

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 26 of 2017

BETWEEN: **DAYA SHANKAR** of Lot 3, Wailoku, Retired. **PLAINTIFF**

AND: **M. A. KHAN ESQUIRE** a law firm of 2nd Floor, Harbour Front
Building, Suva. **DEFENDANT**

Counsel **: Plaintiff: In Person**
 : Defendant: Mr. Maharaj V
Date of Hearing **: 31.08.2022**
Date of Judgment **: 23.09.2022**

JUDGMENT

INTRODUCTION

1. Plaintiff obtained judgment against Defendant for professional negligence that resulted his personal injury claim being struck off for want of prosecution. Defendant filed summons for stay of enforcement of the judgment. Defendant's main contention is there is little or no likelihood of recovering money from Plaintiff if judgment is enforced. Apart from that there is novelty in the issue before court as there were no local cases provided by the parties to this action. The stay of judgment is granted till final determination of the appeal in Court of Appeal.

FACTS

2. On the 4.7.2022, this court delivered judgment, for Plaintiff.
3. Plaintiff was awarded with \$150,000.00 in damage and cost of \$3000.00 was ordered to be paid by Defendant.
4. On 21.7.2022, the Defendant filed the notice and grounds of appeal against the said judgment delivered by the High Court.

5. On the 22.7.2022, the Defendant filed an application for stay on the judgment of the High court and served the Plaintiff with the said application.
6. The matter before the High Court was a matter of alleged professional negligence against the Defendant.
7. The matter in the High Court arose from a previous case (HBC 336 of 2009) which was an action belonging to the Plaintiff and Defendant law firm acted for him in that action as solicitors on record.
8. The Plaintiff in HBC 336 of 2009, sought damages for negligence claim against third parties due to a branch of a tree falling on him while he was a pedestrian.
9. Said action was struck off due to want of prosecution and solicitor of the law firm had admitted to court their oversight by way of an affidavit filed in the said action.
10. The Plaintiff in this current matter initiated this action alleging the Defendant of professional negligence.
11. Defendant in this action denied negligence and also state Plaintiff had no reasonable prospect of success in HBC 336 of 2009.

ANALYSIS

12. Order 45, rule 10 of the High Court Rules, 1988 states,

“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.”
13. So there is a discretion of the court to grant or refuse stay of execution. This discretion is governed by judicial determinations.
14. Plaintiff had obtained the judgment in his favour and right of appeal to Court of Appeal is an option of the party against whom judgment was awarded. This right can be exercised in terms of the law. This is part of due process of law.
15. A party who is awarded damages is at an advantage if the payment is stayed due to decreasing time value for money. This will unduly favour Defendants.
16. Fiji Court of Appeal in Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd held;

“The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005): “On a stay application the Court’s task is carefully to weight all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful.” *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA), at p.87.

17. The following non comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [5] and *Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission* [6];

- 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 interests in the proceeding.
- g. The overall balance of convenience and the status quo.”

18. If a stay is granted injury to Plaintiff is clear as the time value for money decrease with lapse of time and this would make Defendant at an advantage. So, there is clear injury to Plaintiff due to decreasing value of money. There is no special proof needed in this regard when the judgment was for a specific sum.

19. Defendants have timely appealed against the judgment exercising their right of appeal. Hence there is no doubt as to bona fide.

20. In England and Whales Court of Appeal (Civil) decision R (on the application of *BMW AG*) v *Revenue and Customs Comrs.* [2008] EWHC 712 (Admin); [2008] STC 3090; [2008] All ER (D) 114 (May) lifting a stay order of court below in the exercise of discretion held,

“That starting point is, however, by no means also the finishing point, because it is also equally well-established that the court has an unfettered discretion to order a stay of the order under **appeal if the justice of the case demands it. In a case in which the question of the ordering of a stay arises**, the role of the court is to make the order that best accords with the interests of justice. **Where there is a risk of harm to one party or the other, whichever order is made, the court has to balance the alternatives and make a decision as to the course which is likely to occasion the least**

injustice. In *Leicester Circuits Ltd v Coates Brothers Plc* [2002] EWCA Civ 474, Potter LJ said, at paragraph 13:

"The proper approach is to make the **order which best accords with the interests of justice**. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."(emphasis is mine)

21. This is an action based on professional negligence of a lawyer. The negligence is evident but there is a novel issue as to its application in Fiji and the assessment of damages. The basis of award is general damages, hence there are no cases submitted to me on this issue where local judgments had addressed the issue.
22. There is no public interest in this matter except as to its relevance in general application to clients of lawyers.
23. The issue of overall balance of convenience needs to be assessed. Defendant had in the affidavit in support of this application had raised the issue of recovery of money if the appeal is successful. Plaintiff had not replied to said allegation sufficiently in the affidavit in opposition.
24. So in my opinion there is an unexplained issue as to recovery of money if the appeal is successful or partially successful. This favours the Defendant's application to grant a stay. So balance of convenience favours granting of stay considering circumstances of the case and also issue of novelty involved and also lack of local judgments on the subject.
25. Court has to balance the alternative positions and make a decision that will cause least injustice. Due to Plaintiff not addressing the issue of recovery of award in case of successful appeal, in my mind least injustice is caused by granting this stay order.

CONCLUSION

26. Considering interest of justice, the stay of enforcement of judgment granted until final determination of the appeal in Court of Appeal. Considering the circumstances of the case no costs awarded.

FINAL ORDERS

- a. Stay of enforcement of judgment in this action is granted until final determination of appeal in Court of Appeal.
- b. No costs.

Dated at Suva this 23rd day of September, 2022.



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Justice Deepthi Amaratunga
High Court, Suva