

IN THE HIGH COURT OF FIJI

WESTERN DIVISION

AT LAUTOKA

CIVIL ACTION NO. HBC 206 OF 2015

BETWEEN : **HARI PRASAD** of 610A Mt Wellington Hwy, Mt Richmond
1062, Auckland, New Zealand.

PLAINTIFF/RESPONDENT

AND : **MIRA SAMI, RAM RAJ, RITESH MANI** and other
occupants of the premises all of Naisosovou, Nadi.

DEFENDANTS/APPELLANTS

Appearances : Mr S. Valenitabua for appellants

Mr D. S. Naidu for respondent

Date of Hearing : 03 March 2017

Date of Ruling : 03 March 2017

R U L I N G

[01] This is an application to stay of execution of the Master's order of 15 December 2016 (*the order*) pending appeal. The learned Master by his ruling ordered delivery of possession of the land in question to the plaintiff, the respondent in these proceedings.

[02] The respondents in these proceedings have filed a writ of execution of the order. The defendants, the appellants in these proceedings seek to stay the execution pending appeal.

[03] Mr Valenitabua appearing for the appellants submits that the grounds of appeal raise arguable points. He especially submits that there is a clash between two proceedings- section 169 application and section 78 application for vesting order.

[04] Mr Naidu, on the other hand, argues that the plaintiff had issued notice to vacate before the vesting order application and as such, the defendant is a trespasser.

[05] The stay application is supported by an affidavit sworn by Ram Raj (one of the appellants) on 21 February 2017. He under paragraphs 6 to 10 states that:

“...

6. *HOWEVER, the Learned Master failed to consider that the Appellants have had possession for more than 20 years and that their right is more than a future right to possession. It is a future right of ownership or proprietorship.*

7. *HAVING accepted that the Respondent's Notice to Vacate is unnecessary [see paragraph 7 at page 15 of Judgment] the Court failed to consider that the Appellants have had uninterrupted possession for more than 20 years, a fact that was accepted and uncontested by the Respondent, and that the Summons to Eject by the Respondent was filed after the Appellants lodged for registration their vesting order application.*

8. *IF interim stay will not be granted the Appellants will be greatly prejudiced, as the Respondent through the sheriff of the Lautoka High Court, will proceed with the execution of the eviction order of the Learned Master. The Appellants' appeal will be rendered nugatory and academic. The appellants' vesting order application,*

which is currently, being vetted by the Solicitor General's Office, will also be prejudiced.

9. IF interim stay is not granted, the immediate nature of the Learned Master's orders would mean that all the developments made to and crops that have been grown on, the property by the Appellants will be immediately doomed for demolition causing great loss and damage.

10. IF stay is not granted and the Appellants' vesting order application is granted later on by the Registrar of Titles then great prejudice will be caused to the Appellants as any substantial reconstruction and preplanning will be expensive and inconvenience to all parties involved. The status quo must remain to protect the Appellants' right to appeal the Learned Master's Ruling.

...”

[06] The appellants rely upon the following grounds of appeal:

- 1. The Master of the High Court erred in law and in fact in ordering the Appellants to deliver immediate vacant possession of the land comprised in Certificate of Title No. 19443, Lot 1 on Deposited Plan No. 4497.*
- 2. The Master of the High Court erred in law and in fact in ordering the Appellants to pay \$1,000.00 costs to the Respondent.*
- 3. The Master of the High Court erred in law and in fact in holding that the Appellants' vesting order application lodged before the Registrar of Titles is “a possible future right to possession” and is not a present right to possession.*
- 4. The Master of the High Court erred in law and in fact in failing to consider that the Appellants' vesting order application they made under Section 78 of the Land Transfer Act, was lodged prior to any attempts were made by the Respondent to evict them.*

[07] I have carefully considered the oral submissions made by both counsel.

[08] Initiating an appeal does not have the automatic effect of staying execution on any judgment obtained in the lower court. An appeal will operate as a stay of any order or decision of the lower court only if the appeal court or the lower court so orders.

[09] The basic rule is that a litigant is entitled to enjoy the fruits of its success (*BMW AG v Commissioners of HM Revenue and Customs* [2008] EWCA Civ 1028, LTL 7/10/2008). This means that the enforcement should be allowed to proceed unless in all the circumstances of the case have regard to the risk of injustice to the parties a stay ought to be imposed (see: *Greater Assets Ltd v NAC Naftogaz Ukrainiy* [2008] EWCA Civ 1051, LTL 8/10/2008).

[10] The grounds of appeal the defendants rely on raise some arguable points, especially whether the defendant's right to make vesting order application is a future right or a current right. Section 78 of the Land Transfer Act entitles a person who has been in undisturbed possession of any land for which a certificate of title has been issued for a period of not less than 20 years to apply to the Registrar for an order vesting the land in him. Section 78 provides:

"78.-(1) Where-

*(a) **Any person is in possession of any land** subject to the provisions of this Act, for which a certificate of title has been issued or a Crown grant registered under the provisions of this Act; and*

*(b) such possession has been continuous **for a period of not less than twenty years**, and is such that he would have been entitled to an estate in fee simple in the land on the ground of possession if the land had not been subject to the provisions of this Act,*

he may apply to the Registrar in the manner hereinafter provided for an order vesting the land in him for an estate in fee simple or for such other estate or interest as may be claimed by him:-

Provided that, unless such person has been in possession of such land for a continuous period if not less than thirty years, no such application may be made in respect of any land or any part thereof, if the registered proprietor of, or any person appearing by the register to be entitled to the benefit of, any estate or interest therein is under any disability.

(2) For the purposes of this Part, possession of any land by any other person through or under whom any person making application under the provisions of this section (hereinafter in this Part referred to as "the applicant") claims, shall be deemed to be possession by the applicant."

(Emphasis provided)

- [11] Evidence on affidavit is that the appellants have been in continuous possession of the subject land for more than 20 years and that the summons to eject by the respondents was filed after the appellants lodged their application for a vesting order.
- [12] The appeal court also has a discretion to suspend an order for possession pending the appeal (see: *Admiral Taverns (Cygnet) Ltd v Daniel* [2008] EWHC 1688 (QB), [2008] NPC 86). In addition, the court has an unfettered discretion to impose a stay of execution if the justice of the case so demands (see: *BMW AG v Commissioners of HM Revenue and Customs* [2008] EWCA Civ 1028, LTL 7/10/2008).
- [13] The appellants, pursuant to section 78, have made an application to the Registrar for a vesting order on the basis that they have been in continuous possession of the subject land for more than 20 years. Their vesting order application is receiving consideration. The learned Master decided that the appellants' vesting order application lodged before the Registrar of Titles is a 'possible future right to possession' and not a present right to possession. If a stay is refused, there are risks of the vesting order application being stifled. Moreover, if a stay is refused and their vesting order application succeeds, and the order for possession is enforced in the meantime, there are risks of the appellants being able

to recover the property. There are risks of the respondent being sold the property after taking possession. The justice of the case demands a stay of execution pending appeal.

[14] It is for those reasons that I would impose a stay of execution of the order for possession pending appeal. The costs shall be in the cause.

Final Outcome

1. Stay of execution pending appeal granted.
2. Costs in the cause.

M H Mohamed Ajmeer
..... 3/3/17

M H Mohamed Ajmeer

JUDGE

At Lautoka

3 March 2017

