

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 133 of 2017

BETWEEN: MAIMUN NISHA AKA MEHMUN NISHA of 21 Nasilivata Road, Nadera,
Domestic Duties.

APPELLANT/DEFENDANT

AND: MOHAMMED FAROOQ AKA MOHAMMED FAROOD of 31 Greenmeadows
Ave Manurewa, Auckland, New Zealand, Taxi Proprietor.

RESPONDENT/PLAINTIFF

BEFORE : Hon. Justice Vishwa Datt Sharma

COUNSEL : Mr. Isoa M. for the Appellant/ Defendant
 Mr. Kumar V. for the Defendant/ Plaintiff

DATE OF JUDGMENT: Tuesday, 20th June, 2023 @ 9.30am

JUDGMENT

[Leave to Appeal and Stay of Proceedings and Execution]

Introduction

- (1) The Appellant/ Defendant filed two (2) Interlocutory applications and sought for the following Orders:

[A] Leave to Appeal the Judgement of the Learned Honorable Justice Sharma delivered on 19th October 2022; and

[B] Stay of Execution of the Writ of Possession granted by the Court on 21st February, 2023.

Test for Leave to Appeal.

- (2) The test when considering whether or not to grant Leave to Appeal an Interlocutory Order or Judgment is that whether that Appeal, if Leave is granted, has a **Real Prospect of Success**.
- (3) The Appellant must demonstrate that his Case has some prospect of success in the sense that there is a **Substantial Question** to be argued in the Appeal.
- (4) As far as this Court is concerned, it is only required to determine and make a decision whether Leave should be granted to Appeal the Judgement and/or the Final Order made on 19th October 2022.
- (5) I am not required at this stage of the Appellant/Defendant's proceedings and application to analyze 'whether the grounds of proposed Appeal filed herein with Leave application will succeed, but merely whether there is a **Real Prospect of success**.
- (6) The application at this stage is only asking for Leave to Appeal and stay of proceedings of execution of the Writ of Possession and not for determination of the substantive rights.

Determination

- (7) The substantive application seeking an order for Vacant Possession of the property comprised and described in certificate of Title No. 17598 being Lot 21 on DP No. 4257 was granted by

'Consent' on 19th October 2022 together with an order suspending the Execution for a period of 45 days on or before 5th December 2022 at 4pm. Each party to bear their own costs.

- (8) This Court now needs to determine:
- (i) Whether Leave to Appeal the Final 'Consent Order' made by Court on 19th October 2022 be granted?; And
 - (ii) Whether stay of Execution of Order of the Writ of Possession' granted on 21st February 2023 be granted by this Court?
- (9) It will be noted from the file records that the Appellant/Defendant, Maimun Nisha was represented by Legal Aid Commission in this matter.
- (10) The Respondent/ Plaintiff filed an originating Summons on 12th May 2017 and sought for an order against the Defendant/Appellant for immediate Vacant Possession of the Land comprised in Certificate of Title No. 17598 on Lot 21 Deposit Plan No. 4257.
- (11) Upon hearing the parties, the Learned Master delivered her Judgement on 04th September 2018 and converted the Originating Summons to that of a Writ Action together with other findings and orders therein.
- (12) The Appellant/Defendant filed a Statement of Defence on 23rd January 2019 raising a Defence of 'Proprietary Estoppel.'
- (13) On 19th October 2022, the Matter was scheduled for hearing. The Defendant/Appellant was present and Ms. Singh represented by Ms. Ali, from the Legal Aid Commission.
- (14) The Counsel representing the Defendant/Appellant, confirmed to Court that a Consent Orders for Section 169 [Vacant Possession] be granted with Execution to be suspended for 45 days at 4pm on or before 05/12/2022. Each party to bear their own costs. Accordingly, by consent orders were granted as sought for by both counsels representing parties to the proceedings.
- (15) The consent order was subsequently sealed on 29th December 2022 and served onto the Defendant/Appellant on 17th January 2023.

- (16) Leave to issue 'Writ of Possession' was filed on 31st January 2023 and orders granted by the Court on 21st February 2023.
- (17) Upon a careful perusal of Court Record, it came to light that the Appellant/Defendant has failed to file and serve any Affidavit in Support of the Leave to Appeal application on 04th April 2023.
- (18) However, a founding Affidavit has been filed on 09th March 2023 to the 'Stay of Execution Application.
- (19) Upon a further perusal, it was noted that an 'Affidavit in Support' is annexed inside within the founding Affidavit of 'Stay of Execution Application' issued by Court Registry in 09th March 2023, when the 'Leave to Appeal' application was in fact filed into Court on 04th April 2023.
- (20) The 'Consent' order was granted by Court on 19th October 2022. The Leave to Appeal application was subsequently filed after a lapse of some 6 months' timeframe on 4th April 2023 and is rather inordinate.
- (21) As far the stay of execution application is concern, it was also filed on the 9th March 2023 after a lapse of some 5 months timeframe.
- (22) Further, the stay of execution application is filed seeking for the order pursuant to order 42 of the High Court Rules, 1988 which deals with Judgements and orders.'
- (23) The 'Stay of Executive' application needed to be filed pursuant to order 45 Rule 10 of the High Court Rules, 1988.
- (24) The Appellant/Defendant filed and used an originating summons format which is normally used to commence proceedings under order 5 of the High Court Rules 1988; for Summary proceedings in lieu of a summons and seek an order for 'stay'. [Order 7 High Court Rules 1988 Refers].
- (25) Further, the Court granted a 'Consent Order' on 19th October 2022.

- (26) The Appellant/Defendant filed her application for 'Leave to Appeal' some 5 months later after the 'writ of possession' was filed into Court and issued on 09th March 2023.
- (27) The Appellant/ Defendant explains her delay in making this application for 'Leave to Appeal'. She submitted "that she was unaware of what was happening in the substantive vacant possession proceedings. The copy of the order was never served onto her. She only came to know that there was a Court order for her to vacate the premises/property. When the Court Sheriff officer approached her and advised her that she has to vacate the premises/property as soon as possible. That her Legal Aid Counsel Representing her did not obtain any instructions with regards to 'Consent Judgement' rather the Counsel made her own decision."
- (28) In make reference to the case of *Reddy v Devi [2021] FJHC 367; HBC 169.2016* (10 December 2021) his Lordship Justice
25. I am not inclined to grant a stay of execution when the consent orders entered by Stuart J are still in force and are not being challenged.
26. As to how to challenge a consent order, the authorities are clear that in order to set aside a consent order, the applicant will have to institute fresh proceedings rather than file an application in the same proceedings in which the consent order was entered and sealed. (as per Mr. Justice Connors in *m v Mart Martinez [2004] F88*)
- (29) In this Case, the Appellant/Defendant was present in Court when the Court made the Consent Order on 19th October 2022. She understood and had knowledge of what the Plaintiff and Defence Counsels have informed Court on the making of the 'Consent Order' for vacant possession and that the order be suspended for execution for 45 days on or before 05th December 2022 @ 4pm.
- (30) The Appellant/ Defendant at no time intervened, made any objections and/or challenged the Court of the 'Consent Order' made on 19th October 2022 at the time of the making of the order by the court.
- (31) However, it is now that the Appellant/Defendant challenges the 'Consent Order' and/or 'Consent Judgement' made by the Court on 19th October 2022.

- (32) In these circumstances, the Appellant/ Defendant is required to file fresh proceedings rather than seek Leave to appeal the Consent Order made on 19th October 2022 coupled with an order for stay of execution of Writ of possession accordingly.
- (33) Hence, for the aforesaid Rational, I have no alternative but proceed to Dismiss the Appellant/ Defendant's Leave to Appeal and Stay of Execution of Writ of Possession forthwith.

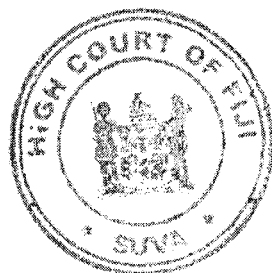
Costs

- (34) Both applications proceeded to full hearing with parties filing affidavit and furnishing Court with their respective Written and oral submissions.
- (35) It is only Just and Fair that the Respondent/Plaintiff [Mohammed Farooq] be entitled to summarily assessed costs of \$1,000 to be paid within 14 days timeframe by the Appellant/ Defendant, Maimun Nisha.

ORDERS

- i. The Appellant/ Defendant's application seeking for 'Leave to Appeal' and 'Stay of Execution' of Writ of Possession' is dismissed accordingly.
- ii. The Appellant/Defendant to pay the Respondent/ Plaintiff a sum of summarily assessed cost of \$1,000 within 14 days timeframe.

Dated at Suva this 20th day of June, 2023.




Vishwa Datt Sharma
JUDGE

CC: MESSRS. NAMBIAR LAWYERS, SUVA
SUNIL KUMAR ESQUIRE, NAUSORI