

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Case No. HBC 540 of 2007

BETWEEN : Diana Giesbrecht
(Plaintiff/Respondent)

AND : Rowena Grace Cross (also known as Grace Bamlett)
and Douglas Bamlett
(Defendants/Applicants)

Before : The Hon. Mr Justice David Alfred

Counsel : Mr. A Rayawa for the Plaintiff
Mr I Fa for the Defendant

Date of Hearing : 10 July 2015

Date of Judgment: 5 October 2015

INTERLOCUTORY JUDGMENT

1. This Summons came up for hearing before me on 10 July 2015. By it the Defendants applied for the following orders:

- (i) That the Defendants be given leave to have their evidence taken in their countries of residence.

- (ii) Alternatively that their evidence be taken at the hearing of this action by way of skype or video conferencing.
2. The application was made pursuant to Order 32 of the Rules of the High Court (RHC) and the inherent jurisdiction of the Court. It was supported by the affidavit of one, Linton Finiasi (Linton) a Senior Clerk in the employ of the Solicitors for the Defendants.
3. The application was opposed by the Plaintiff in her Affidavit in Reply.
4. At the hearing of the Application, Counsel for the Defendants submitted as follows:
 - (a) All preparations for the hearing are completed, except that the Defendants are in the United States (USA) and Canada respectively.
 - (b) The 1st Defendant is the caregiver for her parents who are both suffering from Alzheimer's disease, while the 2nd Defendant is suffering from clinical depression. Both Defendants are therefore unable to travel here for the hearing.
5. Counsel therefore asked for the hearing to be conducted in Court No. 7, taking note of the time difference, via video conferencing/skype.
6. Alternatively he asked for the examination of the Defendants to be conducted, in their foreign jurisdictions, under the provisions of Order 39 rules 1 and 2 of the RHC.
7. Counsel for the Plaintiff provided a written submission and submitted orally as followed:

- (a) Linton's affidavit was not in the 1st person and was in breach of Order 41 rule 1(4) of the RHC, as it was hearsay and not of the deponent's own knowledge. It was therefore defective and no weight should be attached to it.
- (b) There was no reason why the Defendants could not affirm their affidavits before notaries public in the USA and Canada.
- (c) It is impossible for the Defendants to appear before judicial officers in the USA and Canada.
- (d) The Police were waiting for the Defendants to return to Fiji.
- (e) The defects of Skype have been pointed out in a court decision with regard to the demeanour and credibility of witnesses and with regard to the documents.
- (f) Both methods pose problems, if the Defendants lie, with regard to the jurisdiction of the Court in Fiji if there were any perjury.

8. Counsel for the Defendants in his reply said the following:

- (a) Linton's Affidavit cannot be challenged unless a basis exists.
- (b) Linton is making the affidavit based on what is in their file. Order 41 rule 5(2) of the RHC allows hearsay.
- (c) The authorities cited have to be distinguished as they relate to contentious issues.

9. At the conclusion of the submissions, I reserved my decision to a date to be announced.

10. In the course of reaching my decision I have perused the written submission for the Plaintiff and the authorities cited.

11. I now deliver my decision. The sole issue here is whether the evidence of the 1st ad 2nd Defendants can be taken by way of Skype, through the stages of examination in chief, cross-examination and re-examination.

12. The case for this is based on the affidavit of Linton. Linton is neither the 1st nor the 2nd Defendant. He is merely an employee of the Solicitors for the Defendants.
13. Enough has been said by my brother Judges about the impropriety of law clerks affirming affidavits other than in non contentious matters.
14. This is certainly not a non-contentious matter like service of pleadings. This is an affidavit being used as the substratum of an application for a method of trial or at least a part of a trial of a civil action, which is not the normal mode of such a trial where parties and witnesses appear in person in court before the judge and give their testimony. But this affidavit does not determine the fate of the application.
15. I turn now to the affidavit of the Plaintiff opposing the application. While it perfunctorily objects to the affidavit of Linton for the reason it was sworn by the clerk and not by the Defendants, it is plain as a pikestaff to me, that the real and invidious reason for her objection is her desire to get the Defendants to be present in Fiji to answer the criminal allegations left pending at the Criminal Investigation Department in Suva.
16. The Plaintiff gives no cogent reason why she feels the Defendants' giving their evidence via Skype will not meet the ends of justice.
17. I find, the argument of Plaintiff's Counsel that a problem would arise if Defendants perjured themselves in North America, to be a specious argument. If it holds any water, then by the same token, Courts should not accept affidavits and statutory declarations, made in foreign jurisdictions, in Court proceedings in Fiji because the courts here have no jurisdiction if perjury is committed by deponents in foreign parts.

18. Finally, I observe that if Skype is permissible for criminal trials where the liberty of the subject is involved, I can see no conceivable reason why such a method cannot be utilized in a civil claim where only monetary payments are involved.
19. For all the above reasons, I will allow, under the inherent jurisdiction of the Court, the Defendants' Application for their evidence to be given by Skype/Video Conferencing at the hearing of this action. The arrangements for this shall be the responsibility of their solicitors.
20. There is no order as to costs.
21. I will now fix the dates for hearing of this action.

Dated at Suva this 5th day of October 2015.



David Alfred
JUDGE
High Court of Fiji