

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

PROBATE JURISDICTION HPP No. 64 OF 2017

[Transferred to Lautoka High Court
pursuant to Orders granted on 14th
February, 2020]

IN THE MATTER of Estate of **RAM**
DEO SINGH also known as **R.D.**
SINGH late of 20 Jinnu Road, Lautoka
in the Republic of Fiji, Retired
Businessman, deceased, Testate.

BETWEEN : **MANJULA DEVI SINGH** of 69 High Street Road, Ashwood 3147,
Melbourne, Australia.

PLAINTIFF/RESPONDENT

AND : **NAVEEN SINGH** of Vuda Point, Lautoka, Businessman.

DEFENDANT/APPELLANT

Appearances : Ms S. Lata for the appellant
Mr U. Koroi for the respondent
Date of Hearing : 07 August 2020
Date of Judgment : 05 October 2020

J U D G M E N T

Introduction

[01] This is an appeal with leave being granted by the Court, against an interlocutory order delivered by the Learned Master (*“the Master”*) on 14 February 2020. By her order, the Master dismissed an application for security for costs filed by the appellant.

[02] At the hearing, both counsel orally argued the matter and tendered their respective written submissions as well.

Background

[03] The parties are biological children of the late Ram Deo Singh (*"deceased"*) who died on 17 February 2017.

[04] The plaintiff/respondent (*"the plaintiff"*) is one of the beneficiaries in the deceased's last Will dated 29 February 2016. In that Will, the deceased had appointed his son-in-law Lalit Kumar as executor and trustee and made provisions among other things for his property, to be held on trust and all residue of his property to Sarita Narayan and the respondent in equal shares and shares alike after payment of specific bequests.

[05] The plaintiff made an application to the High Court in Suva for a probate based on the deceased's Will dated 29 February 2016. The defendant/appellant (*"the defendant"*) filed a statement of defence and objected to a probate being issued to the plaintiff and counterclaimed that he be granted a probate based on the last Will of the deceased dated 9 August 2016.

[06] The parties were attending to the pre-trial steps. In the meantime, the defendant filed an application for security for costs together with a transfer application to transfer the case from Suva High Court to the Lautoka High Court. The Master ordered the matter to be transferred to Lautoka High Court. However, she dismissed the application for security for costs. The appellant appeals that decision to this court.

The Master's reasoning

[07] The Master gives reasons for dismissing the appellant's application for security for costs as follows:

“

1. ...

2. *There is no dispute that the plaintiff resides in Australia.*
3. ...
4. *The power conferred upon the Court under Order 23 rule 1 (1) (a) of the High Court Rules is discretionary. The Court has to have regard to all circumstances of the case and think it is just to order such security in the circumstances of the case.*
5. *The purpose of the exercise of the inherent power is to prevent the defendant, if successful, being left with an unenforceable costs order.*
6. *Court is not required to go into the detailed examine of merits of the case.*
7.
8.
9. ...
10. *Upon perusing the pleadings before me, it would not be just to conclude that the plaintiff has no reasonable prospect of success in her claim.*
11. ...
12. ...
13. ...
14. *The plaintiff claims she is entitled to a share in Estate of the deceased's properties of which Estate are located in Fiji.*

However of (sic) the Court makes a finding in favour of the defendant, there is no evidence the Plaintiff has any other property in Fiji.

15. *Considering the above I do not find the circumstances of the case warrants the court to make an order for security for costs.
Accordingly the Defendant's application for security for cost is dismissed."*

The law

[08] The High Court Rules 1988, as amended ("HCR"), by O 23, R 1 (1) (a) provides:

"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;*

- (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 or she will be unable to pay the costs of the defendant if ordered to do so;*
- (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 or her 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 proceeding as it thinks just."

Grounds of appeal

[09] The appeal is made on the following four (4) grounds:

1. *The Learned Master erred in law and in fact by failing to consider or consider at all, the defence raised by the appellant in respect of the respondent's action, such that it led her in erroneously exercising her discretion to dismiss the appellant's application for security for costs.*
2. *The Learned Master contradicted herself and erred in law when she made findings in favour of the appellant [at paragraphs 2 and 14], but later dismissed the appellant's application for security for costs.*
3. *The Learned Master erred in law and in fact by holding that "it would not be just to conclude that the plaintiff has no reasonable prospect of success in her claim' when in the circumstances there was evidence to show that:*
 - [i] *the appellant was prima facie the sole beneficiary and trustee under the last and true Will dated 9 August 2016, of the Estate of Ram Deo Singh;*
 - [ii] *the respondent's applications were mere conjecture; and/or*
 - [iii] *the respondent's allegations were contradictory and misconceived,*

such that it led the Learned Master to erroneously dismiss the appellant's application for security of costs.

4. *The Master failed to apply the principles of judicial comity and in the circumstances, failed to consider and/or provide any reasons for parting with the principles enunciated in Sami v Devi [2012] FJHC 926; HBC91.2010 (8 March 2012) and Sharma v Registrar of Titles [2007] FJHC 118; HBC 351.2001 (13 July 2007).*

The issue

- [10] The issue on appeal was whether or not the Master erroneously exercised her discretion to dismiss the defendant's application for security for costs.

Discussion

- [11] The central issue in this appeal was whether the Master was wrong in exercising her discretion to dismiss the defendant's application for security for costs.
- [12] The question of who pays for the costs of a claim is not determined until the claim is finally disposed of. This is because the usual rule is that the successful party recovers costs from the loser and the outcome on the merits is only known when judgment is obtained. However, as exceptions, HCR, O 23, sets out the conditions under which the court can order security for costs against the plaintiff on an application of a defendant to an action or other proceeding in the High Court. Relevantly, one of such conditions is found in R 1 (1) (a) of O 23. That rule provides:

"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."* (Emphasis supplied)

[13] When considering an application for security for costs, the court will have regard to all circumstances of the case. Rule 1 (1) (d), so far as relevant provides:

“ ...

Then if, having regard to all the circumstances of the case, the Court thinks it just 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.”

[14] An order for security for costs usually requires the plaintiff to pay money into court as security for the payment of any costs order that may eventually be made in favour of the defendant, and staying the action until the security is provided.

[15] The court has a general discretion whether to grant an order for security. In exercising this discretion the court will have regard to all circumstances of the case and consider whether it would be just to make the order (see HCR, O 23, R 1 (1) (d)).

[16] On the application for security for costs three matters arise:

- (a) whether there are grounds for ordering security for costs;
- (b) if so, whether the court’s discretion should be exercised in favour of making the order; and
- (c) if so, how much security should be provided.

[17] The defendant has made the application for security for costs on the ground that the plaintiff is resident out of jurisdiction (condition (a) in HCR, O 23, R 1). Condition (a) applies to a plaintiff, whether a natural or legal person, who is resident out of jurisdiction. In *Levene v Commissioner of Inland Revenue* [1928] AC 217 Viscount Cave LC quoted with approval the Oxford English Dictionary definition of ‘reside’ as ‘*To dwell permanently or for a considerable time, to have one’s settled or usual abode, to live, in or at a particular place*’.

[18] The statement of claim clearly states the plaintiff’s address to be: ‘69 High Street Road, Ashwood 3147, Melbourne Australia’. It was not is dispute that the plaintiff is resident in Australia. Thus, condition (a) is met, establishing a ground for seeking security for costs.

[19] The plaintiff did not disclose where her assets are located, except the estate property for which both the parties had applied for probate producing different

Wills of their late father. In *Somerset-Leeke v Kay Trustee* [2004] 3 All ER 406, it was held that there is no general principle that a claimant outside the jurisdiction will be ordered to provide security if he fails to disclose where his assets are located.

- [20] Applications for security on the ground of residence outside the jurisdiction almost always turn on the exercise of the court's jurisdiction.
- [21] In *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 Brown-Wilkinson V-C said:
- "The purpose of ordering security for costs against a [claimant] ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. ...*
- [The court has] an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. ... The question is what, in all the circumstances of the case, is the just answer."*
- [22] Any order for security for costs must be objectively justified, and not be discriminatory (*Nasser v United Bank of Kuwait* [2001] EWCA Civ 556, [2002] 1 WLR 1868; *Zappia Middle East Construction Co. Ltd v Clifford Chance* [2001] EWCA Civ 946). CPR, r. 25.13 (2) (a) (which is equivalent to our HCR, O 23, R 1 (1) (a)) does not mean that a claimant can be ordered to provide security for costs merely because of not residing in a Regulation or Convention States: that would be discrimination in providing access to the courts, contrary to the European Convention on Human Rights, arts 6 (1) and 14, in the **Human Rights Act 1998, sch. 1**. An order for security for costs under CPR, r. 25.13 (2) (a), should reflect the obstacles in this way, or the costs of, enforcing English judgment for costs against a particular claimant or in the particular country concerned (*Nasser v United Bank of Kuwait*). ... (see Blackstone's CIVIL PRACTICE 2011, page 982).
- [23] The **Constitution of the Republic of Fiji** in section 15 guarantees access to courts or tribunals in subsection (2) of that section it says that: *"Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal."*
- [24] HCR, O 23, R 1 (1) (a) does not mean that a claimant can be ordered to provide security for costs merely because of not residing within the jurisdiction: that would be discrimination in providing access to the courts, contrary to section 15

of the Constitution. Therefore, it is imperative that we consider the application for security for costs on the ground that the plaintiff is resident outside the jurisdiction in light of access to justice enshrined in section 15 of the Constitution.

- [25] In the matter at hand, the plaintiff brought a writ action seeking a probate based on her late father's Will dated 29 February 2016. The defendant filed a defence together with a counterclaim that he be granted a probate based on his father's Will dated 9 August 2016. The parties are siblings. Each of them has a Will allegedly executed by their late father on different dates.
- [26] In this action, the defendant is also a plaintiff because of his counterclaim. Counterclaim is entirely separate cross-claim, with an independent validity of its own. The defendant has to prove his counterclaim if he wants a probate on the Will he has propounded. He has to call witnesses in order to prove his counterclaim.
- [27] Returning to the Master's decision to refuse security for costs on the ground that the plaintiff is resident out of jurisdiction.
- [28] The Master quite correctly identified the principle relevant to the application for security for costs on the ground that the plaintiff is resident out of jurisdiction. She identified the purpose of ordering security for costs. She said the purpose of ordering security against the plaintiff is to prevent the defendant, if successful, being left with an unenforceable costs order.
- [29] She then proceeded to consider the grounds for ordering security for costs. Having found the ground to be one that the plaintiff is ordinarily resident out of jurisdiction, she made a finding on the plaintiff's property. At paragraph 14 of her decision she says that:

1. *The plaintiff claims she is entitled to a share in Estate of the deceased's properties of which Estate are located in Fiji.*

However of (sic) the Court makes a finding in favour of the defendant, there is no evidence the plaintiff has any other property in Fiji.

[30] Having found that there is a ground for seeking security for costs; the Master deliberates the second matter as to whether the court's discretion should be exercised in favour of making the order. In that process, she had analysed the statement of claim with a view to determine the prospect of success of the claim. She then states her assessment of the prospect of success of the claim at paragraph 10 of her decision:

10. Upon perusing the pleadings before me, it would not be just to conclude that the plaintiff has no reasonable prospect of success in her claim.

[31] The exercise of discretion to order or refuse security would vary from case to case. The exercise of the power to order security for costs is a balancing process, requiring the doing of justice between the parties.

[32] The Master says in her decision that [at paragraphs 14 and 15 of her decision]:

14. The plaintiff claims she is entitled to a share in Estate of the deceased's properties of which Estate are located in Fiji.

....

2. Considering the above I do not find the circumstances of the case warrants the court to make an order for security for costs.

Accordingly the Defendant's application for security for cost is dismissed.

[33] The Master appears to have proceeded on the basis that the claim is bona fide and has reasonable prospects of success. She was entitled to do so. Furthermore, she appears to have been influenced by decisions cited by the plaintiffs namely *Rokosuka v Pillay* [2018] FJHC 521; HPP23.2016 & Caveat 32.2016 (19 June 2018) and *Prasad v Prasad* [2018] FJHC 585; HPP59.2013 (20 June 2018). Both cases were decided by Master V. D. Sharma (as he then was).

[34] *Rokosuka* held:

"38. However, there is evidence that the Caveatee has a beneficial interest and entitlement in the deceased's Estate of Naveen Chandra Pillay since that can be ascertained from the file records that the Deceased was the Registered Owner of the two properties within the Certificate of Title Nos.

24115 [Lot 1], 24116 [Lot 2]. Further, he had a share in Certificate of Title No. 11836 [Lot 5], which is registered in the name of Naveen Chandra Pillay and 2 others.

39. Bearing in mind the nature of the application and its conduct by the parties to this proceedings, it is only appropriate that I order Costs against the Caveator summarily assessed at \$650 to be paid to the Caveatee within 21 days.
40. For the abovementioned rational, and taking into consideration the material evidence before court favoring the Caveatee, I decline to grant the Caveator's application for security for cost order against the Caveatee and proceed to make the following orders."

[35] The Master in *Prasad* said [at paragraphs 31-33]:

- "31. This is a contentious probate action initiated by the Plaintiff. The Defendant has also filed a Counterclaim. The subject matter of both claims rather hinges on the same wave length, whether the Will of the Deceased dated 06th May, 2013 should be given the validity and a Probate Grant be given by this Court and/or the Court should pronounce against the validity of the said Will.
32. The Plaintiff and the Defendant are siblings. They are both eligible to claim in the Deceased Estate of their deceased father Mahes. Whether they will be successful with their Substantive Claim/Counterclaim is a matter for trial Court to determine. The fact is that they are the children of the Deceased and prima facie since the Deceased Will is being challenged, the children have a legitimate right to claim in the Estate of the deceased, in this case by challenging the validity of the Wills. The widow of the deceased may also be entitled to a share in the Deceased Estate which the Defendant does not deny. The Defendant has a Counterclaim which at this stage of the proceedings cannot be considered as not unmeritorious. Further, the substantive matter is awaiting an order of this court to enter the same for trial before a Judge of the High Court accordingly.
33. Bearing in mind the conduct of this Action by the Plaintiff and the Defendant, it is appropriate that I have considered not to make any order for costs at this stage of the proceedings rather at my discretion leave the cost issue to be made in the cause accordingly. Each party for the present

time and/or for now should bear their own costs at the discretion of this Court."

[36] The defendant appeals the Master's discretionary decision and principles relating to appeals from discretionary decisions apply.

[37] In *Strategic Air Services Ltd v Airports Fiji Ltd* [2008] FJCA 80; ABU0056.2007S (7 November 2008), Fiji Court of Appeal cited with approval *House v The King* [1936] HCA 40; [1936] 55 CLR 499, where Dixon, Evatt & McTiernan JJ at 504-505 said:

"The manner in which an appeal against the exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the material for doing so."

[38] The Fiji Court of Appeal in *Strategic Air Services Ltd* also cited *Hadmore Productions Ltd & Ors v Hamilton & Ors* [1982] 1 All ER 1042, where Lord Diplock confirmed that:

"On an appeal from a judge's grant or refusal of an interlocutory injunction an appellate court must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. We are of the view that the trial judge properly considered all relevant matters going to the exercise of his discretion".

[39] Going back to the matter at hand, the Master, in my opinion, has felt that she should not grant an order for security for costs in the exercise of her discretion and in doing so she had had regard to all the circumstances of the case. She had properly considered all relevant matters in exercising of her discretion. I do not find that she has made any error in exercising her discretion. This would mean that the Master was right in dismissing the application for security for costs.

Conclusion

[40] For the reasons given, the appeal fails. I would accordingly proceed to dismiss the appeal with summarily assessed costs of \$1,200.00 payable by the defendant to the plaintiff.

Result

1. Appeal dismissed.
2. Master's orders dated 14 February 2020 affirmed.
3. The defendant shall pay summarily assessed costs of \$1,200.00 to the plaintiff.

M.H. Mohamed Ajmeer
5/10/20
.....

M.H. Mohamed Ajmeer

JUDGE



At Lautoka

05 October 2020

Solicitors:

AK Lawyers, Barristers & Solicitors for the appellant/defendant
Radhika Reddy Law for the respondent/plaintiff