

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL CASE NO. HBC 019 OF 2017

BETWEEN : **MCF HOLDING TRUST**
Plaintiff/Respondent

AND : **DR KORINA WAIBUTA**
Defendant/Applicant

Counsel : **Mr S Kumar for the Plaintiff/Respondent**
Mr I Matanitobua for the Defendant/Applicant

Hearing : **12 July 2024**

Judgment : **12 July 2024**

EX TEMPORE JUDGMENT

(Summons for Stay of Judgment pending Appeal)

[1] On 16 October 2022, Justice Mansoor allowed the Plaintiff's appeal from an earlier Ruling by the Master. Justice Mansoor ordered the Defendant to provide vacant position of a Suva property within three months and pay costs to the Plaintiff in the amount of \$1,000 within three weeks.

[2] The Defendant filed an appeal to the Court of Appeal. She now seeks a stay of the orders by Justice Mansoor.

Background

[3] In about 2017, the Plaintiff commenced the present proceedings in the High Court. It sought vacant possession of a property situated at 69 Knolly Street, Suva, being Certificate of Title No Volume 38, Folio 3727 Lot 1 on Plan SO 1230 (which I will refer to as 'the property').

- [4] The property was owned by the Trustees of the Methodist Church of Fiji from 1978 and transferred to the Plaintiff in 2006. The Defendant has occupied the property since 1998, operating a medical practice at the premises. According to the Defendant's affidavit dated 9 March 2017, she has had a tenancy arrangement with the Methodist Schools Old Students Association (MSOSA). She also deposed that she paid a monthly rental to MSOSA. The Defendant goes further, stating that there was an arrangement in place between the Methodist Church and MSOSA for the latter to acquire the property – the Defendant annexed to her affidavit a letter from the Methodist Church dated 17 June 2016 advising the Defendant that the property was '*registered under MSOSA, and therefore future communication is with the association only*'. The Defendant points out that she is a member of MSOSA.
- [5] In addition to paying a rental to MSOSA, the Defendant also deposed that she has been paying rates arrears on the property owed by the Plaintiff – she annexed to her affidavit a document from MSOSA providing some verification of this.
- [6] Following the filing of court documents and written submissions, as well as a hearing of the Plaintiff's Originating Summons, the learned Master issued a decision on 21 October 2019. The learned Master accepted the Plaintiff had established its legal interest in the property, as the last registered proprietor. The question before the Master was whether the Defendant had demonstrated that she was no mere trespasser. The Master noted that the Plaintiff had not refuted the Defendant's explanation for being in occupation of the property and, thus, dismissed the Plaintiff's claim. An appeal was taken from the Master's decision.
- [7] As stated, Justice Mansoor issued a decision on 6 October 2022 allowing the appeal. The learned Judge noted the main dispute concerned the Defendant's right to occupy the property. Having set out the available evidence, the learned Judge allowed the appeal on the basis that the Defendant had not shown that MSOSA had any legal interest in the property – the Defendant's right to occupy resting on MSOSA's interest.

Appeal and stay

- [8] The Defendant appears to have filed a timely appeal with the Court of Appeal on 14 November 2022 as well as paid security for costs the same month.

[9] The decision by Justice Mansoor was not sealed by the Plaintiff until 9 November 2023, which in turn appears to have triggered the present application by the Defendant for a stay which was filed in this court on 8 December 2023. About two weeks later, on 19 December 2023, the Plaintiff filed an Ex-Parte Motion seeking leave to issue a writ of possession. That motion has been parked. The Defendant's summons for a stay requires determination first. The Plaintiff filed an Affidavit in Opposition on 12 April and an Affidavit in Reply was filed by the Defendant on 30 April 2024.

Relevant provisions and principles

[10] There is no disagreement between the parties as to the principles applicable to an application for a stay. The starting point is O.45, r.10 which affords the court a discretion to grant a stay.

[11] The principles on which the discretion is exercised is set out in the decision of *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13 (18 March 2005) wherein the Court of Appeal stated:

On a stay application, the Court's task is 'carefully to weigh 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.

[12] The Court of Appeal identified '*the following non-comprehensive list of factors conventionally taken into account by a Court*' as being relevant to the court's exercise of its discretion:

- i. Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory.
- ii. Whether the successful party will be injuriously affected by the stay.
- iii. The bona fides of the applicants as to the prosecution of the appeal.

- iv. The effect on third parties.
- v. The novelty and importance of questions involved.
- vi. The public interest in the proceeding.
- vii. The overall balance of convenience and the status quo.

[13] The following passage is also helpful, as provided by the Court of Appeal in *Murthy v Patel* [2000] FJCA 17 (5 May 2000), where Thompson JA stated

A number of considerations have to be taken into account by a judge exercising his discretion whether or not to grant a stay of execution. Prima facie, the party succeeding in the High Court is entitled to enjoy immediately the fruits of his success. However, if an appellant shows that he has a good arguable case to present on the hearing of the appeal, and if refusal of the stay will cause detriment to the appellant which cannot be effectively remedied if his appeal succeeds, so that the appeal will be rendered nugatory, it may be appropriate for the discretion to grant a stay to be exercised in his favor.

Decision

[14] Four of the seven factors identified by the Court of Appeal are relevant to the present case.

[15] The first is whether if no stay is granted the Defendant's appeal will be rendered nugatory. There is some force in the argument here in favour of the Defendant. While the Plaintiff argues, with good cause, that the Defendant has provided inadequate evidence in her affidavits on the consequences of her removal from the property (if a stay is not granted) in my view the consequences are obvious – and can be inferred from the facts available. If a stay is not granted, the Defendant will be ejected from the property, and she will have to relocate her medical practice to another premises. This will cause her expense and no small inconvenience. It will be disruptive to her patients. If the Defendant is successful with her appeal there is no certainty that she will be allowed back onto the property. The

Plaintiff may arrange a new tenant or occupy the premises itself. Even if the Plaintiff were to permit the Defendant to return, there would be the matter of the inconvenience and cost of relocating her practice a second time.

- [16] The second relevant factor is whether the Plaintiff will be injuriously affected by the stay. I accept that the Plaintiff will be injuriously affected by a stay of Justice Mansoor's orders. The Plaintiff cannot renovate the property, as it appears that they wish to do, until the Defendant moves out. It cannot obtain rental payments on the property – it appears that the Defendant continues to pay the monthly rental payments to MSOSA.
- [17] The third factor is the bona fides of the Defendant as to the prosecution of her appeal. There are, to my mind, two aspects to this factor. Firstly, whether the Defendant has prosecuted her appeal diligently. The Defendant filed her appeal and paid her security for costs in a timely manner. There was some concern raised by the Plaintiff that the present summons for a stay was very late, being one year after the decision by Justice Mansoor, but in my view there is an adequate explanation for this being that the decision was not sealed until a year later and, therefore, the Defendant likely considered it unnecessary to apply for a stay given she had filed her appeal making her intentions clear.
- [18] Secondly, what are the prospects of the Defendant succeeding with her appeal? The Plaintiff argues that this is an important factor when considering whether to grant a stay and I agree that it can be. The substantive issue is narrow and concerns the Defendant's right to occupy the property. Justice Mansoor found that the evidence did not support the same. However, the fact that the learned Master arrived at a different conclusion on the same evidence demonstrates that the issue is at least arguable. For my part, the evidence is far from clear. Quite obviously, the Plaintiff is the last registered proprietor, and the Defendant claims to derive her right of occupancy from her arrangement with MSOSA. As for MSOSA's interest, this is not clear. The Defendant's evidence is that the Methodist Church planned to transfer the property to MSOSA. The Defendant produces a letter from the Methodist Church dated 17 June 2017 that supports this assertion. The Plaintiff also appears to produce evidence that is consistent with the Defendant's right of occupancy. In his affidavit in support of the Plaintiff's Originating Summons dated 26 January 2017, Ratu Peni Volavola annexes a letter from the Plaintiff's then solicitors dated 23 September 2016 which is a demand letter sent to the Defendant to vacate the property. The letter reads, in part:

We act for MCF Holding Trust...and the Methodist Schools Old Scholars Association. Our client, MCF is the proprietor of all that property you presently occupy situated at 69 Knolly Street, Suva.

We understand that you are in occupation of the said property as a tenant of MCF.

Kindly note that any lease, permission or invitation given by MCF or anyone delegated with such authority is hereby revoked and/or withdrawn...

- [19] The Plaintiff's then solicitors, acting on instructions from the Plaintiff, appear to have accepted that the Defendant was then legitimately in occupation of the property as a tenant. To further muddy the waters, the Methodist Church has a connection to the Plaintiff and MSOSA while the Defendant is a member of the church and MSOSA.
- [20] The fourth, and final, factor for the court to consider is the balance of convenience. The Plaintiff relies on the following passage cited from the High Court decision of *Latiff v Hakim* [2020] FJHC 173 (28 February 2020):

The test here is a determination of which of the two parties will suffer greater harm from granting or refusal of an interim stay pending a determination of the appeal on merits, balancing of conflicting consideration is required between the underlying principle that a litigant is entitled to the fruits of his judgment forthwith, and the obvious injustice in refusing a stay where such a refusal will render the appeal nugatory or substantially nugatory.

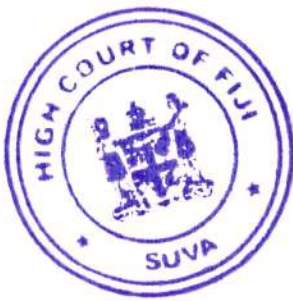
- [21] Where does the balance of convenience lie in the present case? As already pointed out, both parties will be adversely affected by the grant or refusal of a stay. The Defendant has enjoyed 26 years of occupation of the property operating her medical practice. This alone ought to cause this court to pause – and certainly to be cautious in respect to drawing any conclusions on the present evidence as to the prospect of the Defendant being unsuccessful with her appeal. Having regard to the above matters, in my view the balance

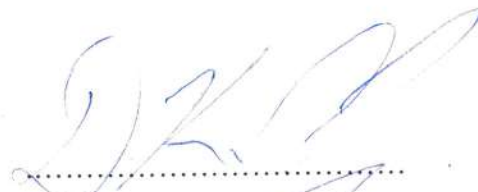
of convenience lies with maintaining the status quo until the Court of Appeal has an opportunity to determine the appeal.

Orders

[22] I make the following orders:

- i. The orders made by the Honourable Mr Justice Mansoor on 6 October 2022 are stayed pending the determination of the Defendant's appeal by the Court of Appeal.
- ii. The costs of this application are to be costs in the cause.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Neel Shivam Lawyers for the Plaintiff

Ravono & Raikaci Law for the Defendant