

**IN THE FAMILY DIVISION OF THE MAGISTRATE'S COURT AT SUVA**

**FILE No: 06/SUV/1084**

**BETWEEN:**

**BW**

**Applicant**

**AND:**

**G P**

**Respondent**

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**APPEARANCES/REPRESENTATIONS**

Ms. Choy C.S (Legal Aid Commission) for the Applicant

Ms. Rakai M.L (Sherani & Co.) for the Respondent

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## INTRODUCTION

1. The first application is by the applicant lady form 12 and 23 filed on 28<sup>th</sup> May 2015 for her family file to be transferred to Nasinu Court.
2. The transfer application is opposed by the Respondent man and affidavit in opposition has been filed 11<sup>th</sup> June 2015.
3. The Respondent man has also filed a form 12 and 23 on 11<sup>th</sup> June 2015 seeking Security of cost in the sum of \$3,000.00.
4. This application by the respondent is opposed by the lady and a substantive affidavit in opposition has been filed 10<sup>th</sup> July 2015. The court also directed to file submissions to address both the transfer and security for costs applications.
5. The parties have been before the Suva Family Court for more than a decade on various applications which would reflect the voluminous files in the Registry.
6. Currently in Suva Family Court, there are 3 pending applications which are as follows:

<b>Document</b>	<b>Filed</b>	<b>By</b>
Urgent Occupation		
Form 12/23 Urgent occupation	05/05/15	Lady
Form 13/23 Opposition	02/06/15	Man
Transfer Application		
Form 12/23 Transfer application	28/05/15	Lady
Form 13/23 opposition	11/06/15	Man
Security of Costs		
Form 12/23 for Security of cost	11/06/15	Lady
Form 13/23 Opposition	10/07/15	Man

## **Facts**

7. The Applicant Lady seeks for that her family proceedings to be transferred to the Nasinu Court on the basis that she has filed an urgent occupancy application.
8. The Applicant Lady also submits that since she and the Respondent man live within the Nasinu vicinity it would be closer for the parties.
9. The Applicant Lady also pleads financial hardship and that it would be more convenient to transfer the case to Nasinu.
10. The Applicant Lady also states that her family case has been pending since 2012 and is a contributing factor towards her family's problems.

11. This application is opposed by the Respondent Man as the parties have been before the Suva family Court since 2006 according to what he can recall.
12. However, the Respondent man's contention is that the Applicant lady has between the parties, filed more applications and that many of these have been against her where there were no costs ordered. The Respondent man's main contention is why a Transfer application is being made after more than 13 years of the parties being before the Suva Family Court.
13. The Respondent man's second contention is whether the Transfer application is being made bona fide or solely because the Applicant lady is "magistrate shopping" since both parties have been before the Suva Family Court even though he was not even in Suva.
14. The Respondent Man pleads *estoppel* as Jurisdiction of the Suva Family Court Division has been accepted by the parties from the commencement of the original filing of court documents between the parties, which can best be reflected by the Court Records.
15. The Respondent Man in his opposition further states that jurisdiction was accepted by the parties more than a decade ago even when he was working in Labasa.
16. The Respondent Man also states that he is represented by Private lawyers who are based in Suva. If the matter is transferred he would incur apart from legal costs, additional expenses for travel from Suva to Nasinu and return.
17. The Respondent Man states that further, parties would be deprived of having a Magistrate who is unfamiliar with the plethora of applications filed by the Applicant lady and there is no urgency pleaded in the Affidavit material. No urgency is shown.
18. The respondent also submits that there is no financial hardship as it is a determined fact that the Applicant Lady owns 4 residential properties whilst the Respondent Man owns only 1 which has an existing mortgage. The Respondent Man seeks that Security of costs be paid before any of the Applicant Lady's application is dealt with by the Court.

#### **ANAYSIS OF SECURITY FOR COSTS AFFIDAVIT**

19. The Applicant Man is seeking Security of Costs in the sum of **\$3,000.00** by way of cash depositor pursuant to Section 205 of the Family Law Act 2003.
20. The Applicant Man makes this application on the basis that the Respondent Lady has filed numerous applications which have been struck out with no costs to him.
21. The Applicant Man submits that the Respondent lady has had maintenance applications and "urgent occupation orders" in the guise of property application which has been struck out more than once. Each time these applications were dismissed with no costs to the Applicant man.

22. The Applicant man has been put to great costs to defend all proceedings by the Respondent lady. Initially the Applicant Man was in person and had to engage private lawyers to deal with the plethora of applications filed by the Respondent lady.
23. The Respondent lady is represented by Legal Aid Commission when it is a determined fact in the decision of Resident Magistrate in "**Exhibit I**"
24. Applicant man submits that she owns 4 properties in Labasa and was in the process of selling one of them. The Respondent Lady owns a motor vehicle, bank account and had funds from the Fiji National Provident Fund unaccounted for in the Ruling. (**Exhibit "D"**)
25. The Respondent Lady states that the Applicant Man chose to be represented by Private lawyers who are misleading him.
26. The Respondent Lady also refers to previous orders not complied by the Applicant man and seeks that this security for costs be dismissed and her transfer application be heard quickly. The Respondent lady pleads that her applications were all made genuinely and as such **\$6,000.00** costs should be awarded in her favour.

## **THE LAW**

### **Transfer of proceedings**

27. The Family Law Act 2003 (Fiji Islands) will apply for the issues in this application as well as its Rules and Regulations.
28. Section 28 of the Family Law Act 2003 provides,
29. 28.-((2) If-
  - (a) there are pending in court proceedings that have been instituted under this act or are being continued in accordance with section 4: and
  - (b) it appears to that court that it is in the interests of justice. or of convenience to the parties. that the proceedings be doubt with in another court having jurisdiction under this Act. the court may transfer the proceedings to the other court.

Rule 5.14 - 5.16 of the Family Law Rules 2005 [Legal Notice 50] provides for transfers as follows, Division 5.2- Transfer of proceedings between courts

#### Application of Division

5.14. This Division applies to and in relation to the transfer of proceedings under section 28 of the Act-

- (a) between registries of the same Family Division-
    - (i) on the motion of a judge or magistrate of that Division; or
    - (ii) on application. in accordance with this Order:
- Applications by parties

5.15. A party who has filed an application or response in proceedings in a court exercising jurisdiction under the Act may, by application in accordance with Form 12, filed in the filing registry, apply to have the proceedings heard-

- (a) in another registry of that court; or
- (b) in another court exercising jurisdiction under the Act.

30. The Family Law Act in Rule 5.16 provides 5 matters the Court must consider before determining any transfer applications.

Matters to be considered

5.16.-(1) In considering a transfer under this Order, the court shall have regard to

- (a) the wishes of the parties;
- (b) whether proceedings in respect of an associated matter are pending in the other court; and
- (c) whether if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding is not transferred;
- (d) whether the proceeding is likely to be heard and determined earlier in the other court;
- (e) the availability of particular procedures appropriate for the class of proceeding; and
- (f) the interests of the administration of justice. Emphasis mine

Security for Costs

31. Section 205 provides for situations where the Courts can order costs and security of costs in the family proceedings states,

“Costs

205. (1) Subject to subsection (2) and section 207, each party to proceedings under this Act bears his or her own costs.

(2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so. the court may. Subject to subsection (3) of the Rules make such order as to costs and security for costs. Whether by way of interlocutory order or otherwise as the court considers just.

(3) In considering what order (if any) should be made under subsection (2), the court **must** have regarded to -

- (a) the financial circumstances of each of the parties to the proceedings;
- (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and. if so. the terms of the grant of that assistance to that party;
- (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
- (d) whether the proceedings were necessitated by the failure of a party to the

proceedings to comply with previous orders of the court:

(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;

(f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer: and

(g) Such other matters as the court considers relevant."

32. In *Luaka v Luaka* [1988] *FamCA* 1520 (24 December 1998) the Family Court of Australian set the test for costs and security of costs for family matters. Section 117 of the Common wealth

Family Law Act 1975 is very similar to Fiji's Section 205 of the Family Law Act.

- The means of the applicant to satisfy an order for cost if unsuccessful;
- The prospect of success of the application;
- Whether the applicants claim is made bona fide;
- Whether an order for costs would be oppressive or stifle the litigation;
- Whether the litigation involves a matter of public importance;
- Whether there has been delay in bring the application for security;
- Any difficulties in enforcing an order for costs; and
- The amount of costs to be incurred.

33. In *Atkins & Hunt (Security for costs)* [2015] *FamCAFC* 66 (30 April 2015) the Court dealt with a similar application for security of costs where it dealt with the issue of impecuniosity of the Lady. The Court assessed this issue and stated the following,

"The authorities suggest that mere impecuniosity of a party will not have itself been a basis for ordering that person to provide security for costs. but there is an exception to that in the case of appeals.

However, as was explained in *Halsbury & Halsbury* [20081 *FamCAFC* 170at [221]:

... It must be remembered that as has been explained in a number of decisions of the Full Court. Impecuniosity of an appellant is not the only or deciding factor in an application for security in respect of the costs to an appeal ... rather it is one factor which must be balanced against other factors. Particularly the prospects of success of or the merits of the appeal ... "(Emphasis added)

## ANALYSIS OF APPLICATIONS

### *Transfer of proceedings*

34. The primary consideration for this court to consider is the factors in section 28, Division 5.2 and how it is to be assessed. The Applicant Lady has made the application for Transfer on the basis that the parties reside in the Nasinu locality and it would be convenient for them to attend the Nasinu Court.

35. The Family Law Rules provide a framework on how procedures are to be carried out in Family Court cases. These rules are more specific in comparison to the Act and it

provides a guideline on how, when and by whom applications can be made in Court. It also provides guidelines on how to determine applications while delivering rulings or judgments.

36. Her basis for the application is based on the provisions set out in Rule 5.16 which is contained in Division 5.2 of the Family law Rules.
37. It is noted that Section 28 (2) is a general provision which deals with transfer of proceedings while Rule 5.16 is a specific provision which lists all the factors the Court shall have regard to when determining transfer applications. It is our understanding that Section 28 (2) has to be read in conjunction with Rule 5.16 as rule 5.16 is a specific provision and it elaborates on the factors that the Court should consider. Section 28 (2) on the other hand, just provides two factors which have been encompassed indirectly in Rule 5.16.
38. Division 5.2 of the Family Law Rules is an express provision which deals with transfer of proceedings between Courts. It includes when Division 5.2 can be used, which parties can make applications under Division 5.2 and what matters the Court needs to consider when dealing with applications under this Division.
39. The applicant submits that she is a Volunteer Counsellor and has 3 grown up children and is financially constraint to come to court for her matters as she is retired.
40. The Applicant lady wishes for her matter to be transferred to Nasinu. She has been attending court on most occasions and it would be practical as both the parties reside in the Nasinu Area.
41. She is the applicant in the current matter which is pending before the court where she yet to seek leave of the court as she has passed the 2 year time frame to institute proceedings before the court.
42. It is submitted by the lady that is in the interest of the administration of justice for the family file to be transferred to Nasinu court to save both the parties from unnecessary costs of travelling to court and to allow the applicant lady to also have a counsel from the Nasinu Legal Aid Commission which will allow her to constantly keep in touch with.
43. The Respondent Man submits inter alia that this Court has to consider the 5 matters in Rule 5.16 of the Family Law Rules 2005.

#### **Security of Costs Application**

44. The Court in Section 205(3) considers 7 factors before deciding on costs and Security of costs.
45. The Court has a discretionary power to award costs or Security of Costs if there are circumstances that justify it doing so subject to the factors analysed as follows:
46. I am of the view that the current application for transfer of the file and the plethora of applications filed by the Lady is not a reason to justify security cost.

47. In relation to whether the plaintiff has any assets the man tendered in evidence by the applicant man includes a judgement which is pending for appeal. Other than the said judgement he failed to provide substantial evidence before this court to substantiate his claim for the lady is having 4 properties in Labasa.
48. It is a difficult task for the court to determine the asserts addressed in the judgement to enable an order for cost to be attached or to be realized from only considering the said judgement. If I accept the applicant man's claim it would may amount to be erred in my part. The man should have put forward more evidence to enable the court to determine whether the lady has realizable asserts within the jurisdiction sufficient for the court can conclude that no order for security for cost should be granted.( **Bubu Patel v Manahan Aluminium Glass Fiji Ltd HBC 19/19 ( 14 Nov 1997)**)
49. I also noted that Resident learned Magistrate Ms. Mua's Decision is still valid and which confirmed that the Respondent lady owned 4 properties not to mention, a car, funds from FNPF unaccounted for and has a bank account. But, as this matter is on appeal, and also the outcome of the appeal matter is yet to determined and I did not hear evidence in respect to the said proceedings; I am of the view that it is prudent for me not to consider the said judgement as sole evidence to justify that the lady is in a financial capacity to deposit \$3000.00 as a security cost.
50. Now, I briefly go through the mandatory criteria for security cost considering the evidence before me. *The court to consider the financial circumstances of each of the parties to the proceedings;* The Lady is retired and is only a volunteer counsellor. She has applied for transfer of proceedings to Nasinu on the basis that she is finding it financially difficult to travel to and from to attend court in Suva.
51. The gentleman is also retired and who owns 1 home with a mortgage, has credit card bills and explained how FNPF monies was used.
52. I am also guided by section 205 (b) of the Family that requires the determination as to *whether any party to the proceedings is in receipt of assistance by way of legal aid and. if so. The terms of the grant of that assistance to that party;* he court takes note of the fact that the lady has been represented by a legal firm while the Applicant was represented by the Legal Aid Commission and receiving assistance from the Legal Aid Commission.
53. This section was specifically included by the drafters of this legislation to ensure that the court should take particular attention when awarding costs against a litigant represented by the Legal Aid Commission. This is may be because the Legal Aid Commission is underfunded and under resourced.
54. I wish to refer to the observation made in VK v KS file No 08 LBS 0041 for clarity. "The Legal Aid Commission relies on a limited budget provided by the Government, funds generated from the interest of the Trust Funds Accounts of law firms, and from any assistance from willing donor agencies. Equally important is that fact that the Legal Aid Commission was established to promote "Access to Justice" by the poor sections of the society who cannot



afford to get justice by the mere fact that they do not have any money to pay the lawyers to arrange for an audience in the court of law. Justice to the poor sections of the society can be very expensive and unattainable without the assistance of the Legal Aid Commission."

55. Accordingly, if the man challenges the criteria for legal aid (provided to the lady) should have established and also should have complained to the Director of the Legal Aid Commission (or to an appropriate authority. The court also cannot merely overlook the objects of the LAC.
56. The court also to consider whether *the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court: In fact this is a complicated question to answer. If I address the most recent application filed by the applicant, prior to the transfer application is Form 12/23 for urgent occupation alone with an application to seeking leave of the court as directed by the appellate court. ( APPEAL NO. 14/APP/0001)*
57. In that sense the application for urgent occupation *was necessitated by the failure of a party to the proceedings to comply with previous orders of the court in particular, to seek leave prior to filing of the occupation order.*
58. *The Court also needs to consider whether any party to the proceedings has been wholly unsuccessful in the proceedings; the answer is already discussed above. Paragraphs and therefore, I do not wish to repeat. Para 23/3/3 of the White Book states in regard to prospects of success –*

***"A major matter for consideration is the likelihood of the plaintiff succeeding. This is not to say that every application for security for costs should be made the occasion for a detailed examination of the merits of the case. Parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure (Porzelack KG v Porzelack (UK) Ltd [1987] 1All ER 1074). In the cases which follow, investigation of the merits was justified only because of the plaintiffs demonstrated a very high probability of success. If there is a strong prima facie presumption that the defendant will fail in his defence to the action, the Court may refuse him any security will fail in his defence to the action, the Court may refuse him any security for costs (seeper Collins J in Crozat v Brogden [1894] 2 QB 30 at 33."***

59. The provisions of s.205 of the FLA inter alia apply to an application where a party is seeking security for costs which *may be* ordered in the applicant's favour in the event that the other party is unsuccessful. This is also a complex determination. As I have noted above, there are 2 pending applications before this court. In these proceedings I am considering an application for transfer and there is a pending matter (Form 12/23 for urgent occupation.) If the lady's application for transfer succeeds, then the matter would be transferred to Nasinu jurisdiction. It is technically difficult for this court to determine in this juncture whether the lady would be succeed in her urgent occupation application or not. But when it comes to the outcome of transfer application; it could be determine in the conclusion of this Ruling.

60. One of the basis of award of costs in an action depends on the conduct of the parties in proceedings: **Yanuca Island Ltd v Markham** [2005] FJCA 67;ABU 0092.2004S (11 November 2005). A party that delays or lengthens the proceedings unnecessarily can expect higher costs than one who concedes when the facts and the law is against him. Costs normally awarded on the standard basis or on an indemnity basis.

61. S205. (2) also entrusted a responsibility on the judicial officer to identify and evaluate the circumstances that justified the making of an order for security for costs. I do not think that the Applicants action was unreasonable or unnecessarily delaying the proceedings. Because, on one hand **the Applicant lady yet to seek leave of the court as she was ordered by the appellate court**. She has to complying with the court order to seek leave. In order to give more insight I wish to quote from the parties appeal matter. His lordship Justice Deepthi Amarathunga conclude the appeal matter stating inter alia that; “

*“Though the Appellant was successful in first appeal ground this appeal needs to be dismissed as the Application seeking occupation of ‘matrimonial home’ after expiration of 2 years from dissolution of marriage needed leave of the court below, to make such application. There was no such application seeking leave before the learned Resident Magistrate. The Appellant is at liberty to make the same or similar application first after obtaining the leave of the court below and if the court below grants leave, then the application for injunctive relief can be made. If such an application is made the court below should consider the issue of leave first...”*

62. Further the case of *Atkins & Hunt (Security for costs)* [2015J Fam CAFC 66 (30 April 2015),

“The authorities suggest that mere impecuniosity of a party will not of itself be a basis for ordering that person to provide security for costs, but there is an exception to that in the case of appeals. However, as was explained in *Halsbury & Halsbury* [20081FamCAFC 170at [221]:

... It must be remembered that as has been explained in a number of decisions of the Full Court. Impecuniosity of all appellant is not the only or deciding factor in an application for security in respect of the costs to an appeal ... rather it is one factor which must be balanced against other factors. Particularly the prospects of success of or the merits of. the appeal ... "(Emphasis added)

63. A purpose of the rule and the prima facie presumption in favour of ordering security for costs has been recognized and applied in Fiji. In this Court in *Furuuchi Suisan Company Ltd v Tokuhisa* [2009] FJHC 194; Civil Action 95. 2009 (9 September 2009), Byrne J said –

*"31.0. The first case I mention is Porzelack (UK) Ltd, (1987), 1 All ER 1074 where Sir Nicolas Browne Wilkinson V.C. said at p. 1076: The purpose of ordering security for costs against a plaintiff 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 endorse the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a*

*defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiff's residents within the jurisdiction.*

*"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."*

## **CONCLUSION**

64. The Respondent Man in the Transfer application seeks that it be struck out with costs on an indemnity basis. As the Rule and s.28 FLA itself states, the ordering of security is a matter of discretion. The discretion is unfettered one. However, security should only be ordered if the court satisfied that it is just to do so having regard to all the circumstances' of the case.
65. I am also of the view that there is no inflexible or rigid rule that security must be ordered, as it is a matter of discretion depending on the circumstances' of the case if the court thinks it is justified in ordering so. The Court might also consider whether the application for security was being used oppressively so as to try and strafe a genuine claim.
66. Having assets in itself is insufficient to exclude an order for security for costs, assets has to be readily converted to pay for the costs. At the other end of the scale, insolvency and poverty is no ground for security for costs; ***Cowell –v- Taylor (1885) 31 Ch.D. 34***, neither should an application for security for costs be used oppressively so as to stifle a genuine claim.
67. The above discussed paragraphs and the criteria for the consideration of security for cost and having regard to all the circumstances' of the case, the court thinks it is not just to order security cost from the lady.
68. In my considered view the principles that guide the Court in the exercise of its discretion to transfer cases are conveniently set out in **Halsbury's Laws of England (4th edition) Vol.37 at para.63** which reads:

*"The Court's power to transfer proceedings from one Court to another is a useful corrective to ensure that proceedings, wherever begun or whatever forum the plaintiff has initially chosen, should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings ... the Court will have regard to the nature and character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case."*
69. In view of the above discussed paragraphs and having considered all the matters raised by both counsels, I conclude that the application for Transfer of the case should be allowed. Accordingly I grant the application of the lady to transfer her proceedings to Nasinu Court inter alia considering the interests of justice and convenience to the parties

(not the legal practitioner's convenience) as both the parties are residents of Nasinu locality and jurisdiction.

70. I also note that the lady failed to put forward evidence to enable the court to determine whether the man has realizable assets and in a financial ability to consider that an order for security of cost of \$6000.00 to be given as sought by her in her response.

**NOW THEREFORE BE IT ORDERED BY THE COURT THAT:**

- i. For the foregoing reasons, I refuse to grant security for cost as sought by the man; accordingly, the application by the man for security cost is hereby dismissed.
- ii. For the foregoing reasons, I grant the application of the lady that her family file (proceedings) to be transferred to Nasinu Court.
- iii. Pursuant to Rule 5.17.—(1) Where a court makes an order to transfer proceedings to another registry or to another court, the court papers shall be transmitted by the registrar responsible for the filing registry to the registry to which the proceedings have been transferred.
- iv. I also wish to conclude the Ruling by highlighting Rule 5. 17 (2) for clarity and proper administration of justice which reads that; Thereafter the court to which the proceedings have been transferred shall proceed as if the proceedings had been originally instituted in that court, and may have regard to the evidence given before the transfer of the proceedings.
- v. Parties to bear their own costs.

30 days to appeal.

**LAKSHIKA FERNANDO (MS)**

**RESIDENT MAGISTRATE**

**DATED AT SUVA this 05<sup>th</sup> day of November 2015.**