

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

HBC NO. 330 OF 2014

BETWEEN : **MOHAMMED ZULFIKAR ALI**, of 536 Berry Ave, Apt 1, Hayward, C.A.94544, USA, Travel Consultant.

PLAINTIFF

AND : **JACK'S RESTAURANT LIMITED**, having its Registered Office at 401 Queens Road, Nadi, t/a"INDIGO-INDO-ASIAN RESTAURANT".

DEFENDANT

Counsel : Mr. K. Patelon the instructions of Mr. Daniel Singh for the Plaintiff.

: Mr. Wasu Pillay on the instructions of Messrs Gordon & Co. for the Defendant.

Date of Hearing : 10th August, 2017.

Date of Ruling : 18th September, 2017.

Ruling by : Justice Mr. Mohamed Mackie

R U L I N G

[A] **INTRODUCTION**

1. This ruling is in relation to the Defendant's "**Summons**" dated on 17th July, 2017, which came up before me on 27th July, 2017, moving for Security for Costs pursuant to **Order 23 rule 1(1) (a) of the High Court Rules 1988** and under the inherent jurisdiction of the Court, seeking for the following Orders;

1. **THAT** the Plaintiff be ordered to pay the sum of \$ 25,000.00 or such other sum as ordered by the Honourable Court , as security for the Defendant’s cost in this action;
 2. **THAT** the sum so ordered to be paid as security for Defendant’s cost of this action be paid by the Plaintiff to the Defendant within 7 (seven) days of the making such order by this Honourable Court;
 3. **THAT** in the event the Plaintiff fails and/or refuses and /or neglects to pay the sum so ordered to be paid as security for the Defendant’s cost of this action to the Defendant within 7 (seven) days of the making of such order by this Honourable Court then the Plaintiff’s action be struck out and/or deemed to be struck out;
 4. **THAT** until this Summons and/or application is heard and/or decided the Plaintiff’s action be stayed and/or the hearing dates of 16th and 17th October ,2017 allocated for the hearing of this matter be vacated forthwith;
 5. **THAT** the cost of this application be paid by the Plaintiff.
2. Since the Summons was not supported by an Affidavit and there being no requirement to file reply, the matter was straightaway fixed for hearing on 10.08.2017. However, an Affidavit dated 4th August, 2017, of one **KINISIMERE RAIQUISO**, a Law Clerk of Singh Lawyer, sworn on the, purported, authority given by the Plaintiff marked “**A**”, was filed for the only purpose of filing a copy of an Email marked “**B**”, purportedly, sent by the Plaintiff from USA to Mr. Daniel Singh, which is self-explanatory.

[B] **BACKGROUND**

3. The Plaintiff filed writ of summons, together with his Statement of Claim on 24th November, 2014, against the Defendant moving for reliefs, *inters- alia*; (1) General damages for the pain and suffering, loss of amenities (2) Special damages and (3) Loss of past and future earnings on account of the injury, allegedly, caused to him at the **Defendant’s Restaurant**, as stated in paragraphs 2 & 3 of his amended Statement of Claim, which read as follows;
 1. That on 05th of April, 2014 during the course of his holiday the Plaintiff with his family while dining out was sitting on a chair when it collapsed while he tried to lean back causing him to fall heavily on his lower back and his right arm, causing him injury, loss and damage and loss of enjoyment of holiday.

2. That the Plaintiff's said injury was caused by the negligence of the defendant and/or by their breach of statutory duty under the Health and Safety at Work Act 1996, Health and Safety At work (General work Place Conditions) Regulations 2003 and the Occupiers Liability Act.
3. The defendant by its Statement of defence, having admitted the visit of the Plaintiff to its Restaurant premises on the day of the incident, has taken up the position that the Plaintiff, whilst rocking himself on the chair, caused the said chair to break resulting his fall. Accordingly, the Defendant prayed for the dismissal of this action on the following grounds, namely, (1) Voluntary assumption of risk as complete defence (2) His negligence, recklessness and improper or unsafe use of the chair, and (3) contributory negligence on his part, which are alternative.

[C] **CHORONOLOGY OF EVENTS:-**

4. According to the Statement of Claim, the cause of action arose on 5th April, 2014. The writ of Summons and Statement of Claim was filed on 24th November, 2014 and same was amended on 09th July, 2015. Summons was acknowledged on behalf of the Defendant on **21st July, 2015** and the Statement of Defence was filed on 29th September, 2015. The PTC minutes and the Copy pleadings were filed on 7th March 2017 and 13th March 2017 respectively. Thereafter, the Summons for Directions was filed on 18th April, 2017 and accordingly Order in terms of same being made on 10th May, 2017, finally on 30th May 2017 matter was mentioned before me and was fixed for 2 day trial to be held on 16th & 17th October, 2017.

[D] **THE SUMMONS FOR SECURITY FOR COST:-**

5. It was while the matter was pending for trial as aforesaid only, the Summons in hand for Security for cost was filed on **17th July, 2017** and the hearing on it held before me on 10th August, 2017, wherein the learned Counsels for both the parties made oral submissions tendering few decided authorities in support of their respective claims and opted not to file written submissions.
6. Learned Counsel for the Defendant supported his argument by referring to the ruling of **M. Ajmeer - J**, in ***Mohamed Abu Baker Siddique Vs Maimun Nisha & others, HBC -251 of 2012***, delivered on 07th April, 2017 and to the decision of **D.Pathik - J**, in ***Huang Tzung-Hao Vs A Team Corporation Ltd [2003] FJHC 288; HBC 0346 r. 1998s (22 July 2003)***, while the learned Counsel for the Plaintiff relied on the ruling of then learned Master of High Court- at Lautoka, Mr. Jude Nanayakkara, in ***Simone Allene Vs Edward Jennings & another HBC***

131 of 2011 arguing as to why the Defendant's Summons for the Security for cost should be dismissed.

[E] **THE LAW:-**

7. Order 23 Rule 1 (a) of the High Court Rules (the HCR) provides:

"Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court that the plaintiff is ordinarily resident out of the jurisdiction, 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".

8. It clearly appears from the very wording of the section above, that the Court has a real discretion whether to award security for costs or not. (**Vide also 23/3/3 of The Supreme Court Rules 1999**). The White Book goes on to say:

"...indeed the Court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs . It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. In particular, the former O. 65 r.6B, which had provided that the power to require a plaintiff resident abroad, suing on a judgment or order or on a bill of exchange or other negotiable instrument, to give security for costs was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1). (Emphasis mine)

9. At 23/3/4, the White Book says:

"The onus is on the defendant to prove that the plaintiff is "ordinarily resident" out of the jurisdiction. The question is one of fact and degree; it does not depend upon the duration of the residence, but upon the way in which a man's life is usually ordered, and it contrasts with occasional or temporary residence

(See Levene v. I.R.C. [1928] A.C. 217 and Lysaght v. I.R.C. [1928] 2 A.C. 234..."

[F] **THE ANALYSIS**

10. The application for Security for cost in this action has been made on 17th July, 2017, after about two years period of time from the date of filing the acknowledgment of summons on behalf of the Defendant, which was on 21st July, 2015 as observed above.
11. It is also to be observed that the Defendant has chosen to make this application only after the matter was fixed for trial, subsequent to all the preliminary steps being taken before the Learned Master over a period of 2 years. Now this matter awaits trial on 16th and 17th of October 2017.
12. Another remarkable aspect is that the Defendant has not chosen to file any affidavit/ evidence for the favourable consideration of the reliefs prayed for in the summons.
13. The oral submissions made by the learned Counsel for the plaintiff were mainly on the absence of any evidence by way of an Affidavit and the delay on the part of the defendant in making this application.
14. In determining where the interests of justice lie, on the brief facts as they have been submitted orally, I am mindful of the delay committed by the Defendant in making the application, sans an affidavit even, to substantiate its contention, when the defendant/solicitors should have been aware of the plaintiff's domicile since the commencement of the proceedings .
15. I am aware that the present law and the line of authorities in this jurisdiction permit the application for security for cost at any time or stage of the proceedings and the delay cannot stand as an absolute bar and particularly, this right is not limited only to one attempt. The application can be made as and when the necessity arises.
16. As stated above, this application for cost has been made while the matter stands fixed for trial on 16th& 17th October, 2017. Generally, these types of interlocutory applications are made, at the early stages of the action, before the Master, from where the Party dissatisfied with Master's ruling will be in a position to make an

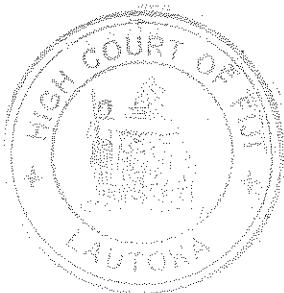
appeal to a Judge of the High Court, however, after leave being obtained. Any deviation from this established procedure & practice will place the party, against whom the ruling is made by the Master, at a disadvantage position of losing one tier of his or her right to appeal to a judge and will be compelled to resort to the Court of Appeal for relief incurring extra time and cost.

17. One can argue stating that, though the application for cost is made belatedly, before a judge; it can, conveniently, be referred to the Master for determination. But this again is bound to cause further delay and cost for the litigants. Further, it will cause additional burden on the Master, who is already inundated in regular matters before him and he cannot be expected to give priority over the matters before him.
18. *“Delay in making an application for security for cost, however, may be relevant to the exercise of court’s discretion to order security. Although in most cases delay is not a decisive factor ,it may be treated as important , especially where it has led ,or may have led the plaintiff to act to his detriment ,or may cause him hardship in the future conduct of the action”.*(*Jenred Properties Ltd v. Ente Nazionale Italiano per il Turismo, Financial Times, October 29, 1985, C.A.*)
19. However, no evidence has been placed before this Court to substantiate that the Plaintiff is “ordinarily resident” out of the jurisdiction. The fact that the Statement of Claim contains a foreign address of the plaintiff in its caption does not, of its own, mean that this Court is bound to act upon it and allow the application for security for cost. The Court has to be satisfied by the Defendant that the Plaintiff is ordinarily resident out of the jurisdiction before it consider all the other aspects and circumstances in deciding the question of ordering security for costs.
20. I need not endeavour to cite the line of authorities that places the burden of proof solely on the Defendant that the Plaintiff is ordinarily resident out of the jurisdiction, which is a question of fact. Primarily, the failure on the part of the Defendant in discharging its burden to satisfy the Court that the Plaintiff is Ordinarily resident out of the Jurisdiction and the delay shown in making the application, do not warrant any favourable consideration of the application and this can be treated as a most appropriate instance that allows the Court to exercise its discretion not to make an order for Security for costs.

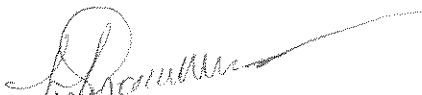
21. In the absence of required evidence before me, having considered the oral submissions of both the learned Counsels, the law applicable and exercising my discretion, I come to the firm conclusion that the application for security for costs has not been made out.
22. In the final result, I think the justice of the case warrants the refusal of the application for the payment of security for costs.

[G] **ORDERS:**

23. The Defendant's Summons for security for costs filed on 17th July, 2017 is hereby dismissed.
24. No cost ordered.



**At Lautoka
18th September, 2017**


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A.M.Mohammed Mackie
Judge

Copies to be served to

1. Daniel Singh Lawyers- Solicitors for the Plaintiff
2. Messrs.Gordon & Co. - Solicitors for the Defendant