

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 303 OF 2019**

**BETWEEN** : **BHAG WATI** of Yalalevu, Ba, Domestic Duties.

**PLAINTIFF**

**AND** : **SHASI SHALENDRA PRASAD** of Vunayasi, Nadi, Driver.

**DEFENDANT**

**Appearances** : Ms S. Veitokiyaki for the defendant/applicant  
Ms S. Shafique with Mr M. Yunus for the plaintiff/respondent  
**Date of Hearing** : 30 October 2020  
**Date of Ruling** : 11 November 2020

# R U L I N G

*[on stay pending appeal]*

## **Introduction**

- [01] This is an application for a stay pending appeal.
- [02] By his summons supported by an affidavit made by Shasi Shalendra Prasad, the defendant (*"the application"*), the defendant/applicant (*"the defendant"*) seeks a stay of execution of my judgment delivered on 30 April 2020. Precisely, the judgment was a monetary judgment where the court entered a default judgment against the defendant in the sum of \$41,000.00 with summarily assessed cost of \$550.00.
- [03] The plaintiff opposes this application. She has filed an affidavit in opposition. The defendant did not file any affidavit in reply to the plaintiff's affidavit in opposition.

[04] The application is made under R 26 (3) and R 34 of the Court of Appeal Rules (“CAR”) and O 45, R 10 and O 47 (1) of the High Court Rules 1988, as amended (“HCR”).

[05] At the hearing, counsel representing the parties orally argued the matter and only counsel for the plaintiff tendered written submission. Counsel for the defendant was given 7 days to file written submission. The defendant had accordingly filed his written submission on 10 November 2020.

### **Background**

[06] The plaintiff took out a writ of summons against the defendant claiming among other things refund of the sum of \$41,000.00 paid by her under a bill of sale, loss of income from 6 January 2019, at the rate of \$100.00 per day until determination of this matter, alternatively specific performance of the agreement and damages and costs.

[07] The writ of summons was served on the defendant. The defendant filed neither acknowledgment of service nor statement of defence within the prescribed time allowed by the HCR.

[08] As a result, the plaintiff filed a summons under the HCR, O 19, R 6. The Court, having heard the application, made its decision on 30 April 2020 and decided that the plaintiff is entitled to enter judgment against the defendant as follows:

1. The defendant shall pay the sum of \$41,000.00 to the plaintiff.
2. The defendant shall pay \$100.00 per day to the plaintiff from 6 January 2019 until the judgment sum is paid in full.
3. The plaintiff shall be entitled to general damages and cost as assessed by the Master.

[09] Subsequently, on 19 May 2020, the defendant filed an application to set aside the default judgment entered against him on 30 April 2020. That application was heard and on 31 August 2020 by its ruling the court dismissed it with costs of \$550.00.

[10] The defendant has appealed the ruling made refusing to set aside the default judgment to the Court of Appeal. That appeal is pending in the Court of Appeal.

In the meantime, the defendant seeks a stay of execution of the judgment pending appeal.

### **Grounds of appeal**

[11] The defendant has appealed the ruling which dismissed his application to set aside the default judgment on the following grounds:

1. *That the Learned Trial Judge erred in law and in fact in considering Order 19 Rule 6 and Rule 9 of the High Court Rules 1988 in dismissing the application for setting aside default judgment [refer to paragraphs 16, 17 and 34 last 3 lines of the ruling] wherein such order deals with default of pleading specifically for failure of service of defence.*
2. *That the Learned Trial Judge erred in law and in fact in failing to consider and proceed under Order 19 Rule (2) (1) and (2) which deals with default of defence for liquidated claim and mandatory rules under Order 13 Rule 1 (2) of the High Court Rules 1988. Thus ignoring the rules under Order 13 [refer to Order 13 rule 1, rule 2, rule 5 and rule 8 – proof of service of writ].*
3. *That the Learned Trial Judge erred in law and in fact when he considered and compared Order 10 Rule 1 (2) (substituted service) with the service affected by bailiff by dropping the sealed envelope (containing the writ addressed to the defendant at his office in front of his staff [refer to paragraph 28 of the judgment]*
4. *That the Learned Trial Judge erred in law and in fact when he failed to consider Order 10 Rule 1 of the High Court Rules requiring that “A writ must be served personally on each defendant by the plaintiff.” Hence judgment was irregular.*
5. *That the Learned Trial Judge erred in law and in fact when he calculated the period of 14 days to file the statement of defence by the defendant (refer to paragraph 18 of the ruling) wherein the endorsement of the face of the writ of summons normally state the period of 14 days to file the acknowledgement of service stating therein the intention whether to contest the proceeding.*

6. *That the Learned Trial Judge erred in law and in fact when he failed to consider and or direct the plaintiff to serve the application to enter judgment to the defendant before delivering the judgment but enter judgment in favour of the plaintiff and without considering the Covid 19 lockdown and its effect in Lautoka and nearby areas from mid-March 2020.*
7. *That the Learned Trial Judge erred in law and in fact when he failed to consider the affidavit in reply (deposed on 6 July and filed on 15 July 2020) by the defendant that the plaintiff had recovered part of the money under the bill of sale and balance of \$28,426.01 is outstanding as evidence in annexure SSP1 in the said affidavit. Hence fail to consider there is meritorious defence.*

#### **Legislative framework**

[12] Of stay of execution, the CAR, R 34, states (so far as relevant):

*“Stay of execution*

34 (1) *Except so far as the court below or the Court of Appeal may otherwise direct-*

*(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;*

*(b) no intermediate act or proceeding shall be invalidated by an appeal.”*

[13] Dealing with applications to Court of Appeal, the CAR, R 26 (3) provides:

*“Applications to Court of Appeal*

*(3) Wherever under these Rules an application may be made either to the court below or to the Court of Appeal it shall be made in the first instance to the court below.”*

[14] The HCR, O 45, R 10 says:

*“Matters occurring after judgment stay of execution etc (O45, R10)*

*10 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 the date of the*

*judgment or order and the Court may by order grant such relief, and on such terms, as it thinks just."*

[15] The HCR, O 47 (1) states:

*"Power to stay execution by writ of fieri facias (O47, R1)*

*1 (1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution-*

*(a) that there are special circumstances which render it inexpedient to enforce the judgment or order, or*

*(b) that the applicant is unable from any cause to pay the money,*

*then, notwithstanding anything in Rule 2, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit."*

### **Legal principles**

[16] The principles governing the application for stay pending appeal were summarized in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (18 March 2005) as follows:

*"(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."*

[17] The court must ask the following questions when considering an application for stay of execution pending appeal:

(a) *If a stay is refused, what are the risks of the appeal being stifled?*

(b) *If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?*

(c) *If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?*

(See *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 1915, LTL 18/12/2001)

## Discussion

[18] The defendant applies to this court for a stay of execution pending appeal. An application for a stay pending appeal may be made either to the court below (High Court) or to the Court of Appeal. However, it must be made to the court below in the first instance (see CAR, R 26 (3)).

[19] In support of his application for a stay pending appeal, the defendant also relies on the HCR, O45, R10 which empowers the court to grant stay of execution on the ground of matters which have occurred since the date of the judgment or order. There appear that the defendant believes that matters which have occurred since the date of judgment because he has made an appeal to the Court of Appeal challenging the judgment. In my opinion, reliance of O45, R10 is irrelevant, for the defendant can apply for a stay pending appeal under the CAR, R 34 (1).

[20] Generally, an appeal does not operate as a stay of execution or of proceedings under the decision of the court below (see CAR, R 34 (1) (a)).

[21] Since the defendant has made an application to a stay pending appeal, I intend to apply the legal principles enunciated in *Natural Waters*, above.

[22] Before I do that, I should say something about the defendant's reliance on the HCR, O 47, R 1 which empowers the court to stay execution by writ of *feri facias* under special circumstances which render it inexpedient to enforce the judgment or order. It is unnecessary to consider the defendant's stay application under O 47, R 1 as the defendant specifically seeks a stay of execution pending appeal. If he obtains a stay pending appeal, the effectively stay execution by any means.

[23] The defendant has made an appeal against the monetary judgment.

*Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory*

[24] The appeal is against the monetary judgment, albeit it was a default judgment. In that case, the court must ask the following questions when considering an application for stay of execution pending appeal:

*(a) If a stay is refused, what are the risks of the appeal being stifled?*

*(b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?*

*(c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent? (see Hammond Suddard Solicitors, above).*

[25] It is notable that the defendant did not deny receiving the sum of \$41,000.00 from the plaintiff under a bill of sale. During the setting aside hearing, counsel for the defendant, answering to a query posed by the court, admitted that the defendant received the sum of \$41,000.00 from the plaintiff under a bill of sale.

[26] In the course of the argument, counsel for the defendant largely submitted that the grounds of appeal are meritorious and which have prospect of success.

[27] The main complaint the defendant intend to argue in the Court of Appeal is service of the writ of summons to him. He complains that he was not personally served as required by the HCR, but the service effected by bailiff by dropping the sealed envelope (containing the writ addressed to the defendant at his office in front of his staff. Initially, the defendant's position was that he was not informed of the writ of summons by his staff; he was in Suva at that time. It is fair to say

that the defendant was well aware of the writ and he had sufficient time to come to court and challenge the service.

- [28] The writ of summons was served to the defendant well before the Covid-19 pandemic outbreak in Fiji in March 2020. Therefore, he cannot rely on Covid-19 pandemic and Lautoka lockdown for not filing either an acknowledgement or a statement of defence.
- [29] The defendant complains in the grounds of appeal that the court refused to set the default judgment even though the plaintiff was consenting to set aside the default judgment upon the defendant depositing the sum of \$41,000.00 into court. In order to confirm this allegation, the court asked counsel for the plaintiff if he consented to set aside on the condition that the defendant depositing the sum of \$41,000.00. He responded that that was a talk outside the court with the defendant's solicitor. I then asked counsel for the defendant whether the defendant is still willing to deposit the sum of \$41,000.00 with a view to get a stay pending appeal. She, having had conversation with the defendant during a brief break, told the court that the defendant was unable to deposit the sum at the moment.
- [30] Counsel for the defendant did not address the court on the issue of the risks of the appeal being nugatory, if a stay is refused.
- [31] The real question to be asked here, as stay is sought in respect of a monetary judgment, is: *If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?*
- [32] There is no evidence to suggest that there are risks of defendant being able to recover what has been paid, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime.
- [33] The grounds of appeal raise some issues about the procedures on service of writ of summons, entering default judgment and setting aside a default judgment. The court refused to set aside the default judgment exercising its discretion given in the HCR. The defendant appeals a discretionary decision of the court. The grounds of appeal, in my opinion, do not raise the novelty and importance of questions of law involved. An appeal based on procedural matter is unlikely to succeed.



[34] I have deliberated the legal principles that were argued before me. The rest of the legal principles was not argued and was not put in dispute. Therefore, further deliberation on the legal principles that were not in dispute is not necessary.

### Conclusion

[35] For the reasons given, I would refuse to grant a stay pending appeal. The stay application is accordingly dismissed with summarily assessed costs of \$500.00 payable to the plaintiff by the defendant.

### Outcome:

1. Stay pending appeal refused.
2. The defendant shall pay summarily assessed costs of \$500.00 to the plaintiff.

*M.H. Mohamed Ajmeer*

11/11/20

M.H. Mohamed Ajmeer  
JUDGE

At Lautoka  
11 November 2020



### Solicitors:

Babu Singh & Associates, Barristers & Solicitors for the applicant/defendant  
My Law, Barristers & Solicitors for the respondent/plaintiff