

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC .. 352
MA 257/2022
(Arising in CS172/2019)

ATTORNEY GENERAL
(rep. by Corinne Rose)

Applicant

And

IOUANA MARY PILLAY
(rep. by Joel Camille)

Respondent

Neutral Citation: *AG v Iouana Pillay* (257 of /2022) [2023] SCSC..... (delivered on 19 May 2023).
Before: Vidot J
Summary: Stay of Execution; section 230 of the Seychelles Code of Civil Procedure
Heard: Counsels filed written submission
Delivered: 19 May 2023

ORDER

Application allowed. A stay of Execution is granted.
The applicant will suffer prejudice if the stay is not granted

It is in the interest of justice and fair and just that in the circumstances that a stay is granted aas the balance of convenience supports the grant of a stay.

RULING

VIDOT J

[1] The applicant has filed Notice of Motion supported with an affidavit sworn by Denis Barbe, Principal Secretary of Housing, for the stay of execution of a judgment of this Court dated

03 June 2022, in pursuance with section 230 of the Seychelles Code of Civil Procedure. The applicant has filed an appeal in the Court of Appeal challenging the said judgement. The Notice of Appeal dated 01 July 2022 is attached to this Application. The respondent filed an Affidavit in reply objecting to the grant of Stay of Execution. However, despite being given ample opportunity, Counsel for the respondent failed to file submissions.

- [2] The case concerns the sale of a parcel of land, V20089, situated at Nouvelle Vallee, Beau Vallon. The Government of Seychelles through its Ministry of Land Use and Housing had offered the parcel of land for sale to the respondent. The respondent failed to meet terms of the agreement relating to time period and manner of payment of the consideration and as a result the applicant rescinded the agreement and offered the land parcel to another buyer.
- [3] For the purpose of this Notice of Appeal, I do not feel that there is need to reproduce the affidavit of Mr. Barbe of the aforementioned Ministry in its entirety; save to note that the following grounds in favour of granting a stay are averred;
- (a) There is a serious and substantial question to be tried or adjudicated upon by the Court of Appeal;
 - (b) That there is an arguable case and the appeal has a high chance of success;
 - (c) That if a stay of execution is not granted the appeal will be rendered nugatory particularly since one of the reliefs accorded to the respondent is that the applicant offers the respondent a parcel of land within 8 months of the judgment. Therefore, if that order was to be executed, it will be difficult, if the appeal is successful to seek recovery of any land so transferred to the respondent.
 - (d) That it is just, fair and equitable that in all the circumstances to order a stay of execution of the decision be made, pending the final disposal of the appeal.
- [4] In her affidavit in reply the respondent objects to the application. Her objections are based on advise from her counsel. These are;

(a) The grounds as set out in the application are incompetent in law as there is no legal basis on which the court can be moved to apply for a stay of the judgment. The grounds have not been substantiated.

(b) The respondent will suffer greater prejudice if the stay is granted. The order to grant a parcel of land or otherwise give monetary compensation to the respondent will not cause any greater hardship to the applicant, should the stay be refused.

[5] The grant of a stay of execution is a discretionary and equitable remedy. There isn't any specific statutory provision which gives power to a court to grant a stay of execution as a legal remedy to protect the interest of an party, or as in this case the respondent in whose favour an judgment has been delivered as was held in **Avalon (Pty) Ltd & Others v Berlouis [2003] SLR 59** and **Chang-Tave v Chang-Tave [2003] SLR 74**. Therefore, a stay of execution is not automatic. In any case an application for a stay of execution should not be utilized as a means to prevent a successful litigant in a case from enjoying the fruits of his judgment. In the present case, it is to order that the respondent benefits from the agreement for the purchase of parcel V20089. It is a remedy that should be exercised sparingly and judiciously when an applicant satisfies one or more of the considerations or grounds as laid down in the paragraph below.

[6] The law in regards to applications for stay is clearly laid down through case law. The case of **Pool v Williams [1996] SLR 192** is one such case. The same grounds laid down in the latter case were followed in **Laserinisima v Boldrini [1999] SLR CS No. 274 of 1998**. These grounds are;

- i. The Applicant could suffer loss, which could not be compensated in damages;
- ii. Where special circumstances of the case so require;
- iii. There are proof of substantial loss that may otherwise result;
- iv. There is a substantial question of law to be adjudicated upon at the hearing of the appeal; and

v. Where, if the stay is not granted the appeal if successful, would be rendered nugatory.

- [7] These considerations or pre-requisites were adopted in the case of **Vijay Construction (Proprietary) Limited v Easter European Engineering Limited [2020] SCSC 476**. They were also followed in **Choppy v NSJ Construction [2011] SLR 251** and **Ramkalawan v Electoral Commission & Ors MA 164 of 2016 (Arising from CP01 of 2016)** (on an application for stay of execution) wherein the Constitutional Court stated that *“The provision is however not instructive as to when such an order should be granted. The authorities in this jurisdiction have confirmed that it is entirely in the discretion of the Court to grant a stay.”*
- [8] The decision whether or not to grant a stay of execution necessarily includes weighing the interest of the parties to establish whether an appeal has a chance of success, the balance of convenience, hardship and irreparable damage that may be suffered by the applicant and the concern that unless a stay is ordered, the appeal will be rendered nugatory; see **Alexander v Cambridge Credit Corp. Ltd [1985] 2 NSWLR 685**.
- [9] The above is very much aligned with what was held in **Avalon (Pty) Ltd. v Berlouis (supra)** that *“... the principles governing a stay of execution and the exercise of the Court’s power to grant a stay in respect cannot be restricted to or pigeonholed within the five grounds as canvassed by the authorities cited supra. In the circumstances, the question as to the granting of a stay is to be determined not on the basis whether the case satisfies any or none of the five grounds or of the chances of success in the appeal but primarily on the basis whether granting such a stay is necessary for the ends of justice in the given set of facts and circumstances*
- [10] Section 230 of the SCCPC states that;
- “An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court or the appellate court so orders and subject to such terms as it may impose. No intermediate act or proceeding shall be invalidated except so far as the appellate court may direct.”*

Rule 20(1) of the Seychelles Court of Appeal Rules provides

“An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from.

Provided that the Supreme Court or the Court may on application supported by affidavits, and served on the respondent, stay execution on any judgment, order, conviction, or sentence pending appeal on such terms, including such security for the payment of any money or the due performance or the non-performance of any or the suffering of any punishment ordered by or in such judgment, order, conviction or sentence, as the Supreme Court or the Court may deem reasonable.”

[11] The applicant has submitted that on the appeal the applicant’s case has a good chance of success and there is a substantial question of law to be adjudicated on at the hearing. I find that such pre-requisite unfortunately calls for the judge who heard the case to assess his own judgment. This is an exercise that is difficult for a judge to determine. A judge should be confident that a judgment he/she delivers is a sound a correct one. Nonetheless it is an exercise that has to be done. In **Elmastry and Anor v Hua Sun MA 195/2019 [2020] SCCA (20 June 2020)**, the Court of Appeal held that *“the most important element that needs to be satisfied in seeking a stay is to aver, prima facie, that there are substantial questions of law and facts to be adjudicated upon at the hearing at the appeal.”* However, in **Chang-Tave v Chang Tave(supra)** the Supreme Court held that under *“... under the English principle, even if the appellant had some prospects of success in the appeal, for that reason alone no stay will be granted unless the appellant satisfies that he will be ruined without a stay of execution.”* It goes on to add *“[A]s a general rule the only ground for stay of execution is an affidavit showing that if damages and costs were paid there is no reasonable possibility of getting them back if the appeal succeeds.”*

[12] It is submitted by the applicant that if the leave is not granted, substantial loss may result. I am of the view that there will not be any monetary loss to government if the judgment was to be executed. The respondent would be made to return the money and in any case, an order that the money is paid into Court as a security can be made and which will be disbursed to either the respondent or refunded to the applicant depending on who wins on

appeal. If on the other hand, in terms with the first order of this Court, that order is executed the applicant transfers a plot of land to the respondent, that might cause the applicant to make some loss. The respondent wants the land on which to build a house. If she was to start construction and the appeal succeeds, then it will be difficult for the applicant to recover the land from her. That it itself will render the appeal nugatory

[13] In **Mary Geers v Noel de Lafontaine MA 200/2018**, it was stated;

“Section 230 makes it clear that this Court has limited powers in respect of stays, any way much power than an appellate court. Jurisprudence constant on this issue is to the effect that the judge’s inherent discretion is exercised based generally on whether it is just and convenient to make such an order, to prevent undue prejudice to the party. The decision is reached by striking a judiciously and equitable balance between the principle that the successful party in the litigation should be allowed to reap the fruits of his litigation and not obtain a hollow victory, and the countervailing principle that should the successful party in litigation be ultimately successful in his appeal, he ought not to be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory or the appellant would suffer loss which could be compensated.”

[14] I find that in this case, the likelihood of the appeal being rendered nugatory is highly probable.

[15] Having perused the Notice of Appeal, I also note that under the head of substantial question of law to be determined at the trial, the applicant questions the interpretation given by this Court; to the agreement between the parties, particularly whether the agreement contains a rescission which would have unable the applicant to unilaterally rescind the contract, without the need to seek an order of the Court. That, in my opinion can be considered in the affirmative that indeed there is a substantial question of law to be determined.

[16] In the circumstance. I find that the balance of convenience tips in favour of granting a stay as otherwise prejudice as identified above will be caused to the applicant if the stay is denied.

[17] After due considerations of the application, I find that the applicant has satisfied this Court that pre-requisites identified above for granting a stay exist and I further consider that it will be fair and just to grant the Notice of Motion and therefore declare that a stay is herewith granted.

Signed, dated and delivered at Ile du Port on 19 May 2023

A handwritten signature in blue ink, appearing to be 'M. Vidot', written over a horizontal line.

Vidot J