

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

Civil Action No HBC 28 of 2019

**BETWEEN** : JITEN PRASAD aka JEETENDRA KUMAR DOUGLAS

**APPLICANT/DEFENDANT**

**AND** : SUNNY SHENAN KUMAR

**RESPONDENT/PLAINTIFF**

**BEFORE** : M. Javed Mansoor, J

**COUNSEL** : Mr. K. Singh for the Plaintiff

: Mr. J. Vulakouvaki for the Defendant

**Date of Hearing** : 11 May 2020

**Date of Decision** : 22 May 2020

# RULING

*PRACTICE & PROCEDURE: Stay of proceedings – Withdrawal of application contrary to instructions – Whether order based on consent? – Reinstatement of application – Inherent power of court*

*The following case is referred to:*

a. *Evans v Bartlam [1973] A.C. at 480*

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1. The plaintiff filed an originating summons on 25 January 2019 seeking to evict the defendant from property comprised in housing authority sub lease number 426916 being lot 48 on DP No. 7780. The Plaintiff is the registered proprietor of the property.
2. By notice of motion dated 22 July 2019, the defendant sought a stay of proceedings until the determination of the substantive matter in HBC 241 of 2019. The motion was supported by the defendant's affidavit, attached to which was a writ of summons containing his claim in HBC 241 of 2019. In his affidavit, the defendant averred that he was challenging the ownership of the subject property.
3. When the case was mentioned on 21 October 2019, counsel for the defendant sought to withdraw his client's application seeking a stay of proceedings. The application to withdraw was allowed by court subject to the payment of a sum of \$500.00 as costs.
4. Subsequently, a notice of change of solicitors was filed on behalf of the defendant by notice dated 25 October 2019. Thereafter, the defendant filed an *inter-partes* notice of motion dated 4 November 2019 seeking the leave of court to set aside the application made on 21 October 2019 to withdraw his stay of proceedings motion. In his supporting affidavit, the defendant averred *inter-alia* that although he instructed his previous solicitor to obtain a stay of proceedings until the substantive matter in HBC 241 of 2019 was determined, counsel, who appeared on 21 October 2019, had withdrawn the stay application without his instructions.

5. The plaintiff objected to the defendant's application to set aside his withdrawal of the stay application.
6. The defendant submitted that although he was present in court, to his surprise, the defendant's counsel had withdrawn the stay application. He contended that the order by court did not go to the merits of the case and, therefore, the court must set aside its order and allow the parties to be heard.
7. The plaintiff's position is that the order made on 21 October 2019 was based on the consent of the parties and that, therefore, the order could not be set aside. In support of that contention, the plaintiff referred to numerous judgments supporting the contention that a judgment based on the consent of the parties could not ordinarily be set aside and that such a judgment could only be challenged by a fresh action.
8. It was further contended that if the defendant so desired, he could have filed a fresh application to stay proceedings, but that he had chosen not to do so. The plaintiff also pointed out that the allegation against the defendant's previous solicitor was unsubstantiated and not supported by an affidavit from the defendant's former solicitors.
9. I am of the view that in the context of the matter it is fair to allow the defendant to proceed with his application for a stay of the proceeding. Lord Atkin's statement in the House of Lords decision of *Evans v Bartlam*<sup>1</sup> that until the court has pronounced judgment upon the merits or by consent, it has the power to revoke the expression of its coercive power where that has been obtained by a failure to follow any of the rules of procedure holds well in these circumstances also, though those observations were made in the context of setting aside a default judgment.

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<sup>1</sup> [1973] A.C 480

10. I do not accept the plaintiff's contention that the order permitting the withdrawal of the defendant's application amounts to a consent order in the usual sense. The record does not reveal any such consideration by the parties. On behalf of the defendant, it was a withdrawal of application *simpliciter*.
11. The court is empowered to allow such an application without the consent of another party on such terms which the court considers to be apt. In this instance, the court imposed costs of \$500 on the defendant in permitting the withdrawal of the stay application.
12. That withdrawal of the stay application was not authorised, the defendant, who was present in court on the day of the withdrawal, insists. How such a situation transpired is not easy to fathom, and it is most unfortunate. The defendant's solicitors at the time are not here to explain.
13. However, I accept the evidence of the defendant that he was unaware of his former counsel's move to make such an application. The defendant has acted without delay to safeguard his rights; the notice of change of solicitors was filed on 25 October 2019, and the current application was filed on 4 November 2019.
14. In the absence of a valid application for withdrawal of the defendant's motion, no order can be made permitting withdrawal. It follows, therefore, that the defendant must be permitted to pursue his application for a stay by setting aside the application for withdrawal on 21 October 2019 and the order allowing such withdrawal. In the interests of justice, this court exercises its inherent power to reinstate the defendant's application.

## ORDERS

- a) The defendant's application seeking to withdraw the application for a stay of proceedings in terms of notice of motion dated 22 July 2019 is set aside.
- b) The order dated 21 October 2019 permitting the withdrawal of the defendant's application for a stay of proceedings in terms of notice of motion dated 22 July 2019 is set aside.
- c) The plaintiff is directed to pay the defendant costs summarily assessed in a sum of \$500 within 14 days of this ruling.
- d) The registrar is directed to list this matter to take its course.

Delivered at **Suva** this 22<sup>nd</sup> day of **May, 2020**



Justice M. Javed Mansoor  
Judge of the High Court

### Solicitors:

KS Law (for the plaintiff)

Volavola Lawyers (for the defendant)