

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Ofume v. Canadian Imperial Bank of Commerce Mortgage Corporation*, 2004 NSCA 102

**Date:** 20040827

**Docket:** CA 227447

**Registry:** Halifax

**Between:**

Dr. Philip Ofume

Applicant

v.

Canadian Imperial Bank of Commerce  
(CIBC) Mortgage Corporation

Respondent

**Judge:**

The Honourable Justice M. Jill Hamilton

**Application Heard:**

August 26, 2004, in Halifax, Nova Scotia, In Chambers

**Held:**

Application for a stay pending appeal is dismissed

**Counsel:**

Dr. Philip Ofume, Self-Represented Applicant  
Wayne Francis & Robin Aitken, Articled Clerk,  
for the respondent

**Decision:**

[1] In connection with the foreclosure of the appellant's former residence, the trial judge ordered that costs be taxed. Following the taxation, which took place over two dates, with the appellant leaving the proceeding shortly after it recommenced on the second date, the appellant appealed the decision of the Taxing Master, Arthur E. Hare, to the Supreme Court. The appeal was heard by Justice Gregory Warner on June 9, 2004. That morning there was a power outage at the court house. The appellant did not attend the appeal hearing before Justice Warner. Justice Warner dismissed the appeal on the basis the appellant's Notice of Appeal was filed outside the prescribed time period for filing such an appeal, pursuant to **Civil Procedure Rule 63.38**.

[2] The appellant appealed Justice Warner's decision to this court and in connection therewith applied for a stay pending appeal. For the following reasons I dismiss the application for a stay.

[3] The test for a stay pending appeal is set out in **Fulton Insurance Agencies Ltd. v. Purdy**, (1990) 100 N.S.R. (2d) 341:

[28] In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:

[29] (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:

[30] (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[4] On the evidence before me it is not clear whether there is an arguable issue on appeal, but there may be given the appellant's evidence that the reason he did not attend the hearing before Justice Warner was because of the confusion following the power outage and because of instructions given to him by court house staff to leave the building. His failure to appear before Justice Warner precluded him from seeking an extension of time to file his Notice of Appeal and make arguments on the merits.

[5] The appellant will not suffer irreparable harm if the stay is not granted and his appeal is successful. Any harm the appellant may suffer can be compensated for in damages and the respondent has the resources to pay any such damages.

[6] Given the numerous and baseless interlocutory motions and appeals made by the appellant relating to the foreclosure action, and given that a portion of the taxed costs have already been received by the respondent from the proceeds of the sale of the former residence, I am not satisfied the balance of convenience favours granting a stay.

[7] Nor am I satisfied there are any exceptional circumstances here making it just and fit that a stay be granted. Accordingly, the application for a stay is dismissed.

Hamilton, J.A.