

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 38 of 2021

- BETWEEN** : **SAROJINI DEVI aka SAROJANI** of Legalega, Nadi, Retired
First Plaintiff
- AND** : **ASHWINI DEVI KRISHNA** normally of Legalega, Nadi but
presently of Auckland, New Zealand, Domestic Duties
Second Plaintiff
- AND** : **RAKESHWARAN KRISHNA** of Legalega, Nadi, Businessman.
First Defendant
- AND** : **ITAUKEI LAND TRUST BOARD** (formerly known as Native
Land Trust Board) a statutory body created under the iTaukei Land
Trust Act, Cap 134 having its registered office in 431 Victoria
Parade, Suva.
Second Plaintiff
- AND** : **AISAKE VARO** of Nadi, Surveyor.
Third Defendant
- AND** : **BANK OF SOUTH PACIFIC** of a company incorporated in
Papua New Guinea and registered in Fiji as a foreign company
under Part X of the Companies Act and having its registered office
at Level 12, Suva, Central Building, Corner of Renwick Road and
Pratt Street, Suva.
Fourth Defendant

AND : **HOME FINANCE COMPANY LIMITED** of a limited liability company having its registered office at HFC Centre, 371 Victoria Parade in Suva, Fiji
Fifth Defendant

AND : **REGISTRAR OF TITLES** having its registered office in Ground Floor, Civic Tower, Suva, Fiji
Sixth Defendant

AND : **DEPARTMENT OF TOWN AND COUNTRY PLANNING** having its registered office in 1st Floor FFA Building 4 Gladstone Road, Suva
Seventh Defendant

Before : Master U.L. Mohamed Azhar

Appearance : Mr. E. Dass for the First and Second Plaintiffs
Ms. A. Sadrata for the First Defendant
Ms. E. Raitamata for the Second Defendant
Third Defendant absent and unrepresented
Ms. A. Singh for the Fourth Defendant
Mr. N. Lajendra for the Fifth Defendant
Mr. S. Kapt for the Sixth and Seventh Defendants

Date of Ruling : 07.07.2023

RULING

01. The first defendant took out this summons pursuant to the Order 23 rule 1 (1) of the High Court Rules and moved the court to order the second plaintiff, who is ordinarily out of the jurisdiction to provide such security for the cost determined by the court and to stay the action until the second plaintiff provides such security.
02. The Order 23 of the High Court Rules gives discretion to the court to order for security for cost and deals with the other connected matters. Whilst the rule 1 deals with the discretion of the court, the other rules 2 and 3 deal with the manner in which the court may order security for cost and additional power of the court. The rule 1 reads as follows:

Security for costs of action, etc (O.23, r.1)

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 the plaintiff (not being a plaintiff who is suing in a representative capacity) is a normal 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 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) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) The references 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 a proceeding on a counterclaim.

03. Unambiguous wording of the above rule clearly indicates that, it is a real discretion given to the court whether to order security or not. This discretion has to be exercised considering all the circumstances of the case. Sir Nicolas Browne Wilkinson V.C in Porzelack K G v. Porzelack (UK) Ltd, (1987) 1 All ER 1074 at page 1077 as follows:

"Under Order 23, r1(1) (a) it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer".


04. It is no longer an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. The following principles emerge from the several authorities in this regard. However, given the discretionary power expected to be exercised by courts with judicial mind considering all the circumstances of a particular case, these principles should not be considered to be exhaustive;
- a. Granting security for cost is a real discretion and the court should have regard to all the circumstances of the case and grant security only if it thinks it just to do so (Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd [1973] 2 All ER 273; Porzelack K G v. Porzelack (UK) Ltd (1987) 1 All ER 1074).
 - b. It is no longer an inflexible or a rigid rule that plaintiff resident abroad should provide security for costs (The Supreme Court Practice 1999).
 - c. Application for security may be made at any stage (Re Smith (1896) 75 L.T. 46, CA; and see Arkwright v. Newbold [1880] W.N. 59; Martano v Mann (1880) 14 Ch.D. 419, CA; Lydney, etc. Iron Ore CO. v. Bird (1883) 23 Ch.D. 358); Brown v. Haig [1905] 2 Ch. 379. Preferably, the application for security should be made promptly (Ravi Nominees Pty Ltd v Phillips Fox ((1992) 10 ACLC 1314 at page 1315).
 - d. The delay in making application may be relevant to the exercise of discretion; however, it is not the decisive factor. The prejudice that may be caused to the plaintiff due to delay will influence the court in exercising its discretion (Jenred Properties Ltd v. Ente Nazionale Italiano per il Tuismo (1985) Financial Times, October 29, CA; Ross Ambrose Group Pty Ltd v Renkon Pty Ltd [2007] TASSC 75; Litmus Australia Pty Ltd (in liq) v Paul Brian Canty and Ors [2007] NSWSC 670 (8 June 2007).
 - e. The purpose of granting security for cost is to protect the defendant and not to put the plaintiff in difficult. It should not be used oppressively so as to try and stifle a genuine claim (Corfu Navigation Co. V. Mobil Shipping Co. Ltd [1991] 2 Lloyd's Rep. 52; Porzelack K G v. Porzelack (UK) Ltd (1987) 1 All ER 1074. Denial of the right to access to justice too, should be considered (Olakunle Olatawura v Abiloye [2002] 4 All ER 903 (CA)).
 - f. It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim (Hogan v. Hogan (No 2) [1924] 2 Ir. R 14). Likewise, order for security is not made against the foreign plaintiffs who have properties within the jurisdiction (Redondo v. Chaytor (1879) 40 L.T. 797; Ebbrard v. Gassier (1884) 28 Ch.D. 232).
 - g. The court may refuse the security for cost on *inter alia* the following ground (see: The Supreme Court Practice 1999 Vol 1 page 430, and paragraph 23/3/3:

1. If the defendant admits the liability.
 2. If the claim of the plaintiff is bona fide and not sham.
 3. If the plaintiff demonstrates a very high probability of success. If there is a strong prima facie presumption that the defendant will fail in his defence.
 4. If the defendant has no defence.
- h. The prospect of success, admission by the defendants, payment to the court, open offer must be taken into account when exercising the discretion. However, the attempt to reach settlement and “without prejudice” negotiations should not be considered (Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd (supra); Simaan Contracting Co. v. Pilkington Glass Ltd [1987] 1 W.L.R. 516; [1987] 1 All E.R. 345).
- i. In case of a minor the security for cost will be awarded against the parent only in most exceptional cases (Re B. (Infants) [1965] 2 All E.R. 651).
05. The late Gopal Krishna was the proprietor of Native Lease No. 28880 known as Legalega (part of) Lot 1 on SO 2125 situated in the Tikina of Nadi and in the Province of Ba having an area of 1.0613 Hectares (subject property). The first plaintiff is the wife of late Gopal Krishna and being the absolute beneficiary under the Last Will of late Krishna, she became the proprietor of the subject property in year 2016. Thereafter, the second plaintiff – the daughter of the first plaintiff became the joint proprietor with her mother – first plaintiff in year 2018. The subject property was mortgaged by the plaintiffs to fourth defendant. The first defendant is the son of the first plaintiff and brother of the second plaintiff. The first defendant as the member of the family has been in occupation of the subject property.
06. It is alleged that, the first plaintiff found out sometime in August 2018 that, the first defendant with the assistance of the second and third defendant fraudulently subdivided the subject property and extracted an area of 3923m² from it. It is further alleged that, the first defendant through fraud and corrupt practice became the proprietor of new Lease No. 33244 for the area of 3923m² extracted from the subject property. The new Lease No. 33244 issued to the first defendant is now mortgaged to the fifth defendant.
07. The plaintiffs claim that, the said subdivision and subsequent transfer to the first defendant be declared null and void. They also claim that, the mortgage of the said portion of land by the first defendant to fifth defendant be cancelled. The total extent of the subject property is 1.0613 Hectares, which is 10613m². The first defendant allegedly subdivided and obtained a new lease to an area of 3923m² which is more than 1/3 of the total land. The dispute is only over this 3923m² piece of land which forms part of the subject property. The plaintiffs own the major portion of the subject property. Even they fail in their claim, the plaintiffs would be the owner of the said major part of the subject land. This means the plaintiffs will continue to be proprietors of major portion of the subject property even they fail in their claim against the defendants. They will only lose 3923m² from the subject property. Accordingly, the plaintiffs have property within the jurisdiction.

08. Furthermore, first plaintiff is resident within the jurisdiction and only the second plaintiff is resident abroad. As stated above, it is no longer an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. Hence, it will not be just to order for security for cost in this case when one of the plaintiffs is within the jurisdiction and both of them have property within the jurisdiction. It appears that, the current summons for security for cost is an attempt to stifle the plaintiffs' action. In the meantime, the claim of the plaintiffs seems to be bona fide and not sham as it is pleaded in the statement of claim. Having considered all the circumstances of the case, I decide that, it is not just to order the second plaintiff to provide security for cost in this matter.
09. In result, the final orders are:
- a. The summons filed by the first defendant seeking an order for security for costs is hereby dismissed; and
 - b. There will be no costs.

At Lautoka
07.07.2023




U.L. Mohamed Azhar
Master of the High Court