

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

HBC NO. 230 OF 2016

BETWEEN : **AJAY KUMAR** of Alladatta Road, Nadi, Carpenter.
First Plaintiff

AND : **RESHMI LATA** of Alladatta Road, Nadi, Taylor.
Second Plaintiff

AND : **DINESH KUMAR** of Alladatta Road, Nadi.
First Defendant

AND : **EPINERI SUSU** of Alladatta Road, Nadi.
Second Defendant

AND : **iTAUKEI LAND TRUST BOARD** a statutory body duly
incorporated under the iTaukei Lands Trust Act.
Third Defendant

Counsel : Mr. Mucunabitu with Ms. Tavakuru o/i of Messrs Vijay
Naidu & Associates for the Plaintiffs.

: Mr. R. Singh o/i of Messrs Patel & Sharma Lawyers for
the 1st Defendant.

: Ms. A. Singh o/i of Asta's Law for the 2nd Defendant.

: Ms. Raitamata from iTLTB Office for the 3rd Defendant.

**Written Submission for the 1st
Defendant** : Filed on 2nd October, 2017.

**Written Submission for the
Plaintiffs** : Filed on 3rd November, 2017.

Date of Hearing : 2nd October, 2017.

Date of Ruling: : 7th November, 2017.

Ruling by : Justice Mr. Mohamed Mackie

R U L I N G
(On the Application for Stay pending Further Decision)

INTRODUCTION:

1. By an inter-parte Notice of Motion dated and filed on 24th October, 2016, the 1st and 2nd Plaintiffs, being Husband and Wife, moved this Court for reliefs, inter-alia;
 - a. *“That the Order made by consent for vacant possession on the 20th day of April, 2016 in the Nadi Magistrate’s Court Civil action Number 560 of 2014, be stayed with all execution thereof until further Order”*
2. The Plaintiffs claim that this Application is made pursuant to the Order 45 Rule 10 of the High Court Rules 1988, and under the inherent jurisdiction of this Court, upon the grounds contained in the Affidavits of both of them filed in support of this Application.

BACKGROUND:

3. Along with the above Notice of Motion, the Plaintiffs also filed **writ of Summons together with their Statement of claim** against the Defendants seeking reliefs, among other things;
 - a. An Order that the Consent Order given by the Nadi Magistrate’s Court on the 20th day of April, 2016, in Civil action Number 560 of 2014 be **permanently stayed**;
 - b. An Order that the 2nd Defendant enforce the agreement of lease given to 1st Defendant to survey his lease excluding the house and the compound occupied by Plaintiffs; &
 - c. An Order by way of an injunction that the 2nd Defendant act on Mataqali Bua’s consent for 2nd Plaintiff to lease the land occupied by them.
4. On perusal of the record, it reveals further details of the said Civil Action bearing No: - **560 of 2014**, that was in the Magistrate’s Court of Nadi, naming the 1st Defendant hereof as the Plaintiff and both the Plaintiffs hereof as 1st and 2nd Defendants, respectively, seeking following relief, as per the Statement of Claim dated 1st November, 2014, filed therein; (copy marked as “E” in the Affidavit of Ajay Kumar)
 1. *“For an Order that the 2nd Defendant forthwith vacate the land comprised in Native agreement for lease No. 50037476 and known as Solovi (part of) Alladatta Road, Nadi, Western Division” (emphasis mine)*
5. The records also reveal that there was a Consent Order dated 20th April, 2016, made by the learned Magistrate of Nadi on a, purported, settlement entered between the Plaintiffs in this case, namely, **Ajay Kumar & Reshmi Lata**, standing as 1st and 2nd Defendants, respectively, and the 1st Defendant hereof, namely, **Dinesh Kumar**, standing as the Plaintiff in the said Magistrate’s Court Case No: 560/2014.

6. The Plaintiffs in the Statement of claim and in their respective Affidavits filed along with the Notice of Motion, moving for the Stay, have taken up the position that they did not get summons at all for the Magistrate's Court Case and the, purported, settlement dated 20th April, 2016, was entered against their free will and by misrepresentation of the facts by the 2nd Defendant hereof to the 1st named Plaintiff hereof and they had not given any instructions to **Mr. Eparama Sailo**, to appear for them and/ or agreed to vacate the premises in such a manner, in which they are occupying from the year 2005.
7. It is on a Writ of Possession being issued, by the Magistrate's Court of Nadi, the Plaintiffs have moved this Court by their Statement of claim and the Notice of Motion seeking, respectively, the aforesaid permanent and temporary stay of the execution of the writ on the purported consent Order in the said M.C. Case No.560/2014.

LAW & THE ANALYSIS:

8. The hearing in to the Notice of Motion seeking a temporary Stay was held before me on 2nd October, 2017, with the appearance of the learned Counsel representing all the parties. Written submissions are before me from Plaintiff's and 1st Defendant's Counsel.
9. The only question that begs adjudication for the time being is, whether a temporary stay of execution, of the writ of possession issued by the Magistrate's Court of Nadi in the case No. 560/2014, should be issued until a final Order is made in this Action by this Court.
10. Learned Counsel for the Plaintiffs and the 1st Defendant are not at variance with regard to the propriety of filing a fresh action to invalidate an Order entered on consent, without filing an Appeal for that purpose. This position is supported by the decision found in *State Transport Ltd v Housing Authority [1989]FJ Law Rp 34; [1989] 35 FLR 13 (18 January 1989)*.
11. Counsel for the Plaintiffs in his submissions, has mainly addressed on the question of balance of convenience and emphasized that if the stay is not granted it will seriously affect the Plaintiffs, having to face eviction from the House they have been living for last 11 years and, should the final outcome of this action be in their favour, it will be rendered nugatory.
12. It was learned Counsel's further submission that the Plaintiffs came in to the land in the year 2005, after entering in to an agreement with the 2nd Defendant by paying \$5000,00 unto him, who had the consent from the Mataqali land owners and subsequently, took initiatives at the ITAUKI Land Trust Board to have a new lease issued under 2nd Plaintiff's name.
13. Learned Counsel for the 1st Defendant addressed the Court referring to the written submission filed by him, that the Order in question was made by the learned Magistrate with the full consent of the Plaintiffs. The Counsel claims, that the 1st named Plaintiff has admitted in his Affidavit that he appeared at the Magistrate Court with a Counsel.

14. He further submitted that the Order 45 Rule 10 of the High Court Rule 1988 ,relied upon by the Plaintiff' s Counsel for this stay Application applies only to the cases decided by the High Court and not to the cases decided by the Magistrate's Court.
15. Learned Counsel also drew the attention of the Court to the well –recognized principles that govern the question of stay pending appeal found in very often cited case of *Natural Waters of Fiji Vs Crystal Clear Mineral Water (Fiji) Ltd Civil Appeal ABU0011..045 18th March 2005* and to several other decisions cited in his helpful written submission.
16. In *Natural Waters of Fiji Vs Crystal Clear Mineral Water (Fiji) Ltd Civil Appeal ABU0011..045 18th March 2005* (Supra), following guiding principles were laid, which are capable of shedding light in resolution of the matter in hand. They are;
 - (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Phillip 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.
17. The first test reiterates the general principle that the Court must consider if no stay is granted, namely, whether the applicant's appeal will be rendered nugatory, albeit this factor "is not determinative".
18. The matter before me is not in relation to an Appeal. What is prayed for in this Application is a stay of the execution of the writ obtained on the purported settlement Order, until the final determination of the substantial matter in this Court, in order to avoid the Plaintiffs being evicted from the House they are occupying over 11 years by duly coming in to the possession on an agreement entered by and between the 1st Plaintiff and the 2nd Defendant.
19. I am not in agreement with the learned Counsel for the 1st Defendant, who averred that the Order 45 Rule 10 applies only to the Judgments / Orders decided by the High Court, which are subjected to appeal, for the simple reason that the circumstances that surround both the instances (Execution pending Appeal & Execution pending final decision in the lower Court) and the principles govern both the instances are found to be same. Although, there is no specific

provision under the High Court Rules to suit the situation in hand, the Court can exercise its inherent power to invoke the most nearest and related provisions in the H.C.Rules to address the situation in order to do the justice what the situation demands.

20. What the Court seriously concerns about in this case, for the time being, is whether the 1st named Plaintiff has been properly, adequately and genuinely represented in the Magistrate's Court, when the purported settlement was entered and the learned Magistrate has duly exercised his role during the purported settlement, in view of the seriousness of the allegation made against the 2nd Defendant and particularly against the Counsel, who is said to have represented the 1st Plaintiff before the learned Magistrate.
21. The allegation made against the Counsel is very serious in nature, which is still pending the determination at the relevant forums. Making the relevant Counsel as a party, as pointed out by the Counsel for the 1st Defendant, is not going to address or guide the Court in deciding the question of stay. If necessary, either he can be added as a party or called as a witness by the Defence for the purpose of the substantial matter.
22. The Plaintiffs are, admittedly, in possession and occupation of the land in question over 11 years spending substantial amount of Money by paying 5000 \$ to the 2nd Defendant, obtaining Electricity cum water connection in 1st Plaintiff's name by even paying the previous arrears of bills, paying certain statutory payments to the 4th Defendant Board for the issue of new lease and spending a colossal amount on the House therein.
23. On the face of the pleadings, I am satisfied that there is a strong case against the 1st Defendant. The Second Defendant who is alleged to have taken the Plaintiff to the Magistrate's Court on the day in question (20th April, 2016) in his reply Affidavit filed in this Court has taken up a position that he does not disagree with the position taken by the Plaintiff in his Affidavit and there was no any fraudulent act on his part.
24. The learned Counsel for the 2nd Defendant at the hearing before me has consented for the stay being granted. The learned Counsel for the 3rd defendant Board has stated that the Board is concerned only about the substantial matter and not about the stay.
25. Turning to the 2nd principle above, whether the 1st Defendant, being the successful party in the Magistrate's Court proceedings, will be injuriously affected, my instant answer would be, undoubtedly, negative. Obviously, he has come in to the picture knowing very well that the Plaintiff was already in occupation of the land in question from the year 2005. There is no any forceful submission that he is going to be seriously affected by the stay.
26. The Plaintiff soon after the purported settlement on 20th April, 2016, has met another Solicitor on 26th April, 2016, to do the needful in order to undo the purported settlement and this is substantiated by the document marked "K" in his affidavit. The writ of possession is

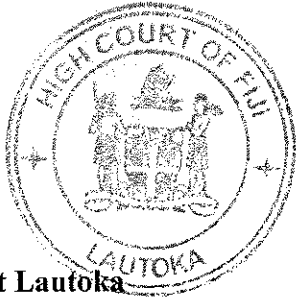
dated 20th October, 2016, and the Plaintiffs have initiated these proceedings on 24th October, 2016. I am satisfied of the *bona-fides* of the Plaintiffs in the institution of the present action to have the purported settlement Order stayed permanently.

27. The House in the disputed land is a residential one, where both the Plaintiffs are, admittedly, living with their family members for last 11 years. Their family members, Children, being a third party are certainly going to be affected, if the stay is not granted.
28. When an Order entered by a lower Court on the purported terms of settlement is, subsequently, challenged, it is always preferable to revisit the process to ascertain whether there has been a proper adjudication of the matter in order to rule out any semblance of fraud, misrepresentation or deception, as the consent Orders are not appealable and supposed to bring the dispute to end for good.
29. When the facts and circumstances placed before this Court are weighed, I am satisfied that the overall balance of convenience favours the grant of a stay and in the event the stay is refused it will seriously affect the Plaintiffs leaving them to quit the House they have been living for a long time, with no alternative.
30. Another point I have to stress here is that, admittedly, the 2nd Plaintiff hereof, who was the 2nd Defendant in the Magistrate's Court proceedings (wife of the 1st Plaintiff) has not taken part in the purported settlement process. At the hearing before me I specifically posted this question to the learned Counsel for the 1st Defendant and his readily given answer was "No". Then the question arises how an effectual settlement could have been entered in her absence.
31. During the hearing, I also posted another question to the learned Counsel for the 1st Defendant, whether this settlement was an impromptu, for which the learned Counsel's instant answer was "Yes". Then a serious doubt arises as to whether the 1st Plaintiff, who is in the land for 11 years spending a colossal amount of Money and doing necessary home works to get a lease in his wife's name, would have **instantly** agreed for a settlement of this nature, particularly in the absence of his wife, who was the 2nd Defendant.
32. I must place on record a special thanks to the learned Counsel for the 1st Defendant Mr. R. Singh for his candidness in answering those two questions from his heart, though the answers were, obviously, detrimental to his case.
33. Another fact that attracted my mind, when perusing the record is that in the statement of Claim before the Magistrate Court, the Plaintiff therein (the 1st Defendant hereof) had asked the Order for the eviction of only the 2nd Defendant therein (the 2nd Plaintiff hereof) and not any Order against the 1st Defendant therein, who is the 1st Plaintiff in this case.

34. All the above observations cast reasonable doubt on the propriety of the Order made by the learned Magistrate on the purported consent of the 1st Defendant therein, who is the 1st Plaintiff in this case. However, I must take caution not to arrive or appear to have arrived at any final decision at this juncture without revisiting the impugned settlement Order by way of trial proper in this case.
35. The learned Counsel for the 1st Defendant has filed a supplementary affidavit along with a copy of the Notice of Intention to Defend filed in the Magistrate's Court on behalf of this Plaintiffs hereof, who were 1st and 2nd Defendants in the said M.C. Case. The presence of such a document in the case record need not necessarily mean that all the affairs concerned have been duly performed or attended. There are so many grey areas that should be gone in to at the trial to decide the propriety of the purported settlement Order which is under attack.
36. Therefore, I am of the view that until such an exercise is duly performed by this Court at the trial, it is not prudent for this Court to disallow the Application of the Plaintiffs for a stay pending final determination of the matter.
37. Accordingly, for the reasons adumbrated above I decide to grant a stay as prayed for in the 1st paragraph of the Inter-parte Notice of Motion dated 24th October, 2016, filed on behalf of the Plaintiffs.

FINAL ORDERS:

- A. Stay granted as prayed for in paragraph 1 of the Inter-parte Notice of Motion dated 24th October, 2016, filed on behalf of the Plaintiffs,
- B. This stay shall be in operation until the final determination of this action by this Court,
- C. Registrar of this Court shall forthwith inform the Registrar of the Magistrate's Court of Nadi, about this stay , by sending a copy of this ruling and call for the original record,
- D. No costs ordered,
- E. The matter will proceed on normal course.



At Lautoka
7th November, 2017

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A.M.Mohammed Mackie

Judge