

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 49 of 2016

BETWEEN : **TOM KARL MORELL** Executor Trustee of the Estate of the late Edward Morel of 45 Balfour Crescent, Riverlea, Hamilton, New Zealand.

FIRST PLAINTIFF

: **JIM MORELL** t/a **MORELL GRAVIL SUPPLIES** of Laqeri Navua.

SECOND PLAINTIFF

AND : **WINSTONE AGGREGATES (FIJI)** and **METROMIX FIJI** entities owned by the MY Group of Companies operating out of Lots 9 and 10 Wailada Sub-division, Lami.

FIRST DEFENDANT

AND : **DIRECTOR OF LANDS** the authority empowered to grant leases or licences under State Lands under the sections 4, 10 and 11 State Lands Act Cap 132.

SECOND DEFENDANT

AND : **ITAUKEI LANDS AND FISHERIES COMMISSION** the Statutory Authority empowered to manage fishing Rights under the iTaukei Lands Act.

THIRD DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI** of 7th Floor, Suvavou House, Victoria Parade, Suva.

FOURTH & NOMINAL DEFENDANT

AND : **B D LAKSHMAN & SONS PROPERTIES LIMITED** a limited liability company having its registered office at Deuba, Fiji.

INTERESTED PARTY

BEFORE : **Master Vishwa Datt Sharma**

COUNSELS : **Mr. Bukarau** - for the Plaintiffs
Mr. Nilesh Sharma - for the 1st Defendant

Date of Hearing : **23rd November, 2017**

Date of Ruling : **16th April, 2018**

RULING

[1st Defendant's Application against the 1st Plaintiff for Security for Costs pursuant to Order 23 of the High Court Rules, 1988 and the Inherent Jurisdiction of the Court]

A. Introduction

1. On 27th April, 2016, the 1st Defendant filed this Summons for Security for Costs against the 1st Plaintiff and sought for the following Order-
 - (a) *That the 1st Plaintiff do give security for costs of these proceedings until final judgment to the satisfaction of this Court;*
 - (b) *That the amount for such security for costs be fixed and the 1st Plaintiff do deposit into Court any amount so ordered within 14 days of the order;*
 - (c) *That in default of giving of such security and deposit of security amount in Court this action herein be dismissed;*
 - (d) *That in the meantime all proceedings herein other than the proceedings relating to the giving of such security, be stayed; and*
 - (e) *That the costs of this application be awarded in favour of the 1st Defendant in any event.*
2. This application is made pursuant to *Order 23 Rule 1 of the High Court Rules, 1988 and the Inherent Jurisdiction of this Court.*
3. The 1st Defendant relies on the Affidavit of Mohammed Imraaz and the written submissions filed herein.
4. The 1st Plaintiff did not file any Affidavit in Response to the application but informed court that he spoke to the Plaintiff in terms of quantum and will seek further instructions from the Plaintiff. He added that 3/10 subject land is owned by the Plaintiff and 17/20 by others and parties need to talk and/or go for mediation.

B. Background

5. The Plaintiffs' filed a Writ of Summons and later amended the same seeking inter- alia compensation for damages to land, fishing rights and for the sale of gravel and river metals. The Plaintiff's had earlier sought for an injunctive relief against the Defendant, but was struck out for non-appearance. As such no orders were made.
6. The Defendants have opposed the Plaintiff's claim

C. The Law on Security for Costs**7. *Security for costs of action, etc. (O.23, r.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, or

(b)

(c)

(d)

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.

The Rule states that "having regard to all circumstances of the case, the Court think, it just to do so, it may order" confers upon the Court a discretion whether or not to order security for costs.

D. Analysis and Determination

8. The issue for this court to determine is 'Whether the 1st Defendant is entitled to Security for Costs' as sought for in their application?
9. The 1st Plaintiff is Executor Trustee of the Estate of his father Edward Morel and co-owner (owning 3/20 interest) of the freehold land adjacent to the Navua River comprised in CT 2494 being land. The owners of the other 2/20 interest are Plaintiff's sister and nephew. Interested Party, B.D. Lakshman & Sons Properties Limited owns 17/20 interest in the same CT 2494.
10. The 1st Defendant acquired a license to extract sand and gravel in Navua. According to the Plaintiff, the 1st Defendant without any colour of right and without permission cut a road through accreted land owned by the Plaintiff to get to its licences site causing damage to the subject land. He added that a strong law in Fiji to state that accreted land belongs to adjacent landowner.
11. The Plaintiff further stated that the first illegal act was committed by the 1st Defendant when without consent of the owners of the subject land bulldozed a road through the land to gain access to its licence site. Having already committed that first illegal act, the 1st Defendant now comes to court to seek security for costs for committing that illegality.
12. The Plaintiff accepts that the court has wide legal discretion to order security under the High Court Rules, 1988 but submitted that the discretion needs to be exercised based on assumption that the grievance in the claim is genuine and that discretion should be exercised just and not oppressively.
13. Further, the claim of the Plaintiff is genuine and based on trite law and Plaintiff's proprietary right is protected from being abused by sections 26 and 29 of the Constitution. However, this protection was

invaded by the unilateral and bulldozing tactics of the first Defendant; hence Plaintiff sought recourse through the courts.

14. Having submitted above, the **1st Plaintiff** has not admitted that the **1st Plaintiff** is a **foreigner** living at **45 Balfour Crescent Riverlea, Hamilton, New Zealand**. Prima Facie, the Writ of Summons filed and commenced by the Plaintiffs clearly mentions the **1st Plaintiff's** address of abode at **45 Balfour Crescent, Riverlea, Hamilton, New Zealand**. This therefore confirms that the **1st Plaintiff** is **resident overseas** in Hamilton, New Zealand.
15. The **1st Defendant** submitted that the **1st Plaintiff** resides in New Zealand and is believed to be a New Zealand Citizen and rarely travels to Fiji due to its old age giving the Power of Attorney to one Ms. Merelea Rarasea Vulavou.
16. The **1st Plaintiff** only owns 1/20 share in CT 2494 and the valuation would be approximately \$20,000, since there is no quantification of the actual gravel deposits nor is there any valuation or even proof of the existence of the same.
17. According to the **1st Defendant**, the Plaintiff's claim does not have any **merits** because the gravel deposits are on accreted land which the **1st Defendant** had lawful authority to extract and which the Plaintiff's claim to own.
18. The **1st Defendant** is seeking **security for costs** in the sum of **\$40,000**. Should the Plaintiff lose their case or abandon their claim, then the **1st Defendant** will not be able to claim or recover costs from the **1st Plaintiff** since he resides overseas and **2nd Plaintiff** does not own any assets in Fiji Jurisdiction.
19. The **1st Defendant** submitted that this sum of **\$40,000 costs** is arrived at to defend the action since there are **6 parties** to the proceedings and the action will require **evidence** to be given regarding the accretion. However, I note that there is **no breakdown** and/or any **pro forma invoice** annexed to the application to support this cost sought.
20. **Security for Costs** is not ordered because a Plaintiff is **ordinarily resident outside of Fiji**, the Court must consider other facts incidental to the proceedings.
21. Reference is made to the case of *Inspired Destinations (Inc) Ltd v Bayleys Real Estate (Fiji) Ltd [2015] FJHC 812; HBC180.2013 (20 October, 2015) wherein the issue of security for costs was discussed and observed as follows:*

"That the Plaintiff is a non-resident and has no assets in Fiji is a circumstance of great weight favouring a security order. I am of course mindful to the fact that the making of an Order for security for costs is discretionary and the Courts no longer adapt a rigid rule. [see, M. J. Raine, "In locals we trust - Foreigners pay cash; rethinking security for costs against Foreign Residents (2012) 1 JCIVP 210 at 214P]."

'Returning to the instant case, although the grounds for security for costs have been proved by the Defendants, I am not bound to make an order.'

22. In the High Court of Fiji in Furuuchi Susian Company Limited v Hiroshi Tokuhisa and Others Civil Action No.95 of 2009, Justice Byrne ordered Security for Costs against a Plaintiff company incorporated and operating in Japan as the Plaintiff was ordinarily resident out of the jurisdiction. In reaching this decision, Justice Byrne relied on what Sir Nicolas Brown Wilkinson V.C said in Porzelack KG v Porzelack (UK) Limited 1987 1 All ER 1074 at p.1076-

"That 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 the court against which it can enforce a 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 resident within the jurisdiction".

23. The 1st Defendant will only be entitled to costs if the Plaintiff's claim is ultimately dismissed with costs. The 1st Defendant is not entitled to security for costs as of right. If the Court feels that the Plaintiff has a good claim with good prospects for success, it may not be inclined to make any order for security for costs.

24. In Ali v Chandra [2014] FJHC 710; HBA14.2013 (30 September 2014), Judge Kumar also saw fit to highlight a portion from Porzelack K.G v. Porzelack (supra) and further enunciated as follows:

3.26 The threshold for exercise of discretion is that Respondent (Plaintiff) "does not ordinarily reside in Fiji".

3.27 The term "resident" or "ordinarily resident" cannot be given a precise definition.

3.28 Whether a person is resident or ordinarily resident will depend on various factors such as person's address, type of employment, duration of stay at a particular address, ownership of real properties and so on.

3.29 Once the Court determines that the Respondent (Plaintiff) "does not reside" or "does not ordinarily reside" in the country then Court has to exercise its discretion as to whether to make an Order for security for costs or not.

3.30 Of course in exercising discretion whether to make an Order for security costs, Court needs to take various factors into account. Some of the factors which Court may take into account are available funds within jurisdiction properties owned by the Respondent within jurisdiction and their values; (Sharma v. Registrar of Titles) chances of Plaintiff's claim succeeding (Para 25.13.1 White Book. Vol 1, 2011).

3.31 It must be made clear that the factors listed in preceding paragraph are not exhaustive and Court is free in exercise of its discretion to take into consideration any relevant factors.

25. As reported in the White Book (1997) at page 407 (23/1-3/2) on Security for Costs it states that:

"Discretionarily power to order security for costs (rr1 - 3). The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs 'if, having regard to all the circumstances of the case, the Court thinks it just to do so' These words have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof to consider the circumstances of each case, and in 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, and inflexible or rigid rule that Plaintiff resident abroad should provide security for costs. In particular, the former Order 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 cost was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).

26. Lord Denning as reported in Sir Lidsy Parkinson & Co Ltd v Farripian Ltd [1973] 2 A.E.R. 273 at 285-286.

.....'If there is a reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case.The court might also consider whether the application for security was being used oppressively-so as to trey and stifle a genuine claim."

27. An exception applies if it is established that a foreign Plaintiff has **substantial assets within the Jurisdiction which are available to satisfy a costs order**. In that exceptional case, security for costs will not be ordered.
28. In *Babu Bhai Patel v Moanohan Aluminium Glass (Fiji) Ltd, Civil Appeal 19/1997*, an appeal from the Magistrates Court, Chief Justice Fatiaki held to the effect that to come within the exception a non- resident Plaintiff has the onus to prove that he has suitable property within Fiji.

'Once it is established that the Plaintiff was not ordinarily resident in Fiji, as in this case they are resident in Australia, the 'onus' then shifted to the Plaintiffs to satisfy Court that they have property within the Jurisdiction which can be made the subject to the process of this court. However, even if the Plaintiffs have no assets in Fiji, they may still avoid having to pay security for costs if they are able to convince the court pursuant to Order 23 of the High Court Rules, 1988, that having regards to all the circumstances of the case, it would not be just and fair to order security for costs or that it would be oppressive to do so in the circumstances.'

29. In the current case before this Court, the Plaintiff argued that Plaintiff Jim Morell is resident on **CT 2494** on the authority of his uncle, Tom Morell to maintain presence and maintain it. Both Plaintiffs are relying on the same cause of action in this proceeding and costs can be awarded at the conclusion of trial without there being any threat of evading the same. The Plaintiff also submitted that Jim Morell has **funds** within the jurisdiction.
30. He further argued that the **1st Defendant** has illegally cut a road on the Plaintiff's land, ignorant of the fact that such land belongs to the Plaintiff and the Plaintiff is seeking for security for costs for

committing this illegality. This is an unjust use of the Rules of the Court to detract the Plaintiff as litigant from protecting his proprietary rights as enshrined in the Constitution.

31. Upon the perusal of the court file, I was able to lay my hands on the 2nd and 3rd Defendant's Affidavit in Opposition deposed on their behalf by David Chang in his capacity as the Surveyor General who stated-

"Based on survey conducted by the Ministry of the said area; it is evident that there is no encroachment upon Certificate of Title No. 2494. The boundary line for the Certificate of Title No. 2494 does not extend to the accreted land for which the Plaintiff's claim ownership. Further, that the access road used by the 1st Defendant goes through Lot 3 DP 716 to Navua River and follows the river bank which is the accreted area and not through the Plaintiff's land."
32. On the other hand, the Plaintiff has confirmed that 3/20 subject land is owned by the Plaintiff and 17/20 by others and parties need to talk and/or go for mediation.
33. Although this fact does confirm that the Plaintiff has asset in terms of the subject land of 3/20 share, but this is not sufficient and the actual valuation is unknown bearing in mind the Quantum of security for costs sought by the 1st Defendant. Further the 3/20 share is not a substantial asset in itself within the Jurisdiction which will be available to satisfy the current costs order sought by the 1st Defendant.
34. The fact remains that the 1st Plaintiff is ordinarily resident out of the jurisdiction and resides in Hamilton, New Zealand and does not have a substantial asset in the jurisdiction to satisfy the security for costs sought by the 1st Defendant
35. The Plaintiffs filed a Writ of Summons and the Statement of Claim on 03rd March, 2016. Subsequently, on 04th March, 2016, the Plaintiff filed an Inter Parte Summons for injunction but later failed to appear in Court and the application seeking the injunctive relief was struck out accordingly.
36. The 1st Defendant filed his Statement of Defence on 26th April, 2016. Thereafter, various affidavits were filed by the parties to this proceeding.
37. The parties need to move on with the next cause and not unnecessarily delay the proceedings because of any impending interlocutory application made in the circumstances.
38. **Prima facie**, bearing in mind the Defendants contention as based hereinabove together with his Defence, and the Statement of Claim of the Plaintiff as set out within the Statement of Claim, and upon a careful consideration, the Plaintiff may have an arguable case with good prospects of success on the pending substantive issue before this Court seeking compensation for damages to land, fishing rights and for the sale of gravel and river metals. . Likewise, the 1st Defendant may also have a good prospect of defending otherwise.

However, this court at this stage of the proceedings cannot delve itself into the merits of the parties' case, since that would be determined upon a proper hearing accordingly. Evidence of both sides need to be put at a **test at a full trial**.

39. In '*Kadavu Shipping Company Ltd v Dominion Insurance Ltd*' 2009 HBC 508 Master Udit said in relation to the 'Strength or bona fides of a claim'

'Under this criterion, the respondent is to show that it has a prima facie regular claim, which disclosed a reasonable cause of action. It is not the court's duty to divulge into a detailed analysis of the merits of the case unless it can be clearly demonstrated that there is a relatively high degree of success or failure. Once it is established, the Court is to proceed on the basis that the claim is bona fide.'

40. In '*Allan v Hill View Limited* [2003] HBC 366, Connors J said:

'.....another matter of importance for the Court is exercising its discretion is the Plaintiff's prospect of success in the action and of course as in any such situation that does not require the Court at this point in time to make any detailed determination of the likelihood of success but merely to do so based on the pleadings as they appear before the court.'

41. The **balance of convenience** lies in the Court accepting that the Plaintiff has a regular bona-fide claim which has a chance of success without making any detailed determination as to the likelihood of success.
42. The **1st Defendant's** main thrust is that since the Plaintiff is resident out of this Jurisdiction, he should be required to pay security for costs. On the other hand, the **1st Defendant** will only be entitled to costs if the Plaintiff's claim is dismissed.
43. The Plaintiff has initiated this proceeding and he has the prosecution of the case to ensure he brings it to the conclusion on the balance of probabilities. And it is for the **1st Defendant** to counter the claim in terms of his Defence.

However, it is obvious in the circumstances that expenses in terms of costs will be incurred and therefore the parties to the proceedings must be ready to cater for the costs. In this case the **1st Defendant** has sought for security for costs against the **1st Plaintiff**.

Quantum of Costs

44. No formula for ascertaining the quantum of the security for costs was furnished to court by any of the Counsels. However, a very helpful guide is provided for in *Halsbury's Law of England (4th edition) Vol. 37 para 307, which states as follows-*

'The amount of security for costs ordered to be given is in the discretion of the court, which will fix such sum as it thinks just to do so, having regards to all the circumstances of the case. It is not the practice to order security for costs on a full party and party, still less on an 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 the stage of the proceedings for which security is ordered, but there is no hard and fast rule.'

45. Reference is made to the New Zealand Court of Appeal case of *Mclachlan & Others v. Mel Network Limited [2002] NZCA 215 (29 August 2002)* at paragraph 27 of the Judgment wherein His Lordship, Mr. Justice Gault said-

'[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...'

46. Further, parties must understand that any orders made in respect of the **Security for Costs** will be directed to be deposited into the Chief Registrar's interest bearing account and will only be released once the entire case is heard and determined by the Court.
47. Not only that, the Defendant may be at liberty to make a **second or consequent application** and seek any additional **Security for Costs** if any costs ordered is insufficient to cover for the actual costs that will be incurred in the final determination of this case.
48. Accordingly, I am inclined to **grant a sum of \$12,500 as Security for costs** against the **1st Plaintiff** which is now ordered to be paid into the **Chief Registrar's interest bearing account** within a timeframe of **21 days**.
49. Finally, whether the **1st Defendant** is entitled to any costs of this application. The application for security for costs was heard by this court in terms of the affidavit evidence and the written submissions. Preparation had to be done and time was of an essence to represent their respective cases to this court. The losing party must always be ordered to pay costs unless the court thinks otherwise in terms of its **discretion**. In this case the **1st Defendant** has succeeded with its security for costs application and is entitled to a reasonable sum of **\$650** to be paid by the **1st Plaintiff** to the **1st Defendant** within **21 days** hereof.
50. For the abovementioned rational, I **grant the 1st Defendant's application** and proceed to make the following orders.

B. ORDERS

- (i) The **1st Plaintiff** is hereby ordered to pay a sum of **\$12,500** as security for costs into the **Chief Registrar's interest bearing account** within **21 days**.
- (ii) Cost of this action is summarily assessed at **\$650** against the **1st Plaintiff** and to be paid to the **1st Defendant** within **21 days**.

- (iii) The Plaintiff's Writ of Summons and the Statement of Claim will be struck out upon the non-payment of the ordered security for costs together with the costs of this application (i) and (ii) within the set time frame of 14 days.
- (iv) Parties to proceed with the next appropriate cause of action in terms of the substantive claim.
- (v) The case will now be scheduled for further directions accordingly.

DATED AT SUVA THIS 16TH DAY OF APRIL 2018




VISHWA DATT SHARMA
MASTER

cc. *Muskits Law, Suva*
Nilesh Sharma Lawyers, Suva.