

**Chang-Tave v Chang-Tave
(2003) SLR 74**

Frank ELIZABETH for the Applicant
Danny LUCAS for the Respondent

Ruling delivered on 6 March 2003 by:

KARUNAKRAN J: The Applicant herein is in occupation of a dwelling house, hereinafter referred to as the "premises" situated at Bel Ombre, Mahe. Indisputedly, the Respondent herein is the owner of the said premises. In June 2002, the Respondent petitioned this Court for a writ habere facias possessionem to issue against the Applicant on the ground that the Applicant was in illegal occupation of the premises. This Court after considering the said writ-petition on the merits delivered its judgment on 5 September 2002 wherein the Court found the occupation illegal and ordered the Applicant to vacate and quit the premises forthwith. The Applicant did not file any appeal to the Court of Appeal against the said judgment within the statutory period 30 days after the date of the judgment nor has he complied with the order of the Court. However, on 3 October 2002, the Applicant has filed an application before this Court seeking a stay of execution of the said judgment. Now, this is the application that forms the subject matter of the ruling hereof.

The Applicant seeks a stay of execution on the following grounds:

1. He has made an application for Legal Aid in order to appeal to the Court of Appeal against the said judgment.
2. He has overwhelming chances of success in his appeal. Hence, it is just and necessary that execution be stayed pending the final determination of the case by the Court of Appeal.

In a nutshell, the learned counsel for the Applicant Mr Elizabeth submitted that the Applicant stands overwhelming chances of success in his appeal. According to the counsel the learned trial judge in his judgment failed to consider the fact that the Respondent has lied in his affidavit, filed in support of the writ-petition wherein the Respondent has on the issue of illegal occupation given totally a different version from the one he gave under oath before the Rent Board. This failure by the trial judge, Mr Elizabeth contends is a valid ground for the Court of Appeal to reverse the judgment in question. In the circumstances, the counsel urged this Court to grant a stay of execution in this matter.

On the other side, the learned counsel for the Respondent Mr D. Lucas vehemently resisted the application. He argued that the Court never grants a stay of execution merely on the ground that the appellant stands overwhelming chances of success in the appeal. In addition, there must be other grounds as well, of which the Court should be

satisfied before granting a stay of execution pending appeal. They are:

1. The appellant would suffer loss, hardship that could not be compensated in damages.
2. The appeal involves a substantial question of law; and
3. There exist some special circumstances to justify granting a stay of execution.

According to Mr Lucas, none of the above ground exists in this particular case to warrant a stay of execution in favour of the Applicant. Therefore, he moved the Court to dismiss this application.

I carefully consider the submissions of the counsel on both sides and perused the relevant case laws in this regard. Although the Court will not without good reason delay a successful party in obtaining the fruits of his judgment, it has power to stay execution if and only if justice requires that the other party against whom the judgment has been given, should have this protection. In fact, there is no specific legal provision under any of our statutes directly and expressly granting this Court power to stay execution of judgment pending appeal except the inference of such power one may draw from Section 229 of our Code of Civil Procedure, which provides thus:

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, unless the Court or the Court of Appeal 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 53 of the Seychelles Court of Appeal Rules 1978 also has an identical provision. As rightly observed by His Lordship Justice Perera in *Falcon Enterprise and another v Eagle Autoparts Ltd* Civil Side No 139 of 2000, neither of these provisions stipulate any ground/s or provide guidelines as to the circumstances in which a stay of execution should be granted or refused. Hence, it is entirely a matter to be considered within the discretion of the Court, upon the facts and circumstances of each case. As I see it, this discretion however, should be exercised by the Court judicially not arbitrarily that indeed, in exercise of its equitable jurisdiction in terms of Section 6 of the Courts Act.

Having said that, I note in the case of *MacDonald Pool v Despillay William* Civil Side No 244 of 1993, this Court identified five grounds, which may be considered in granting a stay of execution of judgment pending appeal. They are:

1. The appellant would suffer loss, which could not be compensated in damages.
2. Where special circumstances of the case so requires.

3. There is proof of substantial loss that may otherwise result.
4. There is a substantial question of law to be adjudicated upon at the hearing of the appeal; and
5. Where, if the stay is not granted the appeal if successful, would be rendered nugatory.

Therefore, the principle of case law in our jurisprudence suggests that the existence of one or more of these grounds singly or in combination would entitle an appellant to a stay of execution pending appeal. However, it appears the principle of case law in the United Kingdom differs from that of ours in that, the English Courts grant stay only when two basic ingredients co-exist in combination to constitute a single legitimate ground. They are:

- (i) Without a stay the appellant will be ruined and
- (ii) The appeal has some prospect of success.

This is evident from the dictum of the Lord Justice Staughton in the case of *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887, which reads thus:

Where an unsuccessful Defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the Defendant is able to satisfy the Court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.

Herein, I prefer to adopt the English principle to that of ours for it is more logical and it balances the interest of the parties by minimizing the risk of possible abuse by the appellant to delay the Respondent from realizing the fruits of his judgment by obtaining a stay of execution. In fact, one may have some prospects of success in his appeal. A stay of execution if granted for that reason alone applying the local principle, there might arise circumstances wherein such a stay may cause more loss and hardship to the Respondent than the one caused to the appellant by refusing to grant it. On the contrary, under the English principle, even if the appellant had some prospects of success in his appeal, for that reason alone no stay will be granted unless the appellant satisfies the Court that he will be ruined without a stay of execution. Thus, the English principle to my mind, is closer to justice as it balances the interest of both parties and minimizes the risk of possible abuse by the appellant.

Coming back to the facts of the instant case, it is so evident that the Applicant has not even mentioned the fact in his affidavit that he would suffer any loss, hardship or any inconvenience, if a stay of execution is not granted Pending appeal. Legally speaking at first place there is no appeal pending against the judgment in question at this stage,

as the Applicant herein has not yet even obtained the necessary leave of this Court or that of Court of Appeal to file appeal out of time in this matter. As regards the ground as to chances of success in appeal, I note that the trial judge is entitled to accept the version of the Respondent and reject that of the Applicant in their respective affidavits. In any event, the finding of the trial judge on the issue of illegal occupation is a question of fact and the appellate Court is normally reluctant to interfere with such findings of fact unless a stronger reason exists to do otherwise. In this matter, there exists no such reason - at any rate - I do not find any.

In light of all the above, applying the above English principle to the facts of the instant case, I find that the Applicant has failed to satisfy this Court that without a stay of execution he will be ruined and that he has an appeal, which has some prospect of success.

For these reasons, the application for stay of execution is dismissed with costs.

Record: Civil Side No 153 of 2002