

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

**HBC 377 OF 2020**

**BETWEEN:**                    **ORCHID FLAT INVESTMENT PTE LIMITED** a company duly incorporated under the Companies Act and having its registered offices at Suva.

**APPELLANT**

**AND:**                            **CONSTRUCTION EQUIPMENT HIRE PTE LIMITED** a limited liability company duly incorporated under the Companies Act and having its registered offices at Suva.

**RESPONDENT**

**Before:**                        Mr. Justice Deepthi Amaratunga

**Counsel:**                      Mr. Gordon R for Appellant (Defendant)

Mr. Savou J for Respondent (Plaintiff)

**Date of Hearing:**    29.8.2024

**Date of Judgment:** 7.10.2024

## **JUDGMENT**

### **INTRODUCTION**

[1]            Plaintiff is the registered proprietor of CT43301 and CT42542. Defendant in the affidavit in opposition did not contest CT 42542 and voluntarily vacated it.

- [2] So the opposition was only regarding CT 43301, but Defendant had not shown a right to possession.
- [3] On 16.3.2023 Master gave possession of CT 433301 (this should read as CT43301) to Plaintiff but execution was stayed for six months. Defendant appealed against the said decision of Master and the Appeal was dismissed subject to typographical correction of CT 43301.this was delivered on 15.3.2024.
- [4] Defendant appealed against the decision of this court to Court of Appeal. Once an appeal is made to Court of Appeal, subject to correction of any typographical or arithmetic errors the court cannot re visit said Appeal judgment handed down on 15.3.2024.
- [5] Defendant is seeking orders other than stay of judgment and such orders cannot be granted even on the appeal so such orders cannot be granted an order for stay of judgment, which is a limited jurisdiction.
- [6] Defendant had also sought an order of the court for recusal of counsel for Plaintiff after conclusion of hearing of the Appeal. This is considered as preliminary issue before consideration of application for Appeal.

### **Application for Recusal of Plaintiff's counsel**

- [7] Jiaoji Savou had previously acted as lawyer for the Defendant up to 2018, on matters unrelated to the present proceedings. This is an action where Plaintiff is seeking to evict Defendant on the basis of registered title in terms of Section 169 of Land Transfer Act 1971.
- [8] The Defendant seeks to have Jiaoji Savou restrained from acting for the Plaintiff, in these proceedings, alleging that Jiaoji Savou has access to the Defendant's confidential information.

[9] Considering the nature of the case and scope of the case for determination the action is based on indefeasibility of title of Plaintiff which is self-evident from title. Defendant was represented by a senior legal practitioner who had appeared in proceedings before Master and also in the appeal before this court and no issue was raised as to confidential information of Defendant known to counsel of Plaintiff.

[10] In this application for stay Defendant was unable to state in what manner Defendant is making this allegation.

[11] In *Bolkiah v KPMG1* the House of Lords set out the principles for determining whether a lawyer should be disqualified, on the application of a previous client, from acting for a subsequent client for having accessed confidential information. Lord Millet characterised the court's jurisdiction to intervene and prevent a lawyer from acting for a subsequent client in the following terms:

"where the Court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.'

[12] In this action already affidavits were filed without objection and the appeal is confined to evidence produced before Master. The scope of application for eviction is limited either to grant or refusal of such orders. Accordingly there is no merits in the application before this court for recusal.

[13] Order 45, rule 10 of the High Court Rules, 1988 provides;

Matters occurring after judgment: stay of execution, etc. (O.45.r10)

“ 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.”

[14] Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13; ABU0011.2004S held,

“7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005):

“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.

[15] 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 (1999) 13 PRNZ 48, at p 50 and Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200:

- (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.”

[16] Plaintiff is the registered owner and this is an admitted fact. This court as well as Master held that Defendant had not shown a right to possession in terms of

Section 172 of Land Transfer Act 1971. Reasons are given in the decision of appeal handed down on 15.3.2024.

**Whether Appeal is rendered nugatory if stay is not granted.**

[17] Plaintiff had filed this action 2020 seeking vacant possession. By order of the vacant possession Appeal is not rendered nugatory from the facts in this action. There is no evidence that eviction will render appeal nugatory.

[18] Without prejudice to above, this is not the determinative factor. Plaintiff who holds the title had waited four years to obtain possession and should not be further delayed.

**Whether the successful party will be injuriously affected by the stay.**

[19] Eviction in terms of Section 169 of Land Transfer Act 1971, is through a special procedure laid in the said Act through originating summons. This is a special procedure for eviction and granting the title holder possession of land.

[20] Plaintiff instituted this action more than four years ago and awaits possession of the land. So delay is prejudicial to Plaintiff.

[21] The bona fides of the applicants as to the prosecution of the appeal.

[22] There is an appeal filed in Court of Appeal so it will be determined in Appeal and there is no issue as to bona fide as due process require that appeal to be determined .

[23] Defendant is a legal entity. The motion seeking stay filed on 27.6.2024 had not shown any effect on third parties or public interest or novelty or any legal questions involved.

### **The Overall Balance of Convenience and the Status Quo.**

- [25] Plaintiff filed this action for summary eviction. This needs determination and status quo cannot remain as it will prevent the party who had obtained an order of court from enjoying the fruits of the judgment.
- [26] Accordingly the overall balance of convenience favours Plaintiff as it is rare to stay eviction proceedings of a registered owner of title. Defendant was granted six months by Master and due process had delayed further execution. So the balance of convenience favours Plaintiff.

### **APPEAL GROUNDS**

Appeal grounds are discussed briefly

- [27] Defendant had participated in the hearing without objecting to extended jurisdiction of Master to hear and did not raise jurisdiction as an issue in court below as well as in the Appeal. There is no merit in this ground of appeal. Master's jurisdiction can be extended in terms of High Court Rules 1988 and this can be done when required. There is no patent lack of jurisdiction.
- [28] There was on issue as to parties were aware of that the application was made in terms of Section 169 of Land Transfer Act 1971. Even if the application was under Order 113 of High Court Rules 1988 it had not shown a right to possession.
- [29] There is no reason for the Plaintiff to comply with Order 7 rules 2 and or rule 3 of High Court Rules 1988, in originating summons filed seeking eviction as it is statutory provision and scope is clear. These provisions are general provisions and for originating summons and Section 169 of Land Transfer Act 1971 the requirements to be stated in such summons are statutorily laid down in Section 170 of Land Transfer Act 1971 and once that is complied no additional material required under said Act.
- [30] It is discretionary for application of Order 28 of High Court Rules 1988, hence it is not an order a Defendant obtain as of right.

[31] There is no reason to comply with Order 113 of High Court Rules 1988, as it proceeded in terms of Section 169 of Land Transfer Act 1971.

[32] Plaintiff had not shown a right to remain in the land in its affidavit in opposition.

[33] So there are no merits in the appeal.

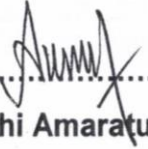
### **CONCLUSION**

[34] Jurisdiction for this court once its decision is appealed is limited. It cannot be expanded as sought by Defendant. Application for stay of judgment is refused. Cost of this application is summarily assessed at \$2,000 considering the circumstances of the case.

### **FINAL ORDERS:**

- a. Summons for stay of the appeal refused.
- b. Cost is summarily assessed at \$2,000.



  
.....  
Deepthi Amaratunga  
Judge

**At Suva** this 7<sup>th</sup> October, 2024.

### **Solicitors**

Mr. Jiaoji Savou

Gordon and Company