

AT THE HIGH COURT OF LAUTOKA
WESTERN DIVISION
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 16 of 2024.

BETWEEN : **ASIF WALI MOHAMMED**
PLAINTIFF/RESPONDENT

AND : **SATEN KUMAR**
DEFENDANT/APPLICANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Ms. Tumalevu M. with Mr. Pillay W. For the Plaintiff/Respondent.
: Mr. Dayal R. for the Defendant/Applicant.

HEARING HELD ON : 14th May 2024.

W. SUBMISSIONS : No W/S filed by the Plaintiff-Respondent.
: Filed by the Defendant- Applicant on 17th May 2024.

DATE OF RULING : 7th October 2024.

RULING

(ON APPLICATION FOR INJUNCTION & STAY PENDING APPEAL)

INTRODUCTION:

1. This ruling pertains to the hearing held before me on 14th May 2024 in relation to the Inter-Parte Notice of Motion filed by the Defendant-Applicant (" the Applicant") seeking , inter alia, the following Orders:

1. *An Order for stay of execution of the judgment of Justice Mohammed Mackie delivered on 26th February, 2024 and Order dated 3rd April, 2024 and sealed on 26th April , 2024 and that all*

proceedings thereunder until hearing and determination of Civil Appeal No-49 of 2024 to the Fiji Court of Appeal.

2. *An injunction restraining the Respondent either through himself or through his agents, servants or howsoever from interfering with the Applicant's peaceful occupation of Housing Authority Lease No-400813 being lot 1 on DP 6225 in the province of BA Tikina of Vuda with a total area of 919 square meters until the hearing and determination of the Civil Appeal No- 49 of 2024 to the Fiji Court of Appeal.*
 3. *An injunction restraining the Respondent from interfering, charging, disposing or leasing Housing Authority Lease No. 400813 being lot 1 on DP 6225 in the province of BA Tikina of Vuda with a total area of 919 square meters until the hearing and determination of the Civil Appeal No- 49 of 2024 to the Fiji Court of Appeal.*
2. The said Notice of Motion, filed on 7th May 2024, is supported by an Affidavit sworn by the Applicant, SATEN KUMAR, on 5th May 2024 and filed along with annexures marked as "A" to "I".
 3. The matter proceeded for hearing with no Affidavits in opposition being filed. At the end of the hearing, the Court granted time to file written submissions, if needed, and accordingly, the Applicant's Counsel has filed his submissions on 17th May 2024.
 4. When the ruling stood fixed for on 3rd June 2024, as I suddenly fell ill, hospitalized on 2nd June 2024 and subsequently evacuated to my home Country on 8th June 2024, the ruling could not be delivered on time. I tender my apologies to the parties and their counsel for the delay caused.

BRIEF HISTORY.

5. The Respondent on 30th January 2024, filed his Originating Summons (Expedited Form) seeking reliefs, inter alia, requiring the Applicant SATEN KUMAR and/ or all other occupants and their family and any other occupants therein:
 - i. **DO GIVE** immediate vacant possession to the Plaintiff of all that piece and parcel of land of which the Plaintiff is the registered lessee comprised and described in Housing Authority Sub-Lease No- 400813 being lot 1 on DP 6225 in the province of Ba Tikina of Vuda with total area of 919 square meters.
 - ii. **ALTERNATIVELY**, to show cause why he and/ or they their family and any other occupant therein should not give immediate vacant possession to the Plaintiff of all that piece and

parcel of land of which the Plaintiff is the registered lessee comprised and described in Housing Authority sub-lease No- 400813 being lot 1 on DP 6225 in the province of Ba Tikina of Vuda with total area of 919 square meters.

6. The above Originating Summons, seeking the vacant possession, was filed by the Respondent subsequent to his purchase of the subject property from Westpac Bank on a Mortgage Sale, which had eventuated as the Applicant hereof had defaulted the repayment of the loan he had obtained from the said Bank.
7. The averments in the Affidavit in support filed by the Respondent, along with his Originating Summons for vacant possession, amply demonstrate the facts and circumstances that led him to purchase the subject property and file the Originating Summons seeking for the ejectment of the Applicant and vacant possession.
8. Having summarily heard both the Counsel in relation to the Originating Summons on 26th February 2024, this Court promptly granted the Orders in terms of the Originating Summons for the Applicant to deliver the vacant possession unto the Respondent.
9. Subsequently, an Application for writ of possession being filed on 12th March 2024 and supported inter-parte on 3rd April 2024, this Court, after hearing the counsel for both parties, also granted order for the execution of the writ of possession, however after expiry of 21 days. The Court also made an order for costs in a sum of \$5,000.00 to be paid by the Applicant. The Applicant is now said to have preferred an Appeal to the Court of Appeal against the aforesaid Orders made by this Court.

THE APPLICATION IN HAND:

10. It is under above circumstances, the Applicant filed this Notice of Motion in hand on 7th May 2024 seeking, inter alia, for the purported, relief of Stay pending Appeal and Injunctive Orders. It is observed that the Notice of Motion does not refer to any relevant Order and/ or Rule under which the relief of Stay pending Appeal is sought. However, this need not be a hurdle for the Application for Stay pending Appeal to be considered, if the Applicant satisfies this Court that he is entitled for such a relief.
11. It is also observed that the oral submissions made and the written submissions filed by the Counsel for the Applicant principally deal only with the relief of, purported, Injunctive relief, and not on the relief of Stay, which is generally sought as and when a decision of this Court is on Appeal. Thus, I will firstly deal with the Application for Injunctive relief sought by the Applicant.

THE RELIEF OF INJUNCTIVE ORDER:

12. The Applicant makes this Application for Injunction order pursuant to Order 29 Rule 1 of the High Court Rules 1988 and the inherent jurisdiction of this Court. It is to be noted that that under Order 29, if an Application for Injunction order is to be made, there has to be an originating process, either by way of Writ Action or Originating Summons.
13. The action commenced by the Respondent before this Court on 30th January 2024, by filing his Originating summons for the recovery of possession, has now been finally disposed by this Court by its Orders made on 26th February 2024 and 3rd April 2024 and the matter is now before the Court of Appeal. In other words, there is no substantial action or relief sought therein to be adjudicated by this Court with an injunction order in place.
14. The only remedy that lies for the Applicant before this court is the relief of stay pending Appeal, which can be considered only if granting of such a relief is warranted in terms of the relevant laws, facts and the circumstances of this case, on which this Court should be satisfied by none other than the Applicant. But, for reason best-known, Counsel for the Applicant did not press for such a relief by making required submissions on it.
15. This Application before me has been filed, not pursuant to an originating process, but pursuant to an Appeal said to be pending in relation to the Orders made by this Court. Counsel for the Applicant was heard making submissions that the relevant Bank (West Pack) should be brought in as a party to this action. The fact that the matter between the Applicant and the Respondent before this Court has now been finally disposed and this Court is not in a position to entertain any new parties to the action seem to have escaped the attention of the Counsel for the Applicant.
16. Even if it is assumed that the Application for injunction orders preferred by the Applicant before this Court is a properly constituted one, I find that the relevant laws and principles that govern the granting of injunction Orders and the facts and circumstances of this case do not warrant any consideration favorable to the Applicant.
17. In **American Cyanamid Co. v Ethicon Ltd [1975] UKHL 1; [1975] 2 W.L.R. 316, [1975] A.C. 396** case Lord Diplock laid down certain guidelines for the courts to consider in deciding whether to grant or refuse an interim injunction, which are still regarded as the leading source of the law on interim injunctions. They are:
 - i. *Whether there is a serious question to be tried at the hearing of the substantive matter;*
 - ii. *Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and*
 - iii. *In whose favor the balance of convenience lie if the injunction is granted or refused.*

Lord Diplock in his judgment at page 408 also said;

“... it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case”.

18. Kerr LJ in ***Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523 at 534*** said:

“It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straitjacket.... The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial”.

19. From the above it is absolutely clear that the court is not bound to follow decision in *American Cyanamid v Ethicon Ltd (supra)* in granting or refusing an Application for injunction and it will entirely depend on the discretion of the court. Injunction is an equitable remedy granted at the discretion of the court and the court can, of course, always be guided by the guide lines laid down in previous decisions.

Any Serious Question to be tried?

20. The Respondent in this matter, being the current owner of the premises , has exercised his legally recognized right to possess the property in question, of which the Applicant was the predecessor in title, who lost his title pursuant to a Mortgage sale by the relevant Bank unto the Respondent. If the Applicant had any grievance against the relevant Bank in relation to his loan facility or the process followed in the Mortgage sale, he should have pursued against the Bank and not against the Respondent, against whom no cause of action or claim appears to be existing in favor of the Applicant as per his pleadings.
21. The serious issue to be determined, if any, must be related to the reliefs sought in a substantive matter. There is neither an existing substantive matter before me now nor has the Applicant demonstrated about any tangible claim or cause of action against the Respondent for him to commence an action by way of Writ or Originating Summons seeking for any substantive relief. There is no dispute over the Respondent’s present title to the subject matter land and premises. The Applicant himself, after the Mortgage sale, has offered to purchase the property from the Respondent as substantiated by email correspondence marked as “AWM-9” to the Respondent’s Affidavit in support of the Originating Summons.

22. The title of the Respondent has now been registered with the RTO pursuant to the purchase at the Mortgage sale. Appellant has not denied the Respondent's present title. The Applicant does not make any allegation of fraud or collusion against the Respondent and the relevant Bank. There is no prima-facie winnable case for the Applicant.
23. The main purpose of granting an interlocutory injunction is to maintain the status quo until the final determination of the substantive matter.

In **Hubbard & Another v Vosper & Another [1972] 2 Q.B. 84** Lord denning said:

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules".

In Whose Favor the Balance of Convenience Relies?

24. In this matter, the Applicant was aware of the consequences of his default in repaying the Bank Loan. He would, undoubtedly, have received reminders and demands for the recovery of the Loan and Notices of impending Mortgage sale from the Bank concerned as a result of his default.
25. The Applicant was also served with the Notice to quit by the Respondent's Solicitors, though it was not warranted as there was no any legally recognized relationship between them. The Respondent, having purchased the property for valuable consideration at the Mortgage sale, is now forced to stay away by losing his expected monthly rental income and by paying interest against the Bank Loan he claims to have obtained to finance his purchasing of this property. The Applicant has totally lost his title for the property and his right to be in possession of the property in question. Thus, the balance of convenience, in my view, does not favor the Applicant.

Adequacy of Damages.

26. I don't find any tangible undertaking by the Applicant as to the damages. The damages that would , probably, befall on the Respondent, in the event an injunction order is granted as prayed for is very high , while the damages, if any, that would befall on the Applicant in the absence of an injunction order is minimal.
27. For the reasons set out above the court is of the view that the Applicant is not entitled to have the injunction orders issued in his favor as prayed for in his Notice of Motion.

APPLICATION FOR STAY PENDING APPEAL.

28. The Respondent has already obtained orders for the vacant possession and the execution of the writ of possession. The Applicant, having appealed against the said Orders, is now seeking to stay the said decisions until final determination of the Appeal.
29. In ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13; ABU0011.2004S (18 March 2005)***(Unreported) Fiji Court of Appeal laid down the criteria for granting stay and held.

Principles on a stay Application:

30. 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 to carefully 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.***

31. 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.”(Emphasis added)

32. The above list is not a comprehensive one and the competing consideration of rights of the successful party to enjoy the fruits of the judgment and effect of that on the Appellant if

the Appeal is successful needs careful evaluation. The above list though not comprehensive is a guide in that evaluation process. I would deal each of the above criteria, briefly, for the purpose of this Application.

- a. **Whether the Appeal would render nugatory?** – The Respondent moves to have the vacant possession of the property that he duly became the owner of. The Applicant continues to live in the property, despite losing his title over a Mortgage Sale owing to his failure to settle his loan arrears. He knew well in advance that this predicament would befall on him due to his own failure. He does not have title or any legally recognized right to remain in the property. I don't find any ground of Appeal that could, eventually, restore his title to the property on the strength of such a ground of Appeal. I don't see any likelihood of his victory for his Appeal to become nugatory. Even if I am wrong on that, this is not the determinative factor. The counsel for the Respondent submitted that the fruits of the judgment need to be enjoyed. By the same token, there is no competing interest to maintain status quo, if there is more than an arguable case for the Appeal to be successful.
- b. **Whether Successful party will be injuriously affected?** The Applicant has had sufficient time to look for an alternative place for his family to reside. Respondent is presently staying out of the premises losing his benefit of enjoying the property or the expected rental income therefrom. He is also said to be paying interest against the Bank Loan he obtained to finance the purchase of the very property. It should be noted that any party who has obtained a judgment would be affected to some extent by the grant of a stay, but this again has to be weigh with the degree of injury to the said party. In my view, it is the Respondent, who will continue to be affected, if a stay is granted pending the purported Appeal.
- c. **The bona fides of the Appeal**-The Applicant , who lost the title to the property, with no any recognized claim against the Respondent hereof, in my view, is now making this Appeal in order to delay the benefit to the Respondent and frustrate him. He knows where he stands, particularly, having made an offer to the Respondent to buy the property for an amount that is very much higher (\$4,50,000.00) than the loan amount he was required to pay and the price the Respondent finally bought it (\$190,000.00) at the Mortgage sale, particularly in the absence of a valuation Report submitted by the Applicant. I don't see any bona fides in the Appeal.
- d. **The effect on third parties, and (e) Novelty and importance of question involved:** I do not have any submission or material on this aspect.
- e. **The Public interest in the proceeding**- There is no public interest in this matter.
- f. **Overall balance of convenience and the status quo**- At the hearing, no argument, whatsoever, was advanced by the Counsel for the Applicant in relation to the above factors, which are generally considered in an Application of this nature.

33. The grant of stay is not automatic in every Appeal. The Appellant needs to demonstrate that there is more than an arguable case and the prospect of success is high.

CONCLUSION:

34. Having considered the submissions made on behalf of the Applicant and the circumstances in this case, in my judgment, it is not a fit and proper case to exercise my discretion (see Winchester Cigarette Machinery Ltd v. Payne and Anor (No.2) (1993) TLR 647 at 648) in granting stay of the decisions made by me on 26th April 2024 and 3rd May 2024. The, purported grounds for Appeal have no reasonable prospect of success, as it appears at this stage. The Applicant has not shown special reason as to why the decisions made warrant a stay.

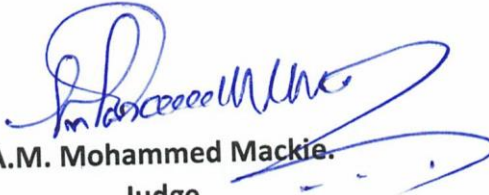
35. Considering the circumstances of the case I decide not to award cost for this Application.

FINAL ORDERS:

36. For the reasons stated above, I make the following Orders;

- a) The Defendant- Applicant's Notice of Motion, seeking for Injunctive Orders and Stay of Execution, is refused.
- b) The Notice of Motion filed on 7th May 2024 is hereby dismissed.
- c) No order for Costs made and the parties shall bear their own costs.




A.M. Mohammed Mackie.
Judge
High Court (Civil)
Lautoka.

On this 7th October, 2024
At Lautoka.

SOLICITORS:

For the Plaintiff/Respondent - Messrs. Gordon & Company- Barristers & Solicitors.

For the Defendant/Applicant – Sarju Prasad Esquire – Barristers & Solicitors.