

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

Civil Action No.: HBC 184 of 2019.

IN THE MATTER of an Appeal from a Decision and/or Order and and/or Judgment of Master U. L. MOHAMED AZHAR dated and pronounced on the 15th of June 2023 in the Civil Action No. HBC 184 of 2019.

BETWEEN : **BISUN KUMARI AND ALL OTHER OCCUPANTS** (Occupants unknown to the Plaintiff) in occupation of that part of the property comprised and described in Certificate of Title No- 12555 being Lot 32 on Deposit Plan No- 2631, known as Waqadra (portion of) situated in the District of Nadi in the Island of Vitilevu.

APPELLANTS (Original Defendants)

AND : **KRISHNA SAMI NAIDU** of Vulovi , Labasa , Fiji Islands, Businessman.
RESPONDENT (Original Plaintiff)

BEFORE : A.M. Mohamed Mackie –J.

COUNSEL : Mr. Rupesh Singh – for the Defendant- Appellant.
: Ms. G. Fathima – For the Plaintiff- Respondent.

HEARING : On 9th November 2023.

WRITTEN SUBMISSIONS: Filed by the Appellant on 09th November 2023. (At the hearing)
: Filed by the Respondent with no date.

RULING : Delivered on 30th January 2024 at 10.00 Am.

RULING

(on Stay pending Appeal)

A. INTRODUCTION

1. This is an Application by the Defendant – Appellant (“the Appellant”) preferred on the 22nd day of August 2023 for the stay (pending Appeal) of the Judgment of the learned Master (“the Master”) delivered on the 15th June 2023.
2. The Master’s said judgment relates to an Application for vacant possession of the subject matter land pursuant to Section 169 of the Land Transfer Act (Cap 131). The property in question in Certificate of Title No- 12555 is presently owned by the Plaintiff-Respondent (“the Respondent”) on which he summoned the Appellant and other occupants thereof to

show cause as to why an Order for eviction and vacant possession thereof should not be made.

3. This Application is made pursuant to Order 59 Rule 16 of the High Court Rule 1988 and the inherent jurisdiction of this Court. It is supported by the Affidavit of MOHAMED ALEEM KHAN sworn on 21st of August 2023 with the authority from the Appellant, and filed on 22nd day of 2023, together with exhibits marked from “A” to “M”.
4. The Respondent filed his Affidavit in opposition on 28th September 2023 , along with exhibits marked from “A”,”B” & “C” , and the Appellant filed her Affidavit in reply on 25th October 2023.
5. In the meantime, the Summons for Direction, in relation to the Appeal, was supported before my Brother Judge A. Tuilevuka on 21st August 2023, who made the orders in terms thereof and fixed the matter to be mentioned on 12th September 2023, while leaving the Sheriff at liberty to execute the writ of possession. Immediately, the Appellant’s Solicitors filed an Ex-parte Summons (Application in hand) on 22nd August 2023 and had supported it before my Brother Judge on 23rd August 2023, who granted an interim stay, of the Master’s Judgment dated 15th June 2023, to be in force till 8th of September 2023 and directed the matter to be mentioned before me on 8th September 2023, as the connected matter in HBC 123 of 2012, is pending before me wherein the Plaintiff thereof and the Respondent hereof are same person and the subject matter in both actions are identical.
6. When the matter came up before me on 08th September, 2023 parties were directed to file Affidavit in opposition and reply in relation to the Stay Application. The directions were duly complied with and the hearing into the Stay pending Appeal Application was fixed for 9th November 2023 with the direction being given to file written submissions, which also has been complied with. The hearing into the substantial matter (Appeal) was fixed for hearing on 6th February 2024 and the temporary stay also was extended accordingly.
7. The task before this court, for the time being, is to decide whether the interim stay, which is in force now, should be extended till the determination of the Appeal before me, which stands fixed for hearing on 6th February 2024. Learned Counsel for both the parties have made oral submissions in addition to the written submissions already filed.

B. HISTORY IN BRIEF

8. As per the Appellant, the property in question was transferred to him on 21st September 1995 after he purchased it from one **Abdul Hafiz** on the said date and continued to be the Registered owner of it till 12th June 2017 when the Respondent fraudulently transferred the said property under his name as has been alleged in the related proceedings ***KRISHNA SAMY NAIDU v MOHAMED ALEEM KHAN Laotoka High Court Civil Action No; HBC 123 of 2012 L.***
9. It is his further contention that after purchasing the property in 1995, he had been residing therein with his family and Mother in Law (the within named Appellant Bisun Kumari), till he

departed from Fiji on 22nd May 2012 for his Medical Treatment in Australia, where he had to stay due to his medical condition, but his Mother in Law continued to be in occupation thereof with his permission. The deponent Mohamed Aleem Khan states that he is now back in Fiji and in occupation of the property in question with his family and Mother in Law Bisun Kumari, the Appellant.

10. Conversely, the Respondent states that he had entered into a sale and purchase Agreement with Mohamed Aleem Khan on 1st June 2006 as per "KSN-5" and as Mohamed Aleem Khan had failed to honor the same, he initiated in Civil Action No-HBC 123 of 2012 and obtained an Order for the property in question to be transferred unto his name. He states further that the Deed was executed by the Chief Registrar of High court and accordingly on 12th June 2017 the Registrar of Title registered his (Respondent's) name as the proprietor thereof pursuant to the order for Transfer made by the High Court.
11. It is based on the said Title, the Respondent initiated section 169 proceedings against the Appellant Bisun Kumari and other unnamed occupants through this action No HBC -184 of 2019 and the Master, after hearing both the parties, made the impugned Judgment on 15th June 2023 ordering the Appellant to deliver the vacant possession of the premises in suit with a further order to pay cost in a sum of \$3,000.00. It is against the said judgment, the Appeal lies before me for hearing on 6th February 2024.
12. As the aforesaid Action No- HBC -123 of 2012, had not been contested by Mohamed Aleem Khan (the Original Owner) the reliefs sought in Amended Notice of Motion filed therein had been granted and subsequently a default Interlocutory judgment also was entered on 9th July 2015, together with special, general damages and costs to be assessed.
13. Though, Mohamed Aleem Khan, had made an Application in the said Action No-HBC -123 of 2012 to have the Orders granted on the amended Notice of Motion dated 5th September 2012 and the default judgment dated 9th July 2015 set aside, same was dismissed by the Master by his Ruling dated and simultaneously pronounced on 15th June 2023 .The said ruling also is now challenged before this Court in a leave to Appeal Application in the said Action No-HBC 123 of 2012.
14. It is also pertinent to put on record that prior to the filing of this action by the Respondent Krishna Samy Naidu in the year 2019, said Mohamed Aleem Khan had filed a separate Action No-HBC -231 of 2018 against the Respondent hereof KRISHNA SAMY NAIDU, ANIL KUMAR (Aleem Khan's former Financial controller) and DOMONION FINANCE Limited seeking reliefs, *inter alia*, to have the default judgment and orders made in the Action No- HBC 123 of 2012 set aside. However, the said Action No-HBC 231 of 2018 was subsequently withdrawn by Mohamed Aleem Khan, purportedly, to avoid the duplicity of actions and to proceed with the setting aside Application in the connected action No-HBC 123 of 2012.
15. Accordingly, this Court has now been called upon to dabble with two matters, namely, Leave to Appeal Application in Action No HBC -123 of 2012 against the Ruling therein dated 15th June 2023 made by the Master dismissing the setting aside Application of the Defendant

therein Mohamed Aleem Khan, and the proper Appeal in HBC 184 f 2019 wherein the Master made order on 15th June 2023 granting an Order for vacant possession to the Respondent KRISHNA SAMY NAIDU and to evict the Appellant BISUN KUMARI and other unnamed occupants. In addition to aforesaid two matters, a separate leave to Appeal Application by Mohamed Aleem Khan in HBC 39 of 2012 also pending for hearing on 6th February 2024. This Ruling pertains to the Stay Pending Appeal Application preferred by the Appellant in this Action No- HBC-184 of 2019.

16. The Respondent had sought to execute the said orders for vacant possession and thought the Orders had been granted Ex-parte by my Brother Judge on 21st August 2023, subsequently on 23rd August 2023 it was temporarily stayed on the Application made by the Appellant's counsel. Now she seeks to stay the said decision until final determination of the Appeal.

C. PRINCIPLES ON STAY APPLICATION & DISCUSSION

17. In ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13; BU0011.2004S (18 March 2005)***(Unreported) Fiji Court of Appeal laid down the criteria for granting stay and held; ,

[7] The principles to be applied on an application for stay pending appeal are conveniently summarized 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.”*

The above list is not a comprehensive list and the competing consideration of rights of the successful party to enjoy the fruits of the judgment and effect of that on the appellant if the appeal is successful needs careful evaluation. The above list though not comprehensive is a guide in that evaluation process”.

18. I would deal each of the above criteria, briefly for the purpose of this Application in the following manner.

- a. **Whether the Appeal would render nugatory** – The Appellant BISUN KUMARI claims to be the Mother in Law of the Predecessor in Title, namely, Mohamed Aleem Khan, who is the Defendant in the connected Action No: HBC 123 of 2012 and litigating to have his title reinstated, which he alleges was fraudulently transferred by KRISHNA SAMY NAIDU, the Respondent in this Application.

Bisun Kumari lives in the said property after the purchase of the same by Mohamed Aleem Khan in the year 1995, who also claims to be residing in the said property, along with his Wife Ayesha Khan, on their return from Australia. These facts are not in dispute. If the Appellant Bisun Kumari and Khan duo are evicted, undoubtedly, her Appeal would become nugatory as it would dispossess her and Mohamed Aleem Khan along with his wife, who had been undisputedly living/ occupying / possessing it for a long period of time. Even if I am wrong on that, this is not the determinative factor. Counsel for the Respondent says that the fruits of the judgment need to be enjoyed. By the same token, there is a competing interest to maintain status quo, if there is more than an arguable case for the Appeal to be successful.

The Appellant by way of the Affidavit in support, sworn through Mohamed Aleem Khan, has very clearly averred that in the event a stay is not granted their Appeal will be rendered nugatory. The substantive Appeal has been fixed for hearing on 6th February 2024 and it is likely to be disposed in near future. The Respondent had waited for around two years to file this action under section 169 for eviction after obtaining title in the year 2017, allegedly, through fraud in Action No HBC 123 of 2012. This too was after said Mohamed Aleem Khan filed a separate Action No- HBC 231 of 2018 to set aside the default Judgment and Orders that had been obtained by the Respondent Krishna Samy Naidu in the Action No- HBC-123 of 2012, allegedly by not serving the summons / papers, and without paying the consideration .

On perusal of the averments in the Affidavits and the contents of the supporting documents, this Court stands convinced that the Appellant and others may have to face, drastic consequences if the stay is not granted and the impugned judgment is executed before the Appeal is finally disposed.

The Fiji Court of Appeal whilst granting stay in ***Reddy's Enterprise Ltd v The Governer of the Reserve Bank of Fiji [1991]FJCA 4; Abu 0067d 9th August 1991***

"I am satisfied that the Appellant's Appeal will be rendered nugatory or substantially so if a stay is not granted. In my view the Applicspecial circumstances warranting to grant stay. In coming to my conclusion I have borne in mind what was said in Wilson v Church [1879] UK Law Report Ch 169; (1879) 11 ChD 576 CA:

" Where an unsuccessful party is exercising on unrestricted right of Appeal , it is the duty of the Court in ordinary case to make such orders for staying proceedings

under a judgment appealed from , as would prevent the appeal , if successful, from being nugatory . But not to be bona fide, or there are other sufficient exceptional circumstances”

- b. **Whether Successful party will be injuriously affected?** The Respondent is presently residing elsewhere and, admittedly, in an attempt to dispose the property in question as alleged by the Appellant. He would not be injuriously affected by the stay. The escalation of the property price in the market will, undoubtedly, benefit the Respondent if the Appeal fails and by the time he obtains the possession of the property. It should be noted that any party who has obtained a judgment would be affected to some extent by the grant of a stay, but this again has to be weighed with the degree of injury to the other party. At the hearing there was no argument raised on this issue by the counsel for the Respondent.

Another salient point to be observed is the absence of any provisions in the purported Agreement to sell in relation to the possession of the property, despite a substantial amount of the purchase price had been, purportedly, paid at the execution of the same in the year 2006, and the balance sum of \$10,000.00 was also, purportedly, paid in the span of 5 years till the year 2011 at the rate of \$2,000.00 per year. I don't find any correspondence on the question of possession between 2006 and 2011. These aspects demonstrate that the Respondent for some or other reason was not in need or hurry to obtain the possession. A further delay of few months, in my view, is not going to prejudice the Respondent.

It is also observed that the outcome of the Appeal in Action No: HBC -123 of 2012 will have a direct bearing in the matter in hand. Serious allegations are levelled against the Respondent to the effect that there was no service of Summons and other relevant papers, the consideration was not paid and the former accountant of Mohamed Aleem Khan had colluded with the Respondent in filing the action and having the property transferred in his name. These allegations cannot be lightly taken. I shall refrain from discussing the merits and demerits of the connected Appeal in action No-HBC -123 of 2012. However, I find that a stay in this matter before the final disposal of the Appeal hereof appears to be indispensable.

- c. **The bona fides of the Appeal**-The Appellant believes that she has all the rights to be in possession under the rights and authority of her Son in Law Mohamed Aleem Khan. The Respondent filed the Action No HBC 123 of 2012 against Mohamed Aleem Khan, who was then in Australia, by purported service of summons in Fiji without seeking an order for service out of jurisdiction. Aleem Khan's occupation of the premises has been tacitly admitted. He claims to be back in Fiji and now occupying the premises. For the reason best known to him the Respondent did not make Mohamed Aleem Khan as a party to the eviction proceedings.

The Respondent did not press the Appellant or any others in the property for the possession thereof for around two years after obtaining the title in 2017. He filed the eviction proceedings only on 24th July 2019. The Appellant promptly filed her

Summons for stay on 22nd August 2023 and obtained the temporary stay on 23rd August 2023. I find the Appellant, along with her Son in Law Mohamed Aleem Khan, has acted bona fide. She believes in and relies on the, purported, rights and title of her Son in Law and is in occupation of the premises with the hope of final victory for Aleem Khan in the connected Action No HBC 123 of 2012.

- d. **Exceptional Circumstances**: There seem to be merits on that grounds adduced in this Appeal and the success of that needs to be determined at the hearing. If the said grounds are successful, the Master's decision for vacant possession will be quashed. Moreover, Mohamed Aleem Khan has challenged the ownership of the Respondent in the connected Action No-HBC 123 of 2012. If he succeeds in the Appeal, the default judgment that gave the title to the Respondent, will not stand and the transfer in favor of the Respondent will also have no effect. Accordingly, the foundation of the eviction proceedings will collapse.

The Appellant has pleaded number of Grounds in her Grounds of Appeal, particularly the Ground No-03, demonstrating that there are substantial arguable issues in this matter that may not have suited for an Action under Summary Procedure pursuant to section 169 of the Land Transfer Act.

- e. **The effect on third parties**- It has been submitted by the Counsel for the Appellant that there are no third parties involved. Thus, I need not delve into this aspect. However, I find that Mohamed Aleem Khan, who is not a named party to this Action, is involved in the action No-HBC 123 of 2012 in respect of the same property and claims to be in occupation thereof as the rightful owner. If a stay is not granted as prayed for, the rights claimed by the Appellant through Mohamed Aleem Khan can be jeopardized.
- f. **Novelty and importance of question involved**- There is no issue of novelty involved. But, I observe that the Respondent in this Appeal claims to have obtained his Title through the Action No-HBC 123 of 2012, which was found on a purported Agreement to Sell. That action has proceeded ex- parte and it is on a default judgment and Orders obtained therein, the Respondent has filed and proceeded with this action for vacant possession. The propriety of the default judgment is challenged by the Defendant therein, namely, Mohamed Aleem Khan and a final decision is yet to be arrived at the Appeal thereof if the leave to Appeal is granted in that matter. Therefore, in the interest of justice and considering the predicament that the Appellant would, probably, face in the absence of a stay, it is safer to preserve the status quo by staying the execution pending the Appeal.
- g. **The Public interest in the proceeding**- There is no public interest in this matter.
- h. **Overall balance of convenience and the status quo**- As alluded to above, the Respondent is residing elsewhere. His only intention is to sell the property in question. The Appellant is in occupation of the property from 2005 till date. There is

no evidence that the Appellant has an alternative place to reside. On consideration of the balance of convenience, I find it favors the Appellant and justifies a stay until the determination of the Appeal against the Master’s decision.

19. The grant of stay is not automatic in every Appeal. The Appellant needs to demonstrate that there is more than an arguable case and the prospect of success is high. The prospect of success in the grounds alleged should lead to quashing of the decision intended to stay. Supreme Court of Fiji stated, “Once successful, the litigant should not lightly be deprived of the fruits of his successful litigation: *The Annot Lyle 91886 11P.D at 116CA; Monk v. Bartram (1891) 1 AB 346. The Power of the Court to grant a stay is discretionary. The Attorney-General v. Emerson and Others (1890) 24 QB 56[1]*. So the threshold for stay is high, nevertheless a court should not hesitate to grant it in an appropriate case.


D. CONCLUSION

20. Having considered overall circumstances in this case ,in my judgment, I find it is a fit and proper case to exercise my discretion (see *Winchester Cigarette Machinery Ltd v. Payne and Anor (No.2) (1993) TLR 647 at 648*) in granting stay of the judgment of the Master delivered on 15th June 2023 until the final determination of the Appeal. There are grounds of Appeal that has reasonable prospect of success, as it appears at this stage. The Appellant has shown special reason as to why this decision needs a stay. (See *Winchester Cigarette Machinery Ltd v. Payne and Anor (No.2) (1993) TLR 647 at 648*).
21. Considering the circumstances of the case, I do not award a cost for this Application.

E. FINAL ORDERS

- a. The decision of the Master delivered on 15th June 2023 is stayed till the final determination of the Appeal.
- b. No costs ordered and the parties shall bear their own costs.




A.M. Mohamed Mackie
Judge

At the High Court of Lautoka on this 30th day of January, 2024.

SOLICITORS:

For the Appellant: Messrs PATEL & SHARMA LAWYERS- Barristers & Solicitors
For the Respondent: Messrs. R. PATEL LAWYERS – Barristers & Solicitors