IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 251 of 2012

BETWEEN : **MOHAMMED ABU BAKER SADDIQUE** of 5987 Lemon Park Way, Sacramento, CA 95824, United States of America, Retired Truck Driver.

PLAINTIFF

A N D : **MAIMUN NISHA** of Suva in her capacity as the Executrix and Trustee of the **ESTATE OF MOHAMMED UMAR FARUQUE.**

FIRST DEFENDANT

A N D : **REGISTRAR OF TITLES** Government Buildings, Suva.

SECOND DEFENDANT

A N D : **ATTORNEY GENERAL** Attorney General's Chambers, Suva.

THIRD DEFENDANT

Appearances : Mr Anil J. Singh for plaintiff
Ms U. Baleilevuka for first defendant

Date of Hearing : 03 November 2016
Date of Ruling : 07 April 2017

R U L I N G

[On Security for Costs]

Introduction

[01] This ruling concerns with an application for security for costs.

[02] By an *Inter-Partes* summons supported by an affidavit of Maimun Nisha, first defendant (*'the application'*), the first defendant (hereinafter *'the defendant'*) seeks the following orders:

(i) *That the Plaintiff do deposit with the Court within twenty-one (21) days of making such order to give security for the costs of the 1st Defendant in the sum of $30,000.00 or such sum as the Court may think just and that pending the giving of such security, all further proceedings in the above action be stayed;*

(ii) *In the event that such security is not provided within 21 days from the date of the Order herein, the action be struck out against 1st Defendant;*

(iii) *That costs of this Application be awarded in favour of the 1st Defendant on an indemnity basis.*

(iv) *Further and/or other relief as this Honourable Court may deem just.*

[03] The application is made pursuant to Order 23 Rule 1 of the High Court Rules 1988 ('*HCR*').

[04] In opposition, the plaintiff filed an affidavit of Mohammed Abu Baker Saddique, the plaintiff sworn on 13 October 2016. The defendant filed an affidavit in reply to plaintiff's affidavit in opposition.

[05] Both parties filed their respective written submissions and agreed to decide the matter upon the written submission. There was no oral hearing.

Background

[06] 1. The brief background of the case is as follows: On 4 December 2012, the plaintiff commences proceedings by way of writ of summons seeking among other things a declaration that the transfer No. 702754 of the Certificate of Title No. 12304 dated 3 June 2008 is null and void and of no effect on the ground that the plaintiff did not sign the transfer documents and vacant possession of the property.

2. The defendant filed the statement of defence and states that the plaintiff did sign the transfer document before a legal clerk.

3. The trial of the matter is yet to be assigned.

4. In the meantime, on 16 August 2016, the defendant applies for security for costs. She seeks security on the ground that the plaintiff is ordinarily resident out of the jurisdiction.

The Law

[07] The relevant rule that deals with security for costs is O. 23 of HCR which, so far as material, provides:

> 1. –(1) where on the application of a defendant to an action or other proceedings in the High Court it appears to the Court-
>
> (a) **that the plaintiff is ordinarily resident out of the jurisdiction** or
>
> (b) that ... , or
>
> (c) ... , 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 circumstances 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 proceedings as it thinks just.
>
> (2)....
>
> (3) ..."

Guidelines on security for costs

[08] The following guidelines have been laid down as to the circumstances which the court ought to consider in granting or refusing security for costs:

(1) whether the plaintiff's claim is made in good faith and is not a sham;

(2) whether the plaintiff has a reasonably good prospect of success;

(3) whether there is an admission by the defendant on the pleadings or otherwise that money is due;

(4) whether there is a substantial payment into court or an open offer of a substantial amount;

(5) whether the application for security was being used oppressively, for example, so as to stifle a genuine claim;

(6) whether the plaintiff's want of means, especially in the case of a limited company, has been brought about by any conduct by the defendant, such as delay in payment, or in doing his part of the work; and

(7) whether the application for security is made at late stage of the proceedings, see Halsbury's Laws of England, Vol. 37 (4 Ed) and see also **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd** [1973] QB 609, [1973] 2 All ER 273, CA, per Lord Denning MR.

Determination

[09] The defendant applies for an order that the plaintiff gives security for the defendant's costs of the action. The application is made on the ground that the plaintiff is ordinarily resident out of the jurisdiction (ground 1(1) (a) of O.23). Security for costs sought by the defendant is in the sum of $30,000.00. The court may order the plaintiff to give security for costs of the action upon the ground that the plaintiff is ordinarily resident out of jurisdiction.

[10] The plaintiff is currently residence in the United States of America and has no assets in Fiji.

[11] It is common ground that the plaintiff is now residing out of jurisdiction. He lives in the USA.This makes a ground on which the court may order the plaintiff to pay security for the defendant's costs of the action.The defendant is therefore entitled to apply for security for costs of the action on the ground that the plaintiff is ordinarily resident out of jurisdiction.

[12] In **Huang Tzung-Hao & Yang Man-Hwa v A Team Corporation Limited & Yu-Shin-Ho** [2003] HBC 346/98 (22 July 2003), Pathik, J observed that:

"..., and where there is no dispute that the plaintiff is ordinarily resident out jurisdiction, order for security for costs is entirely discretionary.

Delay in applying

[13] O. 23 does not prescribe time or stage of the proceedings within which an application for security for costs must be made. According to the decided cases, such an application may be made at any stage of the proceedings.

[14] In Huang (above) it was held that:

The fact that the application was not made long before the close of proceedings or even subsequently when the order for interrogations was made, is no bar to making the application. *This is a proper case in which the application for security for costs ought to be granted."*

[15] I would refer to para 65.20 at page 980 of Blackstone's CIVIL PRACTICE 2011, which reads:

"Applications for security for costs should be made at an early stage in the proceedings. Lateness may of itself be a reason for refusing an order (PR Records Ltd v Vinyl 2000 Ltd [2002] EWHC 2860 (Ch), LTL 9/12/2002). There have been cases where security has been refused because the application was made just a few days or even a few hours before the trial. In Innovare Displays plc v Corporate Broking Services Ltd [1991] BCC 174 the trial was fixed for 25 January 1991, the application seeking security was issued on 21 December 1990 and was heard on 17 and 24 January 1991. The claimants

were in financial difficulties, and throughout had encountered problems in raising money to fight the action. The defendants sought to excuse their late application by saying that it was not until mid December that the claimants confirmed that the action would proceed. They did not want to waste money making applications if there was a chance that the action would not proceed. Once they were told that it would, they acted with proper dispatch. However, their solicitors had written to the Claimants' solicitors in November 1990 warning that if agreement to provide security for their costs was not forthcoming by 15 November 1990, an application for security would be made. It was held that they had not acted with all due expedition, but they were not so dilatory that they had to be deprived entirely of security. A reduced order was made.

An order for security for costs made shortly before trial may be made in an 'unless' form rather than in the usual form of staying the claim until security is provided (Vedatech Corporate" v Crystal Decisions (UK) Ltd [2002] EWCA Civ 357, LTL 28/1/2002). Care must be taken that any such does not act oppressively or disproportionately, and consequently it may not be right to order a large sum to be paid into court within a short period of time."

[16] The plaintiff brought the action against the defendant claiming that he was fraudulently deprived of his share in his father's property. He alleges that the transfer document transferring his share in the property to the defendant was executed fraudulently. The plaintiff filed the action on 4 December 2012. The application for security for the first defendant's costs of the action is filed on 16 August 2016, almost four years after the commencement of the proceedings. The date for trial of the matter is yet to be assigned.

[17] The defence is that the plaintiff did, in fact, sign the deed of transfer in the presence of a law clerk. At this stage, it would be hard for the court to provisionally assess the strength and prospect of success of the plaintiff's case. There was no argument advanced at the hearing that the application for security for costs is being used oppressively, except for the amount sought as security is excessive. Granting or refusing security for costs is entirely a discretionary matter. In the exercise of its discretion, the court may grant security for costs even though such an application is made at late stage of the proceedings, especially where the fact that the plaintiff is resident out of the

jurisdiction is not in dispute. In these circumstances, the application for security for costs ought to be granted.

Amount of Security

[18] The defendant seeks security for costs in the sum of $30,000.00. She has not provided breakdown for the costs claimed as security. However, she provides the reasons for asking such an amount. The first defendant in paras from 8 to 12 of her affidavit states:-

> "...
> *08. I verily believe that the Plaintiff has well and truly left Fiji to reside in United States of America and it appears that he does not have any remaining assets in Fiji. Furthermore, the 1st Defendant does not have any knowledge of the Plaintiff's real worth either in Fiji or United States of America.*
>
> *09. In the circumstances, it will be difficult for the 1st Defendant to recover any costs from the Plaintiff in the event that the Plaintiffs claim fails, as the Plaintiff does not appear to have any assets in Fiji an there is no knowledge of his real worth of his assets in Fiji or abroad.*
>
> *10. That I am informed by my Counsel that the hearing may last 2 days or more. On the basis of that, the estimated costs together with the proforma invoice would be in the sum of $30,000.00.*
>
> *11. That the Plaintiff would not be unfairly prejudiced if the security for costs in the sum of $30,000.00 will be paid to Court since the Plaintiff is out of jurisdiction.*
>
> *12. The 1st Defendants (in their Statement of Defence) are seeking costs of these proceedings on a full indemnity basis.*
>
> ..."

[19] On the other hand, Mr Anil J. Singh counsel for the plaintiff submits that an order to deposit $30,000.00 will have the effect of stifling the claim. The application for security for costs has been made at late

stage of the proceedings when the trial of the matter is yet to be fixed and there has been no explanation for the delay. The application for security for costs should be dismissed on this ground alone.

[20] The amount of security for costs ordered to be given is at the discretion of the court, which will fix the sum as it thinks just to do so, having regard to all the circumstances. It is not the practice to order security for costs on a full party and party, still less on indemnity basis. In the case of a plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up to the stage of the proceedings for which security is ordered, but there is no hard and fast rule. (See para 307, **Halsbury's Laws of England,** 4th Ed (Vol.37)

[21] The court in ***Brocklebank & Co v King's Lynn SS Co*** (1878) 3 CPD 365 held that Security for costs may be ordered for the past as well as future costs.

[22] His Lordship Mr Justice Gault in **Mclachlan & Others v Mel Network Limited** [2002] NZCA215 (29 August 2002) thought at para 27 of his judgment that:

"[27] the amount of security is not necessarily to be fixed by reference to likely costs awards: National Bank of New Zealand Ltd v Donald Export Trading LTD [1980] 1 NZLR 97 at 103. It is rather to be what the Court thinks fit in all the circumstances..."

Human Right Consideration

[23] 1.Another aspect that needs to be considered in ordering security for costs is **access to court or tribunal**. An order which requires a litigant to pay a sum which the litigant cannot afford may amount to a breach of the right of access to a court or tribunal guaranteed by the **2013 Fijian Constitution**, section 15. It is to be noted that the courts have shown reluctance to make an order for security which would stifle a genuine claim.

2. Financial burden placed on parties to litigation, such as security for costs orders or court fees must be considered in the light of access to court.

3. The court must, under section 15 of the 2013 Constitution, take into account inability to pay where that would result in a party being unable to proceed with a claim.

4. In ***Tolstoy Miloslavsky v United Kingdom*** (1995) 20 EHRR 442, the ECHR found that an order for security for costs in relation to appellate proceedings would not infringe **art. 6 (1)** (access to justice), but there would be a violation if an order for security denies access to court of the first instance (Ait-Mouhoub v France (1998) 30 EHRR 382).

[24] In the matter before me, the defendant attempts to obtain security in the sum of $30,000.00, which is largely projected cost. The defendant submits that should the security for costs be granted, it will not stifle the plaintiff's claim because he has not provided sworn evidence to confirm that he will be financially challenged or prejudiced if he is ordered to pay the sum of $30,000.00. The first defendant further submits that if the plaintiff genuinely believes his claim to be true and having substance, then, surely providing security for costs should not be an issue.

[25] It will be noted that at no time was a bill of costs provided by the defendant's solicitors for consideration by the court.

[26] The defendant seeks security for costs on the ground that the plaintiff is ordinarily resident out of the jurisdiction. In the case of a plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two-thirds of the estimated party-party costs up to the stage of the proceedings for which security is ordered. The defendant has put forward a figure, which is, as I said, projected costs. It is not clear whether the costs covers the period from the

commencement of the proceedings to the end of the trial. It would be appropriate to order the plaintiff to provide security for the period between commencements of these proceedings and the date of the formal application for security was made. However, security for costs may be ordered for the past as well as future costs (See *Brocklebank* (Above)). In this case, security for costs is made after the completion of all the pre-trial steps. The matter is to be fixed for trial.

[27] I now attempt to set the amount of security for costs. The defendant asks security in the sum of $30, 000.00, which includes costs right up to the trial. Mr Singh, counsel for the plaintiff submits that the amount requested for security for costs is excessive and unreasonable. I bear in mind that the order for security for cost should not be excessive and oppressive. The defendant asks for an extensive amount of security, which is excessive and unreasonable. There is no hard-and-fast rule in assessing the amount of security. The amount of security is entirely in the discretion of the court. The defendant did not provide breakdown or bill of costs. Therefore, I am left with my discretion in fixing the figure for security. Moreover, the application for security is made at the trial stage. In the circumstances, reduced costs may be appropriate. I would consider reduced costs because the security is sought at late stage of the proceedings. In fixing the security, I have also considered the plaintiff's right of access to court guaranteed under section 15 of the 2013 Constitution. The amount of security should not result in a party being unable to proceed with a claim. This would amount to denial of the right of access to court. I would, therefore, having regard to all the circumstances of the case and on the material that I have before me, fix the amount of security at $3,500.00. The right figure for security would be $3,500.00. This is the amount I would order the plaintiff to deposit into the High Court Registry at Lautoka within 21 days of the date of this ruling as security for costs of the defendant. If

the plaintiff fails to do so, the action will be stayed until such time the security is paid.

[28] In ***La Grange v Mc Andrew*** (1879) 4 QBD 210, the court said that if a plaintiff who has been ordered to give security for costs does not do so, the action may be stayed until security is given or dismissed for want of prosecution.

Costs

[29] As a successful party, the defendant also is entitled to costs of these proceedings. The defendant seeks costs on indemnity basis. I do not find any compelling reasons to order for costs on indemnity basis. I would therefore summarily assess the costs at $400.00, which is also to be paid by the plaintiff to the defendant in 21 days of the date of this ruling.

Conclusion

[30] For all these reasons, I would order that the plaintiff must provide security for costs to the defendant in the sum of $3,500.00. Accordingly, the plaintiff will within three (3) weeks of the date of this ruling deposit $3,500.00 into court as security for the defendant's costs of the action. If the plaintiff does not do so, his action will be stayed until security is given as ordered. I would also order the plaintiff to pay the defendant's cost of these proceedings, which I summarily assessed at $400.00, which is also to be paid within 21 days of the date of this ruling.

Final outcome

The final outcome of this ruling is that:

(i) The plaintiff is to deposit a sum of $3,500.00 into the High Court Registry at Lautoka within three (3) weeks of the date of this ruling as security for the first defendant's costs of the action.

(ii) If the plaintiff does not do so, his action will be stayed until such time the security is provided as ordered.

(iii) The plaintiff is to pay a sum of $400.00 (summarily assessed) to the first defendant as costs of these proceedings.

(iv) Orders accordingly.

.....7.4.17.....

M H Mohamed Ajmeer

JUDGE

At Lautoka

07 April 2017

Solicitors:
For plaintiff: Messrs Anil J. Singh Lawyers
For defendant: M A Khan Esquires Barrister & Solicitor