

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBM 33 of 2014

(On Appeal from
Lautoka High Court
Civil Action No. HBM 33
of 2014)

BETWEEN : **THE MANAGER, FIJI NATIONAL PROVIDENT FUND** of
Naviti Street, Lautoka.

APPLICANT/DEFENDANT

A N D : **PUSHPA WATI** of Saweni, Lautoka.

RESPONDENT/PLAINTIFF

A N D : **KANCHAN NARAYAN** formally of Suva but present address
unknown, Domestic Duties.

NOMINAL 2ND RESPONDENT/NOMINAL 2ND DEFENDANT

Appearances : Ms L. Bula for applicant
Mr V. Chandra for 1st respondent
No appearance for 2nd respondent

Date of Hearing : 23 March 2017

Date of Ruling : 23 March 2017

R U L I N G

Introduction

1. Before me is an application issued by the defendant/applicant ('Applicant') on 2 March 2017 and subsequent amended application filed on 22 March 2017, by which the applicant seeks an order staying the execution of the judgment of 12 October 2016 entered by this court until the determination of the appeal.

2. The applicant has filed an affidavit of Peni Gonelevu, Manager Employers sworn on 1 March 2017.
3. The application is made pursuant to Order 45 Rule 10 of the High Court Rules 1988 (*HCR*). Rule 10 allows a party against whom a judgment has been given or an order is made to apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order. Reliance is placed by the applicant on rule 10 which is not appropriate to an application for stay of execution pending appeal. The applicant should have made this application seeking a stay pending appeal pursuant to Order 34 of the Court of Appeal Rules (*CAR*). In any event, I would deal with this application on the basis that it is filed under R.34 of the CAR.
4. At the hearing of the application, both parties made oral submissions.

Background

5. The background to the action is a dispute between the parties in respect of the FNPF monies stood to the credit of the deceased (Esogaran Goundar). The deceased had nominated his wife (Kanchan Narayan) as nominee. Kanchan Narayan was his wife at the time of nomination. Their marriage was subsequently declared null and void through a court order. The deceased did not cancel the nomination following nullity of the marriage. After the demise of the deceased, his father (original plaintiff) claimed the monies from the deceased's FNPF account. FNPF (current appellant) refused to release the monies to his father. The appellant maintained that only subsequent marriage of the nominor will nullify the nomination otherwise the nomination is still valid despite the nullity of marriage. The plaintiff/respondent filed action seeking a declaration that nomination made by the deceased in favour of Kanchan Narayan is null and void and release of his

deceased son's FPNF monies to him. The learned Master dismissed the action. He held that nullity of the marriage will not nullify the nomination of the deceased.

6. The plaintiff appealed to this court. This court gave judgment in favour of the plaintiff and held that not only subsequent marriage but also the nullity of marriage nullifies the nomination. The appellant appeals the judgment to the Court of Appeal. In view of the appeal, the appellant seeks a stay of execution pending determination of the appeal.

The Law on Stay of execution

7. Order 34 of the CAR is relevant in an application for a stay of execution pending appeal. O.34 (1) (a) provides:

“Except so far as the court below or the Court of Appeal may otherwise direct-

(a) An appeal shall not operate as a stay of execution or of proceedings under decision of the court below;

...”

The Governing Principles

8. The basic rule is that a litigant is entitled to enjoy the fruits of its success. The court has unfettered discretion to impose a stay of execution if the justice of the case so demands (*BMW AG v Commissioner of HM Revenue and Customs* [2008] EWCA Civ 1028, LTL 7/10/2008).

9. The relevant questions to be asked when considering an application for stay of execution include:

(a) If a stay is refused, what are the risks of the appeal being stifled?

(b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?

(c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?

(See *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 1915, LTL 18/12/2001)

10. In ***Reddy's Enterprises Ltd v Governor of the Reserve Bank of Fiji*** [1991] FJCA 4; Abu0067d.90s (9 August 1991), Fiji Court of Appeal took into account the following factors in considering a stay application:

i) The nature and purpose of appeal;

ii) Prejudice to the parties; and

iii) Balance of convenience.

The Ground of Appeal

11. The grounds of appeal the appellant intends to rely upon in the appeal are as follows:

(a) The Learned Judge erred in fact that Pushpa Wati who is the current Appellant and is the surviving wife of the original Appellant; Ranga Sami Goundar has sufficient interest in this appeal when she is not the valid nominee of the deceased.

(b) The Learned Judge erred in fact and in law in holding that the 1st and 2nd Respondent's lack of evidence to establish the 2nd Respondent's interest in claiming the FNPF funds indicated that the 2nd Respondent has renounced her rights to the monies and that the 1st Respondent is forcing the 2nd Respondent to receive the fund when it is clear that the 1st Respondent has a duty under section 57(1) of the Fiji National Provident Fund Decree 2011 to comply with any current nomination and pay out the FNPF monies to the 2nd Respondent.

*(c) The Learned Judge erred in law in applying the decisions on **Whitely v Chappel** (1868) LR 4 QB 147; **R v Harris** (1836) 7 C and **Fisher & Bell** (1961) where the strict application of the plain meaning rule in these cases resulted in ambiguous outcomes when the application of the plain meaning*

rule to section 56 (5) of the Fiji National Provident Fund Decree 2011 in the present case clearly does not lead to or create an ambiguous result.

- (d) The Learned Judge erred in law in applying and following the decision of **Grey v Pearson** (1857) 6 HL cas 61 which relied on the use of the golden rule in interpreting legislature as the plain meaning rule application will lead to an “absurd or ambiguous” outcome when section 56(5) of the Fiji National Provident Fund Decree is clear and unambiguous in its direction and interpretation.*
- (e) The Learned Judge erred in law in holding that the appeal involved an interpretation of section 56(5) of the Fiji National Provident Fund Decree 2011 when the validity of the member’s nomination was not a contested issue before the Master as the Respondent has abandoned his claim on this.*
- (f) The Learned Judge erred in law in holding that applying the plain meaning rule to section 56(5) of the Fiji national Provident Fund Decree 2011 would result in an “absurd outcome” and create a situation where FNPF monies might be released to a nominee who is not entitled to receive such funds when section 56(5) was not applicable in the present case.*
- (g) The Learned Judge erred in law in applying the golden rule in interpreting section 56(5) of the Fiji National Provident Fund Decree 2011 and holding that this provision implies that nullity of marriage is a ground for revocation when there is no provision in the Decree for nullity of a marriage as a ground of revocation.*
- (h) The Learned Judge erred in law in holding that the deceased member’s funds are to be paid to High Court when it is clear that there is a valid nomination in place for the 1st Respondent to comply with.*

The Grounds which the stay is sought upon

12. The applicant bases his application on the following grounds (See: para 6 of the Affidavit in Support) in seeking a stay of execution pending appeal:

- a) I have been informed that meritorious grounds of appeal have been raised in the said Notice of Appeal and that the Applicant has reasonable prospects of succeeding.*

- b) *No prejudice will result to the Respondent whereas the Applicant will be in an extremely difficult position to do the payout because it will be done in contradiction with the FNPF laws if stay is not granted pending hearing of the Appeal.*
- c) *That there are special circumstances which warrant the grant of stay of execution.*
- d) *That there are substantial issues that needs to be determined and if stay is not granted, the subject matter of the dispute may be lost.*
- e) *The learned Judge had erred in determining and wrongly concluded that there was no valid nomination left and that the monies should be paid out to the Respondent.*

Discussion and Decision

13. An appeal does not operate as a stay of execution or of proceedings under decision of the court below unless the court below or the Court of Appeal otherwise directs (see: O.34, HAR).
14. The court has unfettered discretion to impose a stay of execution if the justice of the case so demands (see: *BMW AG's case above*).
15. Without going into the grounds of appeal in depth, I would say, the grounds of appeal clearly invite the Court of Appeal to interpret section 57 of the FNPF Act.
16. The primary ground urged before me for a stay pending appeal in the current application is that irreparable loss will be caused to the appellant and if a stay is not granted the subject matter in dispute may be lost.
17. The submission that the subject matter is likely to be lost if a stay is not granted is a misconception on the part on the applicant. The court

by its judgment ordered the applicant to deposit the monies stood to the credit of the deceased member's FNPF account at the time of his death into the court. It is only the member's entitlement that is to be deposited into court. The money will be in safe custody in court once it is deposited. The court did not order the money is to be released to the respondent. Therefore, on the facts of the case, the question of prejudice or irreparable loss does not arise here. The court is yet to make a finding upon an inquiry and then will decide who is entitled to claim the money on the basis of unallocated sum pursuant to section 57 (4) of the FNPF Act. The question of risk of the appellant being able to recover what has been paid to the respondent if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime will not arise in the circumstances of the case.

18. The applicant, in my opinion, fails to demonstrate any special circumstances that warrant the grant of stay of execution. I would, therefore, refuse to stay execution pending appeal. No order as to costs.

Final Orders

1. Stay of execution pending appeal refused.
2. No order as to costs.

M H Mohamed Ajmeer
..... 23/3/17

M H Mohamed Ajmeer

JUDGE

At Lautoka

23 March 2017

