005), where the Court of Appeal also discussed the principles of stay of execution:

*The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from **Dymoocks 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.*

5. This Court is informed there is a Writ of Fieri Facias pending before the Magistrates Court.

I am further informed by Counsels there is a stay of the writ pending the outcome of this ruling.

6. The Claim by the Plaintiff is based on an agreement to lease having ILLTB Reference 415/2132. The term of lease was for 60 years.

The Plaintiff alleges to have make payments to the Defendant for the premium, rental, work compensation and other payments.

It claims to have constructed on the lease a resort consisting of 5 separate structures and was ready for operation on or about 2010.

The members of Tokatoka Dakuibaitabu being one of the i-Taukei beneficial owners of the lease successfully brought proceeding against the Defendant and had the lease between the Plaintiff and Defendant cancelled for failure of Defendant to obtain the Tokatoka's consent.

As a result the Plaintiff claimed it suffered significant loss and damages:

- Loss of resort situated on the lease valued at \$1,375,000.00.
- Loss of profit from operating the resort from 2008 to the date of Judgment. (Particulars was said to be provided at trial).

The Plaintiff also claimed general damages for the loss caused.

7. The Writ of Summons was said to be served on the Defendant at 431 Victoria Parade Suva on 08 January 2019 (an affidavit of service by one Alfred Norman) was filed on 17 January 2019.

8. On 21 January 2019 the Defendant's Legal Department filed an Acknowledgment of Service.
9. The Plaintiff on 22 February 2019 filed its praecipe, search and Judgment by Default.
The Judgment by Default was entered on grounds there being no Statement of Defence being filed and was for the sum of \$1,375,000.00.
10. An application for setting aside the Default Judgment and stay of execution was filed on 14 March 2019.
11. Paragraph 13/01/2011 at page 132 of the Supreme Court Practice (1993) volume 1 states:
"Judgment in default may be signed hereunder if the claim indorsed be for a stated sum of money alleged to be due from Defendant to Plaintiff, the claim not being in nature of damages."
12. The claim is for loss of resort and loss of profit. There are issues for determination whether it is a liquidated demand or not and whether the plaintiff should have in fact entered an Interlocutory Judgment for damages to be assessed.
13. The Defendant is a statutory body and the execution of the FIFA will be prejudicial to them affecting their daily operation as the amount claimed is quite substantial. As a result the public that the Defendant serves will be affected.
14. Considering the above and the submission by the Defendants' Counsel, I find there are circumstances justifying that there should be a stay granted until the Court hears and makes a finding on the Defendants' application for setting aside the judgment by default.
15. Hence I grant a stay of execution of the Judgment by default sealed on 27 February 2019 until final determination of the Defendants' application for setting aside the judgment.
16. No orders are made for costs.



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Vandhana Lal [Ms]
Acting Master
At Suva.