

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC 20800

BETWEEN: PETER EUGENE REID JR of  
Pago Pago, American Samoa,  
Businessman for himself and as  
Attorney of the Trustees of the  
Estates of ERNEST J REID,  
RICHARD F REID, CECIL M  
REID and BLANCHE H REID

Plaintiff

AND: ATIIFALE FISO of Matautu-tai,  
Workman

Defendant

Counsel: T K Enari for plaintiff  
TRS Toailoa for defendant

Hearing: 25 March 1997

Judgment: 7 May 1997

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**JUDGMENT OF SAPOLU, CJ**

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On 29 April 1993, the plaintiff filed in this Court a statement of claim seeking an order to evict the defendant from the land he is presently occupying at Matautu-tai. On 5 July 1993, the defendant, who was then represented by different counsel, filed a statement of defence which in effect denied and opposed the plaintiff's claim. On 14 August 1995, the defendant filed an amended statement of defence pleading adverse possession and the provisions of the Limitations Act 1975 as a defence.

Then on 21 August 1995 the case was heard in this Court before Casey J. On 25 August 1995, Casey J gave judgment for the plaintiff and ordered the defendant and his family to vacate the disputed land by 23 October 1995, but leave was reserved to each party to apply on 7 days notice for

extension or further extension of that order. The defendant lodged an appeal against that judgment, and this Court ordered a stay of execution of the judgment pending determination of the defendant's appeal by the Court of Appeal. On 29 August 1996 the appeal was heard and dismissed by the Court of Appeal. In its judgment the Court of Appeal held that the application by the plaintiff to lift the suspension of the orders made by Casey J on 23 August 1995 be remitted to this Court.

On 31 January 1997 counsel for the plaintiff filed a motion for this Court to set a date, which is to be two(2) months from these present proceedings, for the defendant and his family to vacate the land in question.

Apparently during the hearing of the appeal by the Court of Appeal on 29 August 1996, the defendant served on the plaintiff a copy of a statement of claim wherein he seeks from the present plaintiff and certain named persons compensation for improvements he claims he had done on the land, on the basis of the law of restitution. Counsel for the defendant has therefore applied to this Court for an order to maintain the status quo until the claim by the defendant has been determined by this Court. What that means for practical purposes is that the defendant and his family be allowed to continue to remain and occupy the land in question until the new claim by the defendant has been determined. That would necessarily involve a lengthy waiting period.

It is clear from the order made by Casey J on 23 August 1995 for the defendant and his family to vacate the disputed land by 23 October 1995, that any application for extension of that order should be for the purpose of extending the time in which the defendant and his family vacate the land. The present application made on behalf of the defendant is not for that purpose; it is not an application to postpone for a short period the operation of the order to vacate the land. What the application seeks is an order which will allow the defendant and his family to continue to remain on the land for what will necessarily be a lengthy period until the new claim by the defendant has been determined.

Given these circumstances, it appears to me that, in substance, the application on behalf of the defendant is to stay execution of the judgment that was given by this Court on 23 August 1995. Even though the application for the defendant is not expressly framed as an application to stay execution of

the judgment given on 23 August 1995, in effect and in substance, that is what the application amounts to. It thus raises for the first time issues which have not been raised before in this Court.

The first question is whether apart from the jurisdiction to order a stay of proceedings or to order a stay of execution of a judgment pending determination of an appeal, the Court has jurisdiction to order a stay of execution of a judgment it has made in circumstances different from the two situations I have just mentioned. It appears from the Supreme Court (Civil Procedure) Rules 1980 that there is power in the Court to order a stay of execution of a judgment or order it has made, but that power, in my view, applies only to a money judgment or order for a monetary sum.

Rule 135 of the Supreme Court (Civil Procedure) Rules 1980 provides :

“(1) An order to suspend or stay any judgment, order or execution under these Rules shall be “in the Form 27”.

“(2) Where an order suspending or staying a judgment, order or execution has been made and “execution has issued, the warrant shall be recalled, but the Judge may order the person named “therein to pay the costs of the warrant and any fees or expenses incurred by the officer “executing the warrant before the recall of the warrant and may authorise the officer executing “the warrant to sell a portion of the goods seized sufficient to realise those costs, fees and “expenses and the expenses of the sale, and any such warrant may be reissued by leave of the “Judge”.

Form 27 which is specified in Rule 135(1), so far as it is relevant, states :

*“On the application of....., and the Court being satisfied that the defendant is unable to pay and discharge the sum recovered against him in this action (or the instalments due under the judgment (or order) in this action), it is ordered that the judgment (or order) be suspended (or that the execution issued in this action be suspended) for [State time], upon the following terms, namely, : [State times]” (italics mine).*

The crucial words, for present purpose, are the opening words of form 27 for they show that the kind of judgment or order in respect of which an order to stay or suspend may be made, is a money judgment or an order for a monetary sum. In terms of Rule 135(1), an order to suspend or stay a judgment or order shall be in form 27. And the opening words of Rule 135(2) which provide for “*an order suspending or staying any judgment, order or execution*” must mean an order which is stated in Rule 135(1) to be in form 27.

I am therefore of the view that Rule 135 which gives the Court power to stay execution of a judgment or order applies only to a money judgment or order, and does not apply to the present application by the defendant which is to stay execution of a judgment ordering the defendant and his family to vacate the land in question.

I have also looked at Rule 219(1) and (2) of the New Zealand District Court Rules 1948 and form 59 mentioned in that rule as published in Wily and Crutchley's *District Court Practice* 8<sup>th</sup> edn at pp 325, 453 as they correspond in substantial terms with our Rule 135(1) and (2) and form 27. The only case mentioned in the commentary in Wily and Crutchley on Rule 219 of the New Zealand District Courts Rules 1948 is *Domine v M Cohen & Co [1936] 1 All E R 55* and that was a case concerning a money judgment.

I have also looked at the corresponding English rule of procedure which is R.S.C. Ord 45, rule 11 and which is cited at p.374 of the judgment in *London Permanent Building Society v De Beir [1968] 1 All E R 372*. At p.378 of the Court's judgment in that case, Plowman J said :

"The rule is therefore one which applied only to money judgments and did not, in my judgment, support the much wider statement in *Halsbury*".

The statement in *Halsbury* with which Plowman J expressed disagreement is that stated in *16 Halsbury's Laws of England (3<sup>rd</sup> edn) p.34 para 49* that the Court :

"... has an inherent jurisdiction over all judgments or orders which it has made, under which it can stay execution in all cases either for a definite or unlimited period".

At p.378 of the Court's judgment, Plowman J expressed the opinion that that proposition in *Halsbury* is too widely stated and is not supported by the cases cited in support of it. The same opinion was expressed on the passage just cited from *Halsbury (3<sup>rd</sup> edn)* in *T.C. Trustees Ltd v J.S. Darwen (Successors) Ltd [1969] 1 All E R 271 at 274* by Lord Denning MR in a judgment concurred in by Lord Diplock. I have also checked the relevant chapter on *Executions* in *17 Halsbury's Laws of England*

(4<sup>th</sup> edn), and the disapproved passage in *16 Halsburys Laws of England (3<sup>rd</sup> edn)* has not been repeated in the 4<sup>th</sup> edition of *Halsbury*.

All that which has been said concerning the relevant position in New Zealand and in England, has reinforced my view that under Rule 135 of our Supreme Court (Civil Procedure) Rules 1980, the power of the Court to stay execution of a judgment or order applies only to money judgments or orders for a monetary sum. That, however, must not be confused with the different power of the Court to order a stay of proceedings, or to order a stay of execution of a judgment pending the determination of an appeal.

I will turn now to the question of whether the Court has inherent jurisdiction to order a stay of execution of a judgment or order it has made. It appears that the Court has such an inherent jurisdiction, but it is of limited extent. In *17 Halsbury's Laws of England (4<sup>th</sup> edn p.270 para 451*, it is there stated :

“The Court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases. On the contrary, the Court’s inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself. The special circumstances which entitle the Court to stay execution of a money judgment are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness. The Court has no inherent jurisdiction or other power to stay or suspend the execution of a judgment or order for possession of land against a trespasser”.

It was not argued that the Court’s limited inherent jurisdiction to stay execution of a judgment or order it has made applies to the circumstances of the present case. But assuming that the inherent jurisdiction applies here, the question then is whether the circumstances in relation to the defendant’s application to stay execution of judgment do fall within the special circumstances which go to the enforcement of the judgment and which would entitle the Court to stay execution of a judgment it has made.

In *Ferdinand Wagner (a firm) v Laubscher Brothers Co (a firm)* [1970] 2 All ER 174 the plaintiffs, a German company, brought proceedings in Germany against the defendants, an English company, for the price of goods supplied by the plaintiffs to the defendants. The defendants defended the proceedings in Germany but judgment was given for the plaintiffs at first instance. The defendants appealed the judgment to the Federal Court of Germany which ordered a retrial. At the retrial, judgment was again given for the plaintiffs and the defendants again appealed to the Federal Court of Germany. That Court dismissed the defendants' appeal. The plaintiffs then had their judgment registered in England under the provisions of the English Foreign Judgments (Reciprocal Enforcement) Act 1933. The German judgment thus became, for all practical purposes, of the same force and effect, as if it had been given by the High Court in England. The defendants then sought to reactivate proceedings they had filed in England in relation to the same subject-matter while the plaintiffs' action was proceeding in Germany, and made application to a single Judge for an order to stay execution of the German judgment on the ground that the defendants had started an action in England against the plaintiffs. The Judge granted the defendants' application and ordered a stay of execution of the German judgment which in effect meant that the execution of the plaintiffs' judgment was stayed until the new action by the defendant was decided. On appeal the English Court of Appeal allowed the appeal and removed the order to stay execution of the German judgment.

Lord Denning MR after referring to the fact that the German judgment had been registered in England under the provisions of the English Foreign Judgments (Reciprocal Enforcement) Act 1933 said at p.176 :

“Here is a German judgment which is equivalent to an English judgment. If the plaintiffs had obtained an English judgment, we should not, for one moment, grant a stay simply because the defendants had brought a cross-claim in another action against the plaintiffs. So here we should not stay execution in this German judgment simply because the defendants have brought a cross-action in England against the plaintiffs. That would be enough to decide this “case”.

Phillimore LJ at p.179 of his judgment said :

“The fact of the matter is that the claim which these respondents are making in their action in England is one they could perfectly well have made years ago in the proceedings in Germany

“if they had wanted to. I would put it rather more strongly and say they had been fully ventilated and for the most part in my view decided in the course of the German proceedings. This judgment was not obtained by default or anything of the sort : it was obtained by a succession of hearing before the superior Courts of another country which is party to this reciprocal enforcement of judgments Act. *If such a judgment had been obtained in the Courts of this country, it is very difficult to think that a Judge of the High Court here would have stayed its execution simply on the ground that the defendants here say they have got some sort of counterclaim which they should have put forward before but which they really now want to pursue*”. (italics mine)

It would appear from what Lord Denning MR said in his judgment, that simply because the defendant has a cross-claim against the plaintiff in a separate action, does not, of itself, constitute special circumstances, which go to the enforcement of the judgment, and which would entitle the Court to order a stay of execution of a judgment already obtained by the plaintiff against the defendant in another action. And from what Phillimore LJ said in his judgment, it is clear that it would be very difficult for the Court to order a stay of execution of a judgment which the plaintiff has already obtained, simply because the defendant, in a separate action, has a cross-claim against the plaintiff which he now wants to pursue, but which he should have put forward before.

Applying those statements of principles to the circumstances of the application by the present defendant, it is clear that the new action by the defendant does not of itself, constitute special circumstances, going to the enforcement of the plaintiff's judgment, which would entitle the Court to order a stay of execution of the judgment already obtained by the plaintiff against the defendant in another action. Likewise it is very difficult to order a stay of execution of the plaintiff's judgment simply because the defendant has filed a new action which he now wants to pursue, but which he should have put forward previously. The plaintiff commenced his action against the defendant in April 1993. He obtained judgment in August 1995 after a defended hearing. An appeal against that judgment was heard and dismissed by the Court of Appeal in August 1996. At about the same time, the defendant served on the plaintiff a new and separate action which relate to the same subject-matter on which the plaintiff had already obtained judgment.

In these circumstances, and given the limited extent of the Court's inherent jurisdiction to order a stay of execution of a judgment it has made, as well as what was said in *Ferdinand Wagner (a firm) v Laubscher Brothers (a firm)* [1970] 2 All E R 174, the application for the defendant is denied.

With regard to the application by counsel for the plaintiff to set a date (two months from these present proceedings) for the defendant and his family to vacate the land in question, I fix 7 July 1997 as the date by which the defendant and his family are to vacate the aforesaid land.

As there was no application for costs, I made no order as to costs.

*TFM Sapatu*  
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**CHIEF JUSTICE**