

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Appeal No. HBM 140 of 2017

BETWEEN : CHINA RAILWAY FIRST GROUP (FIJI) CO.LTD

APPELLANT

AND : SIKELI WISE trading as SITE-SAFE ONSULTANCY

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms S Devan for the Plaintiff.
Mr V Filipe for the Respondent.

Date of Hearing : 21 June 2018
Date of Decision : 17 August 2018

DECISION

1. This is the Respondent's Summon (Summons) to strike out the Appellant's Summons for Stay of Execution filed on 21 November 2017, for non-payment of costs.
2. The Summons is supported by the affidavit of the Respondent who deposes as follows:
 - (1) The summons in Magistrates' Court Action No 47 of 2016 was served on the Appellant on 21 March 2016. However the Appellant failed to enter an appearance and defend the action.
 - (2) The action was formally proved and judgment was delivered on 27 October 2016, after the Court's consideration of the oral and documentary evidence.
 - (3) The Appellant by a Notice of Motion dated 10 January 2017 sought the following orders:
 - (a) The judgment be set aside;
 - (b) The execution of the judgment be stayed;
 - (4) The Magistrate's Court by its Ruling delivered on 13 October 2017 made the following orders:
 - (a) The application is dismissed;
 - (b) The Appellant pay the Respondent's costs of the application in the sum of \$1,000 within 14 days of the date of the Ruling;
 - (c) The Appellant pay the costs (\$1,000) ordered in the judgment of 27 October 2017 (sic, 2016) within 14 days of the date of the Ruling.
3. In the Appellant's Affidavit in Reply, its Legal Counsel, Davina Chan deposed as follows:
 - (a) The Appellant as a condition of stay is willing to deposit the judgment sum and costs into Court pending the determination of the appeal by this Court.
 - (b) The stay application of the Appellant seeks a stay of the decision of 13 October 2017 and all proceedings thereunder including payment of costs.
4. The hearing commenced with Mr Filipe submitting. Two sets of costs were awarded and both were still not paid. He said it is serious not to abide by a Court order to pay costs and is contempt (of Court). There was no appeal against the award of costs. Costs are at the discretion of the court and is separate from the actual claim. The delay in

receiving the costs is prejudicial to the Respondent who was brought into the matter against his will/choice. All this is due to the non-participation of the Appellant in the original action. It did not comply with the court orders and did not show respect for the Courts of Fiji.

5. Ms Devan then submitted that the Respondent's summons was misconceived . The Appellant's in-house counsel who received the writ failed to appear in court. If the appeal succeeds, the costs fall.
6. At the conclusion of the arguments, I said I would take time for consideration. Having done so, I now deliver my decision.
7. The only issue for me to decide is whether its non-payment of the 2 sets of costs within the time period specified by the Court is fatal to the Appellant's Summons for stay of execution of the judgment.
8. I note that Ms Devina Chan has, and may I say significantly, omitted in her Affidavit in Reply to make any mention as to why the Appellant failed to pay the 2 sets of costs within the time frame specified, or at all.
9. I turn now to consider 2 authorities cited by Mr Filipe. In : Chandar Hans and Vijay Kumar AND Rajendra Prasad and Birja Nand AND the Registrar of Titles AND The Attorney General of Fiji: Lautoka High Court Civil Action No HBC 137 of 2003, Ajmeer J in para 24 of his Reasons said "By not making the payment of cost, which was ordered as a precondition for reinstatement of the matter, the Plaintiff had breached the court order. I would therefore, order that the action remains struck out for non-payment of cost ordered within 14 days of the order dated 1 October 2012". I consider this decision is not applicable in the instant matter because here there is no connection between the costs in the Magistrates' Court and the Summons in the High Court.

10. The case of Sukh Ram v Flying Prince Transport Co. Ltd and Anor [2005] FLR 261, is again not relevant for the simple reason that there the Judge was concerned with the computation of the monetary jurisdiction of the Magistrates' Court.
11. I have perused the Ruling made by the Resident Magistrate dated 13 October 2017. In paras 37 and 38 he orders the defendant, now the Appellant to pay the Plaintiff, now the Respondent the costs of \$1,000 for the application and the costs of \$1,000 in the sealed judgment of 27 October 2017 (sic, 2016) both within 14 days of the date of the Ruling. That is all. By no stretch of the imagination can these be considered as tantamount to unless orders which have effect on the stay application.
12. In my opinion the Respondent had no basis in law or in fact to bring this application to strike out the Appellant's summons for stay.
13. In the result I dismiss the Respondent's Summons filed on 22 December 2017, with costs summarily assessed at \$750 to be paid to the Appellant.

Delivered at Suva this 17th day of August 2018.



David Alfred

JUDGE

High Court of Fiji