

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. HBA 4 of 2009L

On Appeal from Sigatoka Mags Ct. Civ. Action 107/00

BETWEEN : **SATISH KUMAR** f/n Ram Sewak and **ROHINI KUMAR**
f/n B. D. Sharma both of Olosara Sigatoka, Bank Officers

APPELLANTS
(Original Defendants)

AND : **KUSUM NISHA** F/N Mohammed Nasir and **FAIYAZ KHAN**
f/n Mubarak Khan as Executors and Trustees of the estate
of **MUBARAK KHAN** f/n Abdul Samad Khan, deceased, of
Semo, Sigatoka t/a **M. KHAN FURNITURE AND**
GENERAL BUILDING CONTRACTORS

RESPONDENT
(Original Plaintiff)

INTERLOCUTORY JUDGMENT

Of: Inoke J.

Counsel Appearing: No Counsel as Judgment on the papers

Solicitors: Patel & Sharma for the Appellants
Samusamuvodre Sharma Law for the
Respondent

Date of Hearing: Judgment on notice

Date of Judgment: 16 October 2009

INTRODUCTION

[1] This is an appeal from a judgment of the Sigatoka Magistrates Court delivered on 9 November 2005 in favour of the Plaintiff, Mubarak Khan, for \$13,875.00 (the "Judgment").

[2] Mubarak Khan died on 12 September 2006 before his Judgment was satisfied. It is now being pursued by his wife, Kulsum Nisha, and son, Faiyaz Khan, as the trustees and executors of his estate under a grant of probate.

[3] On 30 October 2008 a Writ of Fifta was issued out of the Magistrates Court for the enforcement of the Judgment. On 5 November 2008, the Defendants, Satish Kumar and his wife, Roshni Kumar, filed a motion in the Magistrates Court for stay of execution of the Writ of Fifta and the Judgment. The learned Magistrate refused the application and the Defendants now appeal to this Court. When the appeal was brought in this Court in January 2009, Phillips J granted an interim stay of execution pending hearing of the application on the merits. This is the judgment on that application.

CASE HISTORY

[4] This claim arose out of a building contract that was entered into in March 1999, in which the original Plaintiff, Mubarak Khan, was to build the Kumars' house. The parties were friends. After completion, Mubarak Khan alleged that the Kumars did not pay him the balance due under the contract and the cost of the extra works done by him. He sued them in the Sigatoka Magistrates Court in Civil Action 107 of 2000 by writ of summons filed on 20 December 2000. The Magistrates Court file shows that the matter had been adjourned many times including setting down for hearing on 9 separate dates. It eventually came to be heard on 21 July 2004. The hearing did not complete on that day because the Plaintiff did not have all his witnesses so it was reset for 8 September 2004. It did not proceed on 8 September 2004, the reason for which is not obvious from the Court file and the hearing reset again for 1 November 2004. Five more adjournments took the matter to 10 May 2005. The Magistrate noted in the Court file: "This is a 1999 matter. The matter has been adjourned so many times – 9 hearing dates to date." The learned Magistrate eventually set the matter down for the last time for hearing on 7 July 2005. The hearing proceeded on **7 July 2005** and at the end of the hearing Counsels were given time to file written submissions and Judgment to be delivered on 24 August 2005. Further time was given for the Defendants to file submissions on two more occasions and Judgment was

eventually delivered on **9 November 2005** in favour of the Plaintiff, Mubarak Khan.

THE APPLICATION

[5] The application now before the Court came by way of inter-parte motion filed on 29 January 2009 for the following orders:

1. Leave to the Appellants to appeal Sigatoka Magistrates Court Civil Action 107 of 2000 out of time;
2. Stay of all proceedings (including execution) of Sigatoka Magistrates Court Civil D/S 35 of 2008 pending the determination of the Appellants appeal of the Sigatoka Magistrates Court civil Action 107 of 2000.

[6] It is supported by the affidavit of the First Defendant/Appellant, Satish Kumar, filed on 29 January 2009. The Respondent, Faiyaz Khan, has filed an affidavit in reply on 31 March 2009.

[7] The application was first called on 30 January 2009. It was unusual for applications to be brought before the Court on such short notice but it appears from the Court file notes that the bailiff had already visited the Kumars in an attempt to execute the judgment now that the Magistrates Court had refused a stay. Phillips J imposed a stay of execution until determination of the application on the merits, gave the parties more time to file further affidavits and for the Deputy Registrar to ascertain and advise the status of preparation of the Magistrates Court Record. The application was set down for hearing on 13 March 2009.

[8] The hearing did not proceed on 13 March 2009 because Counsel for the Respondents was not available and the Magistrates Court Record was still not available.

[9] The application was eventually called before me on 21 July 2009 and I had it set down for hearing on 7 August 2009. The Magistrates Court Record

was still not available on 7 August 2009 so I adjourned the hearing for another week. The Record eventually became available and on 22 September 2009 the Plaintiff's solicitors requested that I deliver judgment on notice based on submissions and the Court records.

[10] The two orders sought are for leave to appeal out of time and continuing stay of execution until determination of the appeal. I will deal first with the stay order.

STAY APPLICATION

[11] The filing of a notice of intention to appeal or grounds of appeal do "not operate as a stay of execution or of proceedings under the judgment or decision appealed from, except so far as the court below or the appellate court may order, and no intermediate act or proceeding shall be invalidated except so far as the court below may direct": **Order XXXVII rule 6** of the **Magistrates Court Rules**

[12] The leading case on stay in Fiji is the Court of Appeal decision in: **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005). At paragraph [7] the Court sets out the principles on stay applications:

"Principles on a stay application

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.

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."

[13] There are several factors which weigh against the Kumars. They have had since 9 November 2005 to appeal. They did nothing for another 3 years, except file a Notice of Intention to Appeal in the Magistrates Court on 16 November 2005 and the Grounds of Appeal a month later. In January 2006, the solicitors for the Plaintiff issued bankruptcy proceedings against the Kumars but these remained uncompleted at the time of the Plaintiffs death in September 2006. The Kumars' desire to appeal was rekindled in November 2008 when they were served with a second attempt to recover the Judgment debt, a Writ of Fife. Satish Kumar says in his affidavit that their solicitors made several inquiries of the Magistrates Court of the status of their appeal. He then makes these rather brazen statements¹:

"Neither our solicitor nor we the Defendants believe that it is our duty to process (liaise with another Registry) our appeal at either the Sigatoka Magistrates Court or here at the Lautoka High Court. Or, that we are required to personally deliver the court files and records from the Registry of the Sigatoka Magistrates Court to the Registry of the High Court of Lautoka.

We the Defendants have been advised and, believe that there was a high turnover rate of the staff at the Sigatoka Magistrates Court between 2005-8.

We the Defendants as lay people are baffled as to how the former Resident Magistrate Mr P Samusamuvodre can now (through his law firm) execute the judgment in civil action 107 of 2000 after he had heard and given judgment in the same matter."

[14] As between the parties in this action I do not accept Mr Kumar's complaints as a satisfactory explanation for his inaction and justification for a stay of execution.

¹ Paras 17, 18 and 19 of his affidavit filed on 29 January 2009.

[15] Firstly, it is not for this or any other Court to manage a litigant's case. It is the duty of his lawyer to do that and if the lawyer cannot manage his case then the litigant's remedy lies against the lawyer and not the Court or the other litigant. It is true that the Magistrates Court Rules require the Court registries to make the records available at the cost of the appellant but at the end of the day the litigants should not just sit back and wait or accept what they are told.

[16] Secondly, this case clearly illustrates the delays that are so often caused by lawyers not being ready to have their cases heard. The Kumars and their lawyers took from 14 February 2001 to 16 May 2001 to file and serve their Defence and Counter-claim. That involved 5 Court appearances, one each month, and each time an adjournment at the request of Kumars' lawyers. On 16 June 2001, no one appeared for the Plaintiff and the Magistrate struck out his claim and adjourned the Kumars' Counter-claim for formal proof on 18 July 2001. On 18 July 2001, no one again appeared for the Plaintiff but Counsel for the Defendants was not ready to proceed because he did not have his key witness available so the matter was further adjourned to 29 August 2001 for formal proof. On 29 August 2001, it was Defence Counsel's turn to not appear, he apparently had taken ill. The matter was adjourned to 19 September 2001 for Counsel for the Plaintiff to file his motion for reinstatement. On 19 September 2001, the Magistrate was informed that both parties had agreed to reinstatement so the matter was reinstated and the Plaintiff given 14 days to file his Reply and Answer. The matter was adjourned to 17 October 2001. No Reply and Answer having been filed on 17 October 2001, the Magistrate set the matter down for hearing on 5 December 2001. The Magistrate was not available and no lawyers appeared on 5 December 2001 so the hearing was adjourned to 18 December 2001. Then followed 15 Court appearances, 7 of which were trial dates which had to be vacated because the parties were not ready. The Magistrate finally refused to grant further adjournments and the hearing took place on **21 July 2004**. It did not complete on that day and the hearing was

adjourned 5 more times because a witness was not available until the learned Magistrate put his foot down and ordered that the trial proceed on **7 July 2005**. Then, as is usual, Counsels took till **October 2005** to file written submissions. It had taken 23 Court appearances, of which 9 were hearing fixtures, and 3 years before the case to be first heard. In all but on one occasion was the Magistrate not available to hear the matter and even then the hearing could not have proceeded because neither lawyer turned up. Judgment was delivered on **9 November 2005**. I do not think any blame can be put on the learned trial Magistrate for not hearing this case or delivering Judgment in a timely manner.

[17] Thirdly, whatever complaint the Kumars may have against the former trial Magistrate is a matter between them and him and their remedy is to be found elsewhere and not in these proceedings.

[18] It is nearly 4 years since judgment and the Kumars have still not obtained leave to appeal out of time, let alone prove their appeal on the merits. The latter could take another year or two. I do not think they are bona fide about prosecuting the appeal. The original Plaintiff is dead and his claim is now being pursued by his wife and son. The Court was informed on 30 September 2009 by a letter from the Plaintiff's solicitors to the Deputy Registrar that the wife has now become very ill and admitted to the Sigatoka Hospital.

[19] It appears from the Court file that Phillips J was swayed into granting the interim stay of execution by their Counsel's submission that the Kumars are bank officers. I have examined the reasoned Ruling of Keteca SM on His Worship's refusal of the Defendants' stay application in the Magistrate Court. His Worship applied the correct principles that I have cited above and I am not prepared to differ from his decision. I note from His Worship's Ruling that he too had doubts about the Kumars' bona fides in pursuing their appeal.

[20] Further, this is an appeal against an interlocutory judgment which should only be set aside on exceptional circumstance or clear error of law being shown. Neither of those exists in this case. It makes no difference that the decision appealed against is that of a Magistrate.

[21] Taking all these matters into consideration, I do not think there are any special circumstances justifying a stay of execution. Mr Mubarak Khan and his family have waited long enough.

LEAVE TO APPEAL OUT OF TIME

[22] The Original Notice of Appeal was dated 15 November 2005 and filed in the Magistrates Court on **16 November 2005**. The Original Grounds of Appeal filed on **5 December 2005** in the Magistrates Court were as follows:

- i. That the Learned Magistrate erred in fact and in law in dismissing the Appellants/ Original Defendants counterclaim and awarding Judgment for the Plaintiff in the sum of \$13,875.00 and cost in the sum of \$1000.00.
- ii. That the Learned Magistrate erred in fact and in law in applying the case of **Din Shiu Prasad v Abdul Habib Sahu Khan** 10 FLR 162, 165 as applicable to this case.
- iii. That the Learned Magistrate erred in fact and in Law in holding that the Respondent had completed the building with variation and that the Appellants had acquiesced to the completion.
- iv. That the Learned Magistrate erred in fact and in Law in awarding Judgment for the Plaintiff for works which are incomplete and unattended by the Respondent to date.
- v. That the Learned Magistrate erred in fact and in law in holding that the Appellants were not entitled to their Counterclaim.
- vi. That the Appellants reserve the right to adduce further grounds of appeal once the Court record is made available.

[23] A second Notice and Grounds of Appeal was filed in this Court on 29 January 2009 together with the application that is now being considered. The seven grounds relate only to the Magistrate's refusal to grant a stay and not to the leave to appeal application.

[24] **Order XXXVII rule 1** of the **Magistrates Court Rules** provides that “every appellant shall **within seven days after** the day on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called “the court below”) notice in writing of his intention to appeal.”

[25] **Rule 3(1)** of that Order provides that “the appellant shall **within one month from the date** of the decision appealed from, including the day of such date, file in the court below the grounds of his appeal, and shall cause a copy of such grounds of appeal to be served on the respondent”. Under **Rule 4**, “on the appellant failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.”

[26] The Judgment was delivered on **9 November 2005**. The Original Notice of intention to appeal was filed on **16 November 2005** within the 7 day period and the Original Grounds of Appeal was filed on **5 December 2005** within the one month period set by the Rules. The Notice was served 5 days late and it is not clear from the affidavits when the Grounds were served. No issue has been taken on this point so I do not take it into account in my judgment. The Rules have been complied with so the Appellants do not require leave to appeal out of time. The delay has been the preparation of the Magistrates Court Record. The Record and the Magistrates Court file is now available so the hearing of the appeal can proceed. This matter will then be called to fix the date of hearing.

[27] However, I have read the fully reasoned written Judgment of the learned trial Magistrate and would suggest to Counsel for the Appellants that he revisits that judgment before proceeding with the appeal.

COSTS

[28] The Plaintiff/Respondent has won the substantial part of this application so he is entitled to costs. Substantive affidavits and submissions have been filed and several Court appearances have taken place. I summarily assess costs at \$600 to be paid by the Defendants/Appellants within 14 days.

[29] It is not clear from the Court file whether the costs of preparation of the appeal record and for the appeal have been paid so the Deputy Registrar will have to look into it and fix them for payment before the appeal is heard.

ORDERS

[30] The **Orders** are therefore as follows:

1. **The Stay of execution of the Judgment of the Sigatoka Magistrates Court delivered on 9 November 2005 in civil action 107 of 2000 and Writ of Fife, granted by Phillips J on 30 January 2009, is lifted forthwith.**
2. **The Defendants/Appellants shall pay the Plaintiff's costs of this application of \$600 within 14 days.**
3. **The appeal against the said Judgment shall be heard on a date suitable to Counsels and the Court.**
4. **The Registry's Costs of preparing the appeal record and the appeal, if any, shall be set by the Deputy Registrar and shall be paid by the Appellant within 14 days.**

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Sosefo Inoke
Judge

