

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No: HBC 65 of 2012.

BETWEEN: **KAIVITI CORPORATION LIMITED** a company duly registered and having its office at 9 – 12 Nukuwatu Street, Lami, Fiji.

PLAINTIFF

AND: **MR CHRISTOPHER MATHEW DARBY** of 1861 Cold Springs Road, Fairfield, Pennsylvania, USA.

1st DEFENDANT

AND: **MRS HEATHER ANN DARBY** of 1861 Cold Springs Road, Fairfield, Pennsylvania, USA.

2nd DEFENDANT

AND: **CROMPTONS** Barristers and Solicitors of Suite 10, QBE Insurance Centre, Victoria Parade, Suva, Fiji.

3rd DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Ms. Malimali B. P. B.** for the Plaintiff

Mr. Lagilagi S. for the Defendant

Date of Hearing : **19th February, 2013**

Date of Ruling : **1st March, 2013**

RULING

A. INTRODUCTION

1. The Defendant filed a statement of defence with a counterclaim and Plaintiff sought security for cost in terms of Order 23 rule 1(3). The summons for the

security for cost was served on the solicitor of the Defendant and an affidavit of service was filed, but the Defendant neither filed an affidavit in opposition nor appeared in court on the summons returnable date and order for the security for cost was made.

2. The Defendant did not comply with the security ordered by the court but thought it fit to make an application for extension of time for appeal against the said order of the court made ex-parte on 9th August, 2012 and no stay order was granted in the said application. This is clearly an abuse of process where there is express provision for vacation of an order made in ex-parte in terms of Order 32 rule 6, of High Court Rules 1988 but this is a matter for extension of time for appeal is not before me and I only state this to indicate the conduct of the Defendant in this case.
3. The Plaintiff filed a motion seeking strike out of the statement of defence and counterclaim and to enter judgment as claimed in the statement of claim for non compliance with the order for security for cost.
4. Order 23 Rule 1 of the High Court Rules provides as follows:

SECURITY FOR COSTS

Security for costs of action

“1 (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court –

- a) That the Plaintiff is ordinarily resident out of the jurisdiction; or*
- b) That the Plaintiff (not being a Plaintiff who is suing in a representative capacity) is a nominal Plaintiff who is suing for the benefit of some other person and that*

there is reason to believe that he will be unable to pay the costs of the Defendant if ordered to do so; or

- c) Subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or*
- d) That the Plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation;*

Then if, having regard to all the circumstance of the case, the Court thinks it just to do so, it may order the Plaintiff to give such security for the Defendant's costs of the action or other proceeding as it thinks just.

(2) The Court shall not require a plaintiff to give security by reason only of paragraph 1© if he or she satisfies the Court that the failure to state his or her address or the mis statement thereof was made incorrectly and without intention to deceive.

(3) The reference in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including on a counterclaim.” (emphasis is added)

5. The White Book (1999) Volume 1 at page 431 (23/3/5) which states as follow;

“The ordinary rule of practice is that no order for security for costs will be made if there is a co-plaintiff resident within the jurisdiction (Winthorp v. Royal Exchange Assurance Co. (1755) 1 Dick. 282; D' Hormusgeev Gray (18820 10 Q.B.D. 13)). The ordinary rule, however, is subject to the general discretion of the Court; it is not an

unvarying rule. Its application is appropriate where the foreign and English co-Plaintiffs rely on the same cause of action, where each of the Plaintiff is bound to be held liable for all of such costs as may be ordered to be paid by any of the Plaintiffs to the Defendant at the conclusion of the trial, and where one or more of the Plaintiffs has funds within the jurisdiction to meet such liability.” (emphasis is added)

White Book (1988) p 406 state as follows

‘23/1-3/30 **Default in giving security**- If the plaintiff makes default in giving security he may be ordered to give security within a limited time , and in default the action may be dismissed (Gidding v Gidding (1847) 10 Beav, 29; and see La Garne v Mc Andrew(1879) 4 Q. B.D. 210 where action was dismissed after order for security and stay of proceedings meantime) In Burton v Holdsworth [1951] 2 All ER 381, CA an order for transfer to the county court was made (against an assisted person) in default of payment for security of costs into Court.

The power to dismiss an action for default by a plaintiff in complying with an order for security derives from the inherent jurisdiction of the court, and applies as much to an order for security made under s 726(1) of the Companies Act 1985 as to one made under O. 23,r 1:pursued with due diligence,(ii) there is no reasonable prospect that the security will be paid, and (iii) the time limit prescribed by the court for the giving of security has been disregarded (Speed Up Holding Ltd v Gough & Co (Handly)Ltd [1986] F.S.R 330).”

6. The Defendant did not appear to the summons for security for cost and an ex parte order for security for cost was made after the service to the Defendant’s solicitor was proved through an affidavit of service. No application was made by the Defendant’s solicitors to set aside the said ex-parte order, but for reasons

best known to them thought it fit to seek an extension of time to appeal against the said order and no stay order granted for the stay of this action.

7. The Plaintiff is seeking to strike out the statement of defence for non compliance with the order for security for costs. The Plaintiff was able to file the summons for security for costs upon the counterclaim of the Defendant, hence if no security for cost is paid it should be confined to the counter claim and not to the whole defence. The court can either order a stay of proceeding with the said counterclaim or strike out the said counter claim due to non compliance with the security for cost order. Considering the circumstances of this case I will grant further one month for the Defendant to comply with the order for security for cost if not the counterclaim contained in the statement of defence is stayed and the Defendant is precluded from proceeding with the counterclaim till the security for cost was deposited in court or an appropriate order obtained from court on that regard.

B. FINAL ORDERS

- a. The Defendant is granted further one month to comply with the Oder for security cost or to obtain a suitable order regarding the security for cost order.
- b. If not the Defendant’s counterclaim contained in the statement of defence is stayed till the compliance with the order for security for cost.
- c. The Plaintiff is granted cost \$500 assessed summarily for this application to be paid within 21 days from today.

Dated at **Suva** this **1st day** of **March, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva