

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

CIVIL ACTION NO. HBC 150 OF 2011

BETWEEN: : **ENGINEER PROCURE CONSTRUCTION FIJI LTD** a limited liability Company having its registered office at 5 Nagaga Street, Lautoka in Fiji
PLAINTIFF

AND: : **SIGATOKA ELECTRIC LIMITED** a limited liability company having its registered office at Valley Road, C-/P.O.Box 113, Sigatoka, Fiji
DEFENDANT

BEFORE : Hon. A.M. Mohamed Mackie-J.

APPEARANCES : Ms. Choo N. For the Plaintiff- Respondent
: Ms. Prasad P. For the Defendant – Applicant

HEARING : Held on 13th August 2025

W. SUBMISSIONS : Filed by both parties on 02nd September 2025.

DATE OF RULING : 5th December, 2025

RULING

A. INTRODUCTION:

1. This Ruling pertains to the hearing held before me on 13th August 2025 in relation to the “**Summons on Stay**” (“the Application”) filed by the Defendant- Applicant (“the Applicant”) on 25th February 2025, seeking for the following Orders;
 - 1) *That the Judgment of the Honourable Mr. Justice A. M. Mohammed Mackie delivered on the 23rd January 2025 herein be Stayed pending the determination of the Appeal to the Fiji Court of Appeal.*
 - 2) *That the costs of this Application abide the Orders of the Court of Appeal.*
 - 3) *Any such further or other orders as this Honorable Court deems just and expedient.*
2. The Application is supported by the Affidavit sworn by VIJAY NARAYAN, the Managing Director of the Applicant Company and filed on 25th February 2025, together with annexures marked as “VN-1” & “VN-2”.

3. The Application states that it is made pursuant to Order 45 Rule 10 of the High Court Rules 1988, section 21(1) (a) of the Court Rules 1949, Rule 26 (3) of the Court of Appeal Rules 1949 and the inherent jurisdiction of this Court.
4. The Application being first heard inter-Parte on 25th March 2025, as the junior Counsel for the Plaintiff-Respondent (“the Respondent”) objected to the application, having given directions for filing of Affidavit in response and reply, the Court fixed the matter for mention on 19th May 2025. Though, an interim stay was verbally moved for, since there was no such a relief formally prayed for and considering the objection raised, the Court refused to grant an interim stay and deferred it to be considered at the hearing.
5. In the meantime, Solicitors for the Applicant on 1st April 2025 filed an Ex-parte Notice of Motion seeking relief, *inter alia*, an Interim Stay of my Judgment dated 23rd January 2025, and particularly a stay of further proceedings of the Statutory Demand served on the Applicant, pursuant to Section 515 of the Companies Act.
6. When the matter was mentioned on 19th May 2025, the said ex-parte Notice of Motion for an interim stay being supported, as no objection was recorded by the junior Counsel for the Respondent, a temporary interim Stay pending the hearing was granted by this Court as prayed for in paragraph 1 of the Ex-Parte Notice of Motion, and the substantive hearing was fixed for **13th August 2025**.
7. Accordingly, when the matter came up for hearing on 13th August 2025, a preliminary objection being raised by the senior Counsel for the Respondent with regard to the temporary interim stay already granted, having heard both the Counsel and after careful perusal of the record, this Court promptly set aside the temporary Stay order and fixed the substantive matter for Ruling.
8. In addition to the oral submissions made at the hearing, both parties have filed their respective written submissions on 02nd September 2025 as stated above.

B. HISTORY

9. This Court by its substantive judgment dated and pronounced on 23rd January 2025 has granted the Respondent the following reliefs;
 - a. *The Plaintiff's action succeeds.*
 - b. *The Plaintiff is entitled for a total sum of \$1,098,456.24 (One Million Ninety-Eight Thousand Four Hundred Fifty-Six Dollars and Twenty-four Cents) on account of 4 unpaid invoices and the retention money.*
 - c. *The Plaintiff is entitled to the interest on the said sum at 3% per centum per annum, for the period from 1st January 2007 till this Day of Judgment.*
 - d. *The Plaintiff is entitled to post-judgment interest at the rate of 4% centum per annum from 24th January 2025 till the principal sum is fully paid and settled.*
 - e. *The Defendant shall also pay the Plaintiff a sum of \$10,500.00 (Ten Thousand Five Hundred Dollars) being the summarily assessed costs.*

10. Being aggrieved by the said judgment, having preferred an Appeal to the Court of Appeal, the Applicant has filed this Application seeking stay of the judgment pending the Appeal.

C. **ANALYSIS:**

11. It is to be observed that the Summons in hand has been filed, *inter alia*, under Order 20 Rule (1) (a) of the Court of Appeal Rules and Order 45, Rule 10 of the High Court Rules, 1988.
12. It has been submitted on behalf of the Respondent that the Order 20 (1) (a) of the Court of Appeal Rules deals with Leave to Appeal and not with stay applications, which I agree with.
13. The Applicant also relies on Order 45 Rule 10 of the High court Rules 1988, which reads as follows.

Matters accruing after judgment; Stay of execution.

“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.”

14. It is well established that an Order 45 Rule 10 operates to stay an execution of a judgment where after making of the judgment or an order of the Court, there are matters that have occurred since the date of judgment. An Appeal is not a matter that has occurred but is an ongoing process, and a right given to the aggrieved party whether to challenge or not to challenge. Otherwise, every appeal made after the judgment is bound to qualify the Appellant for a stay as of a right. This cannot be the intention of the legislator.
15. The stay of an execution of the judgment is not an automatic right or reason under Order 45 Rule 10 to stay. The Court will only exercise its inherent jurisdiction to put on hold the fruits of the judgment, provided serious and exceptional circumstances are shown to be existing. So, there is a discretion of the Court to grant or refuse stay of execution. This discretion is governed by judicial determinations.
16. The Respondent obtained the judgment in its favour and right of appeal to Court of Appeal is an option of the party (the Applicant) against whom judgment was awarded. This right can be exercised in terms of the law. This is part of due process of law, but that does not deprive the Respondent, the fruits of the judgment specially when it is in relation to an award on money.
17. It should be noted that a party who is ordered to pay damages is at an advantage if the payment is stayed due to decreasing value of money. This will unduly favour the Applicant, the judgment debtor.

18. 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.

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** and **Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission;**

- 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."*
19. The Applicant has made a timely appeal against the judgment exercising its right of appeal. But this does not necessarily mean the bona fides of the application favors Defendant. It is part of due process and they also know that there is no automatic stay of execution on an appeal being preferred, unless court grants such a stay if it is warranted. The Applicant may bona fide believe success of their appeal, and may proceed with due diligence.
20. UK Supreme Court Practice (White Book) 1988 59/13/1 p 893 states;

Stay of execution of proceedings pending appeal

The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled, "pending an appeal (The Annot Lyle [1886] UKLawRpPro 31; (1886) 11 P.D. 114, p 116, CA; Monk v Brtram [1891] UKLawRpKQB 15; [1891] 1 Q.B. 346; and this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from for example, inquiriesBut it has also been said that "when a party is appealing exercising his undoubted right of appeal, this Court ought to see that the appeal is successful is not nugatory.... It is in the discretion of the Court to grant or refuse a stay and the court will grant it where the special circumstances of the case so require. As a general rule the only ground for a stay of execution is an affidavit showing that if

damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds...."

21. In the Affidavit in support, sworn by VIJAY NARAYAN on behalf of the Applicant and filed with its initial Application on 25th February 2025, in the subsequent Affidavit filed with the Ex-Parte Notice of motion on 01st August 2025 seeking an interim stay and even in the Affidavit in Reply by VIJAY NARAYAN for the Applicant, there is no material to substantiate that Respondent was not an entity who may return the sum paid pending the Appeal, in the event the Appeal becomes victorious.
22. This kind of allegation was not made in the Affidavit in support or in the subsequent Affidavit, thereby depriving Respondent an opportunity to refute such allegation. In my mind, the averment in paragraph 7 of the Affidavit in reply to the effect that "*The Respondent has not shown any evidentiary material that it is in such a financial position*" is only a mere statement without any basis, and cannot be considered as meritorious ground to deprive Respondent's right to the fruits of the judgment.
23. Supreme Court of Fiji in ***Ward v Chandra [2011] FJSC 8; CBV0010 (20 April 2011)*** cited a previous decision of Supreme Court with authority, (Per Justice Gates- President of Supreme Court)

'[21] In ***Iftakhar Iqbal Khan v Michael Fenech CBV0002.05S (4 May 2005) Ward JA*** in this court said (at p.4) in relation to stay:

"Execution in this case is payment of a sum of money. Only in the rarest of cases is that sufficient to justify a stay as subsequent success in the appeal will be implemented by repayment to the appellant. This is not a case of performance or restraint of some action or destruction of property which will irreversibly change the status quo and render a successful appeal nugatory. The description in the petitioner's affidavit of the consequence of having to pay before the application for special leave is heard is insufficient to meet that test."

24. The Applicant cannot use the right of appeal to delay payment ordered by court unless the Applicant adduces a compelling circumstance. It is rare to grant stay in a judgment for money. The balance of convenience favors the Respondent. Hence refusal of stay of execution can be justified.
25. The Respondent has been in litigation since the year 2011 in order to recover its dues from the Applicant on four (4) invoices raised by it on account of the works performed by it as a sub-contractor and not under a joint venture -partnership agreement as argued by the Applicant at the substantive trial.
26. The pivotal question that is to be gone into in the Appeal, as per the Respondent's counsel, is whether the works performed by the Respondent at the Applicant's work site was on a sub-contract or on a partnership agreement? However, the Applicant has raised 55 purported grounds of appeal, scrutiny of which is not my duty or within my jurisdiction at this juncture. Nonetheless, I tend to pose a question here that, If the Applicant had 55 meritorious grounds of appeal, what made the applicant to drag the issue of Statutory Demand Letter into this Application and obtained an interim

stay, when the Statutory Demand letter was supposed to be dealt with through a separate mechanism? This clearly amounted to misleading.

27. The admission of the Applicant in its Affidavits that it will have to draw money from its operational funds to pay the Respondent, if the stay is not granted, itself depicts an adverse picture about the financial position of the Applicant. The Applicant has not adduced any tangible evidence to demonstrate its financial wellbeing. There was no evidence in any of the affidavits to show that the Respondent will **not be** in a position to pay said sum if the appeal is successful.
28. Currently, there is no any interim stay in operation for same to be extended as moved by the Counsel for the Applicant in her written submission filed after the oral hearing. The interim stay that had been inadvertently granted prior to the hearing was discontinued on the date of hearing pursuant to the preliminary objection raised by the Respondent's Counsel.
29. I do not find any compelling ground or an exceptional circumstance to grant a stay of my judgment dated and pronounced on 23rd January 2025.
30. For the reasons discussed above, I decide to dismiss the Summons for Stay, with an order for costs in a sum of \$1,500.00 summarily assessed.

D. ORDERS:

- a. The Defendant- Applicant's Summons for stay fails.
- b. The Summons for Stay filed on 25th February 2025 is hereby dismissed.
- c. The Defendant- Applicant shall pay the Plaintiff -Respondent a sum of \$1,500.00, being the summarily assessed costs of this Summons.


A.M. Mohamed Mackie
Judge



At the High Court of Lautoka on this 5th day of December 2025.

SOLICITORS: (as at today)

For the Plaintiff- Respondent

For the Defendant- Applicant

Messrs. R. Patel Lawyers – Barristers & Solicitors.

Messrs. MUNRO LEYS - Barristers & Solicitors.