



NAURU COURT OF APPEAL
AT YAREN
APPELLATE JURISDICTION

Civil Appeal No. 07 of 2020
(Supreme Court Civil Case
No: 8/2020)

BETWEEN

JANELLE TSIODE

Appellant

AND

DARAN ADEANG

Respondent

Before : Fatiaki CJ (President)

Date of Hearing : 20 April, 2021

Date of Ruling : 19 November , 2021

CITATION : Tsiode v Adeang

CATCHWORDS: *“order for vacant possession” ; “no date or time to comply with order” ; “appeal against order” ; “stay of execution ” ; “grounds to consider for a stay” ; “requirements for the affidavit in-support of application”.*

LEGISLATION : ss 17 & 27 Nauru Court of Appeal Act 2018 ; Rules 9 & 12 Nauru Court of Appeal Rules 2018 ;

CASES REFERRED TO : Herman v Deireragea [2012] NRCA 2 ; Jennings Construction Ltd v Burgundy Investments Pty Ltd (No.1) [1986] 161CLR 685 ; Keung v GBR Investment Limited [2010] NZCA 396 ; Eobob v Amandus [2018] NRSC 38.

APPEARANCES:

Counsel for the Appellant : A. Amwano
Counsel for the Respondent : D. Aingimea

RULING

INTRODUCTION

1. On 1 December 2020 the Supreme Court (Khan A/CJ) delivered a judgment in Civil Case No 8 of 2020 between Daran Adeang (the Respondent) and Janelle Tsiode (the Appellant) in which the Court ordered inter-alia :

“..... that (the Appellant) has been in occupation of the house (situated on Portion 10 of Ewa District , namely Ateimanema) , **without any right and I order her to give vacant possession of the house to** (the Respondent)”. (my insertion in brackets)

Unfortunately , no particular date , event or length of time is included in the order by when “vacant possession” was to be given by the appellant such as : “*within three (3) months*” or “*after the expiry of any appeal period*”.

THE APPEAL & STAY APPLICATION

2. On 9 December 2020 the Appellant filed a Notice of Appeal in the Court of Appeal against the whole of the judgment of the Supreme Court. The Notice advanced five (5) grounds of appeal but no interlocutory relief or orders was sought in the Notice.
3. On 16 December 2020 the Appellant filed an Amended Notice of Appeal identifying the number of the Supreme Court case being appealed ie. Civil Case No. 8/2020 and reducing the grounds of appeal from five to four (4) grounds. The Appellant also sought in the Notice , “..... an interim stay of the Supreme Court decision (1st December 2020) ”.
4. An undated Summons for stay of execution together with two (2) affidavits in support was filed on 9 December 2020 and given a return date of 16 December 2020.

THE LAW

5. ***Rule 9 Reference to the Court includes a single Justice of Appeal***

Where under the Rules a reference is made to the Court, a single Justice of Appeal may exercise those powers and jurisdiction of the Court vested to him or her under sections 27 and 43 of the Act.

Rule 12 Stay of execution or proceeding

(1) An appeal shall not operate as a stay of execution or proceeding unless ordered by the Supreme Court or the Court.

(2) Where an intended appellant or appellant seeks an order for stay of execution or proceeding against the judgment, decision or order of the Supreme Court, before or after filing of the notice of appeal respectively, he or she may file and serve:

(a) a summons seeking an order for stay of execution or proceeding with any other appropriate orders in Form 3 in Schedule 1; and

(b) one or more affidavits in support of the application for stay of execution or proceeding for and on behalf of the applicant.

(3) The affidavit in sub rule (2)(b) shall include:

- (a) reasons as to why the failure to stay the execution or proceeding will render the appeal nugatory;**
- (b) the prospect of the success of the appeal or where an appeal is not filed, exhibit a duly completed copy of the proposed notice of appeal in Form 1 in Schedule 1;**
- (c) the effect of the stay on third party;**
- (d) the balance of convenience and competing rights of parties to the intended appeal or appeal filed;**
- (e) a copy of the judgment, decision or order of the Supreme Court;**
- (f) a copy of the decision or order of the Supreme Court where the application for stay was filed but dismissed; and**
- (g) any other matters which the intended appellant or appellant may deem necessary.**

(4) (inapplicable)

(5) (inapplicable)

(6) Any respondent or interested party who seeks to oppose the application may file and serve an answering affidavit no later than 7 days or as directed by the Court from the date of the service of the summons and affidavit filed in sub rule (2).

(7) An order granted under this rule shall be served to the respondent or any other interested third parties as soon as practicable or as ordered by the Court.

Section 17 Stay of execution of judgment decision or order

(1) Subject to Part 7, the Court shall have the jurisdiction and power to stay the execution of any judgment, decision or order of the Supreme Court until the final determination of the appeal or such further or other orders the Court may deem fit.

(2) A party may apply for the discharge or variation of an order granting stay on the grounds of change of circumstances from the time the decision to stay was granted.

Section 27 Powers of a Justice of Appeal

The powers of a Justice of Appeal under this Part are to:

- (a) give leave to appeal an interlocutory judgment, decision or order of the Supreme Court;**
- (b) give leave to appeal an interlocutory judgment, decision or order where leave in the first instance has been refused by the Supreme Court;**
- (c) extend the time within which a notice of appeal or an application for an appeal may be given;**
- (d) give directions as to the service of documents;**
- (e) stay execution of a judgment, decision or order of the Supreme Court;**
- (f) give leave to amend a notice of appeal or a respondent's notice;**
- (g) make orders by consent of the parties;**
- (h) make orders for costs;**
- (i) dismiss an appeal for want of prosecution;**
- (j) give leave to withdraw an appeal on the application of an appellant;**

(k) *strike out an appeal under section 26;*

(l) *deliver a reserved judgment of the Court if any or all the Justices of Appeal who heard the appeal are unable to sit to deliver the judgment;*

(m) *give general directions for the purposes of the appeal; or*

(n) *any other matters as prescribed under the Act, other written law or the rules of the Court or directions published by the Chief Justice from time to time.*

(my highlightings)

6. By a Court file Minute on 16 December 2020 , the stay application was adjourned to 23 December 2020 and the Appellant was granted time to file an affidavit in reply to the Respondents affidavit received that morning in opposition to the stay application.
7. On 23 December 2020 the application was further adjourned to 26 January 2021 and this time , the Court gave directions for the filing of written submissions on the stay application. After drawing counsels attention to **Rule 12** of the Court of Appeal Rules which deals with a “*stay of execution*” which may be : “*....ordered by the Supreme Court or the Court (of Appeal)*”, Khan A/CJ recused himself on the following basis :
“ *It is my judgment of which stay is being sought I should disqualify from hearing this matter.* ”
8. In that regard , I merely observe that the Summons for a stay is intituled and was issued out of the Court of Appeal. It also adopted the Form provided in the Court of Appeal Rules and expressly invokes **Rule 12(2)(a)**. The stay application was also dealt with by Khan A/CJ in his capacity as “*President of the Court of Appeal*” and not as a Supreme Court judge. In this latter regard **Article 57(6)** of the Constitution prohibits the Chief Justice (who is “*ex-officio*” the President of the Court of Appeal) , from “*hearing an appeal*” from any judgment or decision of his while sitting as a judge in the Supreme Court.
9. In my view, an interlocutory application to stay the execution of a judgment filed in the Court of Appeal is not an “*.... appeal from a judgment*” nor does the consideration and/or grant of the application constitute the “*.... hearing of an appeal*”. In short , the Article has no relevance to the stay application.
10. Be that as it may , **Section 17** of the Court of Appeal Act 2018 which deals with a stay of execution , gives the Court of Appeal “*... jurisdiction and power to stay the execution of any judgment of the Supreme Court until the final determination of the appeal*” Likewise , **Section 27** in Part 7 which enumerates the powers of a Justice of Appeal includes power at **para(e)** :
“ (to) *stay execution of a judgment , decision or order of the Supreme Court.* ”
11. From the foregoing , there is no doubt that the Supreme Court as well as the Court of Appeal and a Justice of Appeal has the necessary power to grant a stay of execution of a judgment that has been appealed to the Court of Appeal.

12. Besides a Summons seeking a stay order , **sub-rule(3)** of Rule 12 sets out the minimum contents of the affidavit required to be filed in support of the application which “**shall include**” :
- “(a) reasons why the failure to stay the execution will render the appeal nugatory ;
 (b) the prospect of success of the appeal..... ;
 (c) the effect of the stay on a third party ;
 (d) the balance of convenience and competing rights of the parties to the appeal ;
- (e) a copy of the judgment of the Supreme Court being appealed ;
 (f) **a copy of the decision or order of the Supreme Court where the application for stay was filed but dismissed ;**
 (g) any other matters which the appellant deems necessary ”. (my highlighting)
13. **Para(f)** above , in the absence of the words (“if any”) , strongly suggests that a stay application should initially , be made to the Supreme Court and , only if it is dismissed , should an application be made to a single Justice of Appeal.

APPELLANT’S AFFIDAVIT & SUBMISSIONS

14. The appellants’ affidavit filed in support of the stay application referred to her having lived in “*my only family house for so many years*” and witnessing the improvements and monies spent on the house over the years , totalling in excess of \$40,0000 “... to renovate (by) *adding more rooms plus the \$12,0000 fresh water tank..*” The appellant also deposed :
 “*Moreover (the disputed house) was bequeathed to me known by all my relatives.... the Nauru Lands Committee including my respondent relative....*”
15. Additionally , the appellant claims that “*there is prospect of success of her appeal*” which advances four (4) arguable grounds of appeal that highlights several discrete issues that the Supreme Court failed to consider and determine in its judgment.
16. She also deposes that the stay would have “*no effect at all on any third party*” other than the clarification of the law and the setting of “*....an absolute judicial precedent*” for similar cases that may arise in future.
17. As for the “*balance of convenience*” , her counsel deposes that it strongly favours the appellant who has lived for many years in the disputed house as opposed to the respondent, who has never lived in it and the appellant stands to be displaced and rendered homeless , if no stay is granted. Furthermore , the appellant is the legitimate beneficiary of a will and codicil dealing with the disputed house , whereas , the respondent’s claim to the disputed house is “*baseless*”.
18. Finally , under requirement (**g**) of sub-rule 12 (3) the appellant deposes :
 “*..... the Acting Chief Justice mention of the law that obliges the Deputy Curator to distribute specifically personal property’ yet allowed a permanent fixture on land to pass from one Land to another as easy as chattels , in so doing has made an error of law....*”
and “*.... another is the equity in terms of monies totalling \$52,000 which the intended appellant’s deceased aunt spent to renovate increase room capacity purchase water tank*”

plus any other improvement all the while naming the intended appellant as beneficiary in respect of the house....”

19. In summary , appellant’s counsel identifies four (4) issues in the appellant’s original claim as follows :
- (1) Ownership of the disputed house at Portion 10 , Ewa District ;
 - (2) Landowners consent to build the disputed house ;
 - (3) The appellant’s equity in the disputed house and related land on which it is erected ;
 - (4) The Deputy Curators’ jurisdiction in Anzac Dediya’s intestate estate ;
20. Counsel also paraphrases the contents of the appellant’s affidavit and highlights the “*balance of convenience*” which counsel submits , clearly favours the appellant who stands to be deprived of the only family home that she has known and lived in from when “*....she was a child until now that she has her own family*” , whereas the grant of a stay would mean that the respondent who claims that he “*...has been waiting for the house for more than eighteen (18) years*” , will just have to wait a little longer.

RESPONDENT’S AFFIDAVIT & SUBMISSIONS

21. In opposing the stay application, the respondent deposes that since the Government Gazette No 67 of 2003 (GN. 226/2003) the disputed house in “*Ewa is/was mine after the original owner died. There was never any attempt to challenge my ownership*” and “*I have waited for more than eighteen (18) years to have my house*”.
22. In his brief written submission , respondent’s counsel writes :
- “ the applicant is appealing on evidence that the Supreme Court has already determined. The court examined all the evidence as well as the law. All the appeal points raised were either evidence or points of law that was examined by the Supreme Court , and the appeal should be struck out with costs.”*
23. In his longer oral submissions counsel reiterated that the evidence before the trial judge included published Gazette Notices as well as original decisions of a “*family meeting*” that gave the disputed house to the respondent albeit not gazetted. Furthermore the realty part of the relevant estate was gazetted and in any event , section 9 of the Nauru Lands Committee (Amendment) Act 2012 retrospectively validated the Deputy Curator’s gazetted decision.
24. As for the “*balance of convenience*” , counsel submits that the respondent is the beneficiary of a “*family meeting*” decision which should be accepted as sacrosanct having been made and agreed by the owners of the land on which the disputed house sits. Despite that , the respondent has had to pursue his entitlement through the court and having succeeded , should not be denied the fruits of her success.
25. The respondent , counsel submits , is prejudiced in not being able to take possession of the disputed house since his aunt died and willed it to him many years ago , and furthermore the respondent has a court order for “*vacant possession*”.

CONSIDERATION & DECISION

26. In the present case it is common ground that the appeal of right against the judgment of the Supreme Court is brought within time. Equally, **Rule 12(1)** of the Court of Appeal Rules 2018 makes it clear that the mere lodgement and service of an appeal does not operate as a stay of execution of the judgment appealed against “.....*unless ordered by the Supreme Court or the Court (of Appeal).*”
27. In this latter regard, **Section 17** of the Nauru Court of Appeal Act 2018 grants the Court of Appeal power to stay the execution of a judgment that has been appealed. Similarly, **Order 36 rule 8** of the Civil Procedure Rules 1972 enables the Supreme Court to order that enforcement of a judgment be delayed or made conditional. **Rule 12(1)** of the Nauru Court of Appeal Rules 2018 also gives the Supreme Court power to order the stay of execution of a judgment. Finally, **Section 27** of the Court of Appeal Act extends a similar power to a Justice of Appeal.
28. In the present appeal, the appellant has sought a stay from the Court of Appeal as he is entitled to and, in a similar application, Jitoko CJ after referring to **Section 17** of the Nauru Court of Appeal Act 2018 in Herman v Deireragea [2012] NRCA 2 said :
“ *It is sufficient to summarise the grounds upon which the Court will consider before it arrives at its decision. They are set out under **Rules 12(3)** of the Nauru Court of Appeal Rules as follows :*
- (a) Failure to stay execution will render the appeal nugatory ;*
 - (b) There is some prospect of the appeal (succeeding) ;*
 - (c) The effect of the stay on third parties , and*
 - (d) Balance of convenience ” (and competing rights of the parties to the appeal).*
29. Even accepting that the above comprises the mandatory contents of the affidavit filed in support of a stay application, they are nevertheless, relevant factors that have been developed and applied by the Court in the exercise of its unfettered discretion in the granting of a stay.
- (my underlining)
30. In similar vein the NZ Court of appeal in Keung v GBR Investment Limited [2010] NZCA 396 said :
- “ *In determining whether or not to grant a stay, the Court must weigh the factors in the balance between the successful litigants’ rights to the fruits of a judgment and the need to preserve the position in case the appeal is successful. Factors to be taken into account in the balancing exercise include :*
- (a) whether the appeal may be rendered nugatory by the lack of a stay ;*
 - (b) the bona fides or the applicant as to the prosecution of the appeal ;*
 - (c) whether the successful party will be injuriously affected by the stay ;*
 - (d) the effect on third parties ;*
 - (e) the novelty and importance of the questions involved ;*
 - (f) the public interest in the proceeding ; and*
 - (g) the overall balance of convenience.*
- That list does not include the apparent strength of the appeal but it has been treated as an additional factor.... ”*

31. I say at once that not all factors will apply in every application for a stay , nor will any one of them prove decisive in the exercise of the Courts' discretion in granting or refusing a stay.
32. For present purposes I gratefully adopt the four (4) grounds enumerated by Jitoko CJ in Herman V Deireragea (op.cit) as the relevant factors in the present application.
 - **Failure to stay will render the appeal nugatory.**
33. In this instance the eviction of the appellant from the disputed house will render the appeal nugatory if it ultimately succeeds and the appellant is unable to immediately recover possession and occupancy of the house.
34. The unconditional vacation of the disputed house to the respondent could result in a tenancy being created in favour of a third party with the additional hurdle(s) that that might impose in the way or the appellant's efforts to recover the disputed house in the event of her appeal being successful.
35. Although the respondent has deposed to having waited "*for more than eighteen (18) years*" for the disputed house , the Supreme Court judgment records at para5 that the disputed house "*...was given to him subject to him attaining eighteen (18) years of age , and the plaintiff is now twenty (25) years old*" (ie. in 2020).
36. In other words , the respondent was not entitled to possession of the disputed house until he turned eighteen (18) years on 25 January 2013. He has therefore waited for seven (7) years after becoming entitled , before seeking an order for vacant possession. Plainly there has been urgency on his part.
37. Whatsmore , the order for "*vacant possession*" in the respondent's favour not having a certain date or time specified in the order by which date possession was to be given to the defendant , no possible prejudice arises unless and until the same has been ordered or is specified in an enforcement proceeding brought for that purpose.
 - **There is some prospect of appeal succeeding.**
38. Although respondent's counsel submits there is "*no appealable error*" raised by all four (4) grounds of appeal , the appellants' affidavit in reply and written submission highlights numerous issues both legal and factual that were left undecided by the Supreme Court in its judgment.
39. In his response to the appeal counsel accepts that appeal point 2 "*is a mute point*". I believe the correct word is "*moot*". The distinction between what fixtures comprise the "*real estate*" and "*personalty*" has been a long-standing issue in Land appeals and has not been the subject matter of an Appeal Court determination in the past three (3) years since its creation. It is an issue that is surrounded by legislative provisions as well as a variety of Court decision that requires to be determined finally and is plainly arguable. (see for eg. Eobob v Amandus [2018] NRSC 38).

40. In light of the foregoing I am satisfied that not only does the appellant have an arguable appeal , but also , the novelty and importance of the matters raised in the appeal are in the public interest and need to be decided by a final appellate Court. I am also satisfied that the overall "*balance of convenience*" strongly favours the continued maintenance of the appellant's occupancy of the disputed house until the determination of the appeal.
41. Accordingly , and for the foregoing reasons including the absence in the judgment of a date or time by which vacant possession was to be given , the application is granted and the judgment of Khan J delivered on 1 December, 2020 is stayed until the final determination of the appeal.

DATED : this 19 day of November , 2021


D.V.FATIAKI (CJ)
PRESIDENT

