

MALAYSIA

DALJINDER SINGH

... APPLICANT

AMARDEEP SINGH A/L DALJINDER SINGH

AS THE ADMINISTRATOR OF THE ESTATE

OF THE LATE PRASAN KAUR A/P

SANTOKH SINGH

... RESPONDENT

SHARANDEEP SINGH A/L DALJINDER SINGH

... INTERVENER

deceased person.

**BEFORE THE HONOURABLE
YA TUAN LEONARD DAVID SHIM
JUDICIAL COMMISSIONER
HIGH COURT IN SABAH AND SARAWAK
AT KOTA KINABALU**

GROUND OF DECISION

(Enclosure 92)

- [1] This is an application by the Respondent for a stay of execution of the High Court Order dated 3.8.2021 (the Court Order) pending the final disposal of the Respondent's appeal to the Court of Appeal.
- [2] The grounds of stay of execution as averred in the Respondent's Affidavit in Support and Reply (Encl. 94 and Encl. 101) and reproduced herein are as follows:
- (a) That Respondent's appeal would be rendered nugatory if the stay were not granted.
 - (b) There are special circumstances that render it inexpedient to enforce the judgment.

Contention of the Parties

- [3] The Respondent contends that in his Affidavit he has pleaded to this Court regarding the need to preserve the status quo of the estate pending the finalisation of investigation from the Police Department of the Federal Territory of Labuan.
- [4] The Respondent had highlighted in his affidavit he suspects that a cheating has been committed pertaining to a property known as Lot 42, Block A, Lazenda Centre, Federal Territory of Labuan (the Lazenda Property) in which a police report has been lodged on 01.12.2016 and is currently pending investigation by the Police Department of the Federal Territory of Labuan. At the initial investigation, the Police Department informed that there was no action taken for reasons only they know.

- [5] The Respondent also has averred in his Affidavit that status quo of the case should be preserved pending the appeal as the claim involves rights on immovable properties which affects the estate of the Deceased and his fear is founded on a strong ground in the event that the Applicant land or the subject matter is sold then the substratum of the case is irretrievably destroyed.
- [6] The Respondent submit that what amounts to special circumstances was considered by Ian H C Chin, JC (as he then was) in **Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and Another [1993] 4 CLJ 98:**

“I respectfully agree with those views of the learned V.C. George J. An attempt was made to define special circumstances by Raja Azlan Shah J. (as His Majesty then was) in the case of Leong Poh Shee V. Ng Kat Chong [1965] 1 LNS 90 , viz:

Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

The definition only serves to emphasise the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts.”

- [7] The Respondent submits that the subject matters involved a few pieces of land or property and it is not a monetary judgment. The

appeal will be render nugatory if the subject matter is transferred to a 3rd party and not the beneficiary.

- [8] Furthermore, the Respondent submit that there is a pending investigation regarding the Applicant's involvement in a cheating case in one of the property.
- [9] The Applicant submitted that it is established law that a person against whom a judgment of Court has been issued he is duty bound to obey that judgment until and unless it is set aside. It is not open for him to decide for himself whether the judgment was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the judgment may be set aside or varied. Any person who fails to obey a judgment of Court runs the risk of being held in contempt with all its attendant consequences.
- [10] The Applicant relied mainly on two apex court decisions - **Shamala Sathiyaseelan v Dr. Jeyaganesh C Mogarajah & Anor [2011] 1 CLJ 568**, and **Wee Choo Keong & MBF Holdings Bhd & anor and another appeal [1993] 3 CLJ 210**, Supreme Court.
- [11] Shamala is a 2010 Federal Court judgment by the then Chief Justice of Malaysia, Tun Zaki Tun Azmi; then President of Court of Appeal, Tan Sri Alauddin Mohd Sherif; then Chief Justice Malaya (later Chief Justice Malaysia), Tun Arifin Zakaria; Chief Justice Sabah & Sarawak Tan Sri Richard Malanjum and Federal Court Judge Tan Sri Zulkefli Makinudin. Shamala is a reference by the Court of Appeal under art. 128(2) of the Federal Constitution wherein give constitutional questions were posed to the Federal Court. In Shamala, the 1st respondent objected to the reference on the ground

that leave was granted by the High Court for contempt proceedings to be commenced against the appellant for breach of an interim order. The interim order inter alia gave the respondent the right of access to the children. In dismissing the reference with costs, Tan Sri Arifin Zakaria, delivering his judgment for the majority said:

“It was further held that the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt by returning the child to jurisdiction.

...

Reverting to the present case, I am of the firm view that unless and until the two children are brought back, the court should decline to proceed with the reference.

...

Orders of the court must be respected otherwise, the integrity and respect for the judiciary will be seriously undermined. In the result, I agree with the learned CJ that the preliminary objection by the respondent ought, in the circumstances, to be allowed and the reference be dismissed forthwith with costs.”

[12] The Judgment given by the learned Judicial Commissioner on 03.08.2021 (Encl. 90) is clear and unequivocal. In particular, paragraph 2 of the Order states that the Respondent was ordered to deliver up all cash, access, chattels, items, properties and documents in connection with the estate of the deceased within two (2) weeks of the Order. The Respondent had refused, neglected or otherwise failed to deliver up the documents. To date (more than 3 months later), the Respondent has still not delivered the original

documents that enables the Applicant to carry out the duties as the administrator of the estate of the deceased. The Respondent is clearly in defiance of the Judgment.

[13] The Applicant contends that the Respondent clearly knows the terms of the Order. In Exhibit AS-1 of Encl. 94, the Respondent had exhibited the full Order including the Notice pursuant to Order 45 rule 7 of the Rules of Court 2012. The Respondent has full knowledge of the terms of the Judgment. From his conduct, it is clear that the Respondent has no intention of complying with the Judgment.

[14] Applying Tun Sri Arifin Zakaria (later Chief Justice Malaysia)'s judgment in Shamala Sathiyaseelan, paragraph 7 at 575, the Applicant contends that it would be most unjust to the Applicant for this Court to allow the Respondent to avail himself of the judicial process, when it is clear that he has no intention to comply with the court orders. The court should not permit itself to be used by him for his own end at the expense of the Court's integrity.

[15] When the leave to issue committal proceedings has been granted on 29 October 2021, the learned Judicial Commissioner has accepted that there was a prima facie case for contempt against the Respondent.

[16] An extract Lord President Abdul Hamid bin Omar's judgment in Wee Choo Keong at page 213 is reproduced here:

"In the appeals before us, leave to issue committal proceedings has been granted. This means that the learned

High Court Judge has accepted that there was a prima facie case for contempt against the appellants. It may well be on the hearing of the Motion proper, the appellants will be acquitted of any charge of contempt. However, for the purposes of the present appeals, the allegations of contempt are supported by the order for leave. In Instituto Bancario San Paolo Di Torina SPA [v Colour Touch Sdn. Bhd. & Anor (see [1993] 3 CLJ 34)] there appears to have only been an allegation of contempt without any more. Here there is a prima facie contempt which cannot be ignored. In this context, we are more inclined to accept the view expressed by Young J in Young v Jackman [1986] 7 NSWLR 97 where he said:

Accordingly, it would seem from 1820 onwards that the rule that a person will not be heard when he is guilty of contempt extended as well to the case where a party was considered to be in contempt, that is, where his contempt had prima facie been demonstrated to the court or alternatively when he had confessed the facts which were subject of a charge of contempt.”

[17] Following the two apex court authorities, the Applicant respectfully ask that the Respondent’s application for stay of execution be dismissed with costs to be paid forthwith.

[18] This matter before this High Court is merely one of compliance to a Letter of Administration to distribute and wind up the estate of the Applicant’s late wife and the Respondent’s late mother.

[19] The merits of the matter have been duly submitted by the parties; considered and decided by this Court. On 5 November 2019, the Respondent was ordered to distribute the assets within six (6) months. This was not complied with. On 3 August 2021, this Court discharged the Respondent as the administrator and appointed the Applicant to handle the administration. Yet, the Respondent continues to defy the Court orders and frustrate the process of administration.

[20] Moreover, the Applicant submit that it is trite that the merits of the unsuccessful party's case, especially in the appeal, do not amount to special circumstances and are not relevant for the consideration of the Court in a stay application.

[21] The Federal Court had in **Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 1 MLRA 536** (supra) held:

"[19]...Both parties delved into some length on the merits of their respective case in the affidavits filed and the submission made in court. The merits of a party's case in a stay application is not a relevant matter for consideration.

...

[22] It is therefore unnecessary for me to consider the merits of the respective case of the applicants and respondents."

[22] The Court of Appeal in **Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 1 MLRA 214** held:

“[66] The approach taken by most judges appears to be that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances (or special grounds) that justify a stay of execution to be granted. The weight of authorities appears to me to say that the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).”

...

“[74] I do not think that a court hearing an application for a stay of execution should make a finding that the appeal is doomed to failure or even that there are no merits in the appeal. The reasons are given by Shankar JCA (as he then was in) in Salim bin Ismail & Ors v. Lebby Sdn Bhd (No 1) [1995] 2 MLRA 483; [1997] 1 CLJ 98; [1997] 2 AMR 1110 (CA):-...”

[23] In Ming Ann Holdings (supra), the Court of Appeal held that a court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances.

[24] Although the Respondent has appealed against the Order, the appeal does not operate as a stay of execution. Section 73 of the Courts of Judicature Act 1964 (CJA 1964) clearly provides:

“An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no

intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.”

[25] Order 55, rule 16(1) of the Rules of Court 2012 clearly provides:

“(1) An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from.”

[26] It is again noted that the Order is only to administer the estate in accordance with the Letter of Administration obtained by the Respondent in 2016. The Respondent, being the appointed administrator, must comply with the legislation in doing so. There would be no prejudice to the Respondent provided he also complies with all the relevant legislations and Court Orders. Any allegation that the appeal would be rendered nugatory is therefore baseless.

[27] It is submitted by the Applicant that the Respondent has failed to show that there is special circumstances arising that would justify the stay of execution.

[28] In the Respondent’s affidavit under Encl. 94, he claims that there is a special circumstance that there was a fraud to which a police report was lodged on 01.12.2016. The Applicant responds as follows:

- (i) Firstly, such allegation was never raised this in Court previously despite this matter being litigated since April 2019.

This brings into question the authenticity or even whether such a cause or complaint was a genuine issue. The Applicant noted that the police report in 2016 exhibited in Encl. 101 was also incomplete and has missing page(s).

- (ii) Secondly, the Applicant has unequivocally stated that there is no element of fraud and all such allegations were unfounded. Be that as it may, the criminal investigation (if any) would have concluded by now as more than 2 years have lapsed.

In paragraph 17 of Encl. 94, the Respondent has admitted that the police department has confirmed that no further action would be taken. The Respondent then claims that there were new developments and investigation has been reopened. There is no document whatsoever or any specifics at all to support this. No cover letter was shown to evidence that the original documents were given to the police department.

- (iii) Thirdly, even if the criminal investigation is ongoing, there ought to be no effect to the compliance of the Court Orders. The Applicant is agreeable to assist with any such investigation should he be called upon.
- (iv) Fourthly, if the Respondent claims that there was fraud involved. The Respondent ought to have commenced civil action in a timely manner. The Respondent had purportedly discovered the alleged fraud upon the passing of the Deceased on 10.10.2015 and police report was lodged on 01.12.2016. To date, no legal action was commenced. By

now, the statute of limitation has set in and any right or recourse would have been extinguished.

- (v) Fifth, there are reasons to suspect that the Respondent is not telling the truth or the whole truth. On the one hand, he affirmed the affidavit in Penampang, Sabah; and claims that he was not able to travel to Labuan to collect the original documents. Yet, he was able to gather the original documents and deliver them to the police station in Labuan.

[29] The Applicant contend that the Respondent failed to detail what documents are kept in Labuan and/or Kuala Lumpur. Importantly, he must provide all the documents he has in his possession and explain what other documents are unavailable. Be that as it may, interstate travel is allowed and there is no reason or excuse whatsoever for the supposed travel restriction.

Evaluation and Findings

[30] The Respondent contends that a stay of the Court Order dated 3.8.2021 is necessary to maintain the status quo until the disposal of his appeal by the Court of Appeal. It is settled law that an appeal does not operate as a stay of execution unless the Court orders otherwise. See s.73 CJA 1964 and o.55 r.16 ROC 2016.

[31] The general principle adopted by the Courts is that a successful litigant should not be deprived of the fruits of their litigation. Thus, the unsuccessful party must demonstrate that there are special

circumstances to warrant the grant of a stay of execution. See Kosma Palm Oil Mill and Ming Ann Holdings's case above.

[32] The Respondent contends that he have good merits in the appeal in that a police report was lodged by the Respondent against the Applicant on 1.12.2016 for alleged cheating or fraud affecting the Lazenda property and the lawful beneficiaries may risk losing their share in their late mother's estate which includes immovable properties if a stay is not granted. It is not disputed that the said police report was lodged 5 years ago for alleged cheating or fraud and the police have informed the complainant that no further action is required to be taken. After the 2nd application for replacement of the Respondent as Administrator (Encl. 37) was filed, the Applicant lodged another police report on 21st July, 2021 with regard to the alleged cheating or fraud and now contend that new police report is pending investigation.

[33] During the proceedings to replace the Respondent as the administrator of the deceased's estate (Encl. 37), neither the said police reports nor any cogent evidence of the alleged cheating or fraud was adduced by the Respondent and the issue of cheating/fraud was not raised or argued before this Court. Hence, it is unfair and unjust to allow the Respondent to now raise the new issue of alleged cheating or fraud as a ground for stay without any cogent evidence. It should have been raised earlier and ventilated during the hearing of Encl. 37. The Respondent should not be allowed to present his case by instalments.

[34] Further, by raising the issue of cheating or fraud during the application for stay appears to be delving into the merits of the appeal. It is trite that the strength or merits of the appeal does not amount to special circumstances. See Ming Ann Holdings's case above.

[35] The Affidavit evidence shows that the Applicant is attempting to comply with the Court Order dated 3.8.2021 to lawfully distribute the properties of his late wife's estate to his children and himself who are the rightful beneficiaries including the Respondent but the Respondent refused to cooperate and comply with the Order of this Court dated 3.8.2021. Prior to the making of the Court Order dated 3.8.2021, this Court had by an Order dated 5.11.2019 made in an earlier application to replace the Respondent as administrator (Encl. 19) allowed the Respondent an extension of time of 6 months to, inter alia, distribute all the assets of the deceased contained in the Letter of Administration. The Respondent did not appeal against the Court Order dated 5.11.2019. The Respondent had ample time of over 5 years to distribute the estate properties to the beneficiaries but to no avail. No valid or satisfactory reason was given to justify the failure and/or breach of the Respondent's statutory duties to promptly and faithfully distribute the estate properties in accordance with the law to the lawful beneficiaries who are his father and siblings. This Court finds that to allow a stay would result in further delay and more prejudice to the beneficiaries than a refusal of stay.

[36] Further, the breach of statutory duty and non-compliance with the said Court Orders dated 5.11.2019 and 3.8.2021 by the Respondent would not only be inequitable but may tantamount to a contempt of

Court. The relief of stay is similar in function to an Erinford injunction which is an equitable relief. Therefore, the clean hands maxim under the law of equity would apply. In the present case, the Respondent have not come to Court with clean hands and the Court should not lend its assistance to any inequitable and/or unlawful conduct or matter.

[37] Although some of the estate properties consist of land, the Applicant is prepared to and undertook to distribute the lawful shares of the beneficiaries in the estate properties to the beneficiaries including the Respondent in accordance with the law. There is no evidence to show that the Applicant would not distribute or transfer the estate properties to the rightful beneficiaries. Neither is there any evidence to show that the Applicant is insolvent and could not compensate the Respondent or pay for any loss of Respondent's share in the estate properties. Even if the Respondent's bare assumption turned out to be correct and landed properties are wrongfully transferred by reason of fraud (which this Court has found to be unsubstantiated), the Respondent or beneficiaries are not left without any legal redress or remedies. They could apply to set aside the transfer and/or claim damages on the ground of fraud. It is not disputed that no civil Suit for the alleged cheating or fraud has been filed by the Applicant since the police report was lodged in 2016.

[38] After considering all the evidence adduced and the submissions filed by all parties, this Court finds that the Respondent has failed to demonstrate that there are special circumstances for a stay of execution to be allowed.

[39] Based on the aforesaid reasons, the application for stay (Encl. 92) is refused with costs in the sum of RM 3,000.00 to follow the event of the outcome of the Respondent's appeal to the Court of Appeal subject to allocatur fee.

Dated 02nd December 2021.

Signed

**Leonard David Shim
Judicial Commissioner
High Court Kota Kinabalu**

For the Applicant : Ryan Soo of Messrs RYCO Law Firm

For the Respondent : Ashraaf Danial Bin Zakaria of Messrs
Safrin Saleh & Co.

For the Intervener : Korventt Wheezar of Messrs Korventt &
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[Notice: This Grounds of Decision is subject to official editorial revision]