

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HPP 60 of 2016
Probate No. 57691

IN THE MATTER OF ESTATE of Wajid Ali,
deceased, Testate

AND

IN THE MATTER of Succession, Probate and
Administration Act Cap 60; and Inheritance (Family
Provisions) Act Cap 61

AND

IN THE MATTER of Order 76 Rules of the High
Court

BETWEEN : **GAZALA RAFIQAH** of Auckland, New Zealand, Student

Plaintiff

AND : **RAHMAT ALI** of Drasa Vitogo, Lautoka, Fiji, Businessman

Defendant

Before : Master U.L. Mohamed Azhar

Counsels: Mr. S. Nacolawa (on instruction) for the Plaintiff
Mr. Iqbal Khan for the Defendant

Date of Ruling: 24.06. 2022

RULING

01. The defendant took out this summons pursuant to the Order 23 rule 1 (1) of the High Court Rules moved the court to exercise its discretion and to order the plaintiff to provide security for cost in sum of \$ 15,000 as mentioned in the supporting affidavit. The defendant sought the following orders in the said summons:

- a) The Plaintiff being ordinarily resident out of the jurisdiction do give such security for costs as this Honourable Court may deem fit;
 - b) This action be stayed until the plaintiff gives the required security; and
 - c) The plaintiff do pay the costs of this application.
02. The summons is supported by an affidavit sworn by the defendant himself. The defendant also filed another affidavit sworn by one Johara Ali – the wife of late Wajid Ali. The defendant filed an affidavit and opposed the affidavit of the said Johara Ali. In reply, an associate of defendant's solicitors sworn and filed an affidavit. The said Johara Ali was not a party to this action and there was no necessity for the associate of the solicitors to depose an affidavit in support of a person who is not a party to the action. Therefore, the court directed to expunge those affidavits and directed the parties to file proper affidavits. The plaintiff then filed an affidavit in opposition of the summons and thereafter, an affidavit sworn by the defendant was filed. At hearing, the counsels agreed to dispose this application by way of written submission and they filed the same.
03. The Order 23 of the High Court Rules, which contains 4 rules therein, provides for the discretion of the court to order to provide 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 supplementary power of the court. The rule 4 prohibits any such order being made against the state. 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.

04. A cursory reading of the above rule clearly indicates that, the power given to the court is a real discretion, which is simply understood from the word 'may', used in the said rule. Lord Denning M.R. when interpreting the same word used in the Companies Act 1948 held in Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd [1973] 2 All ER 273 at 285 that;

Turning now to the words of the statute, the important word is "may". That gives a judge a discretion whether to order security or not. There is no burden one way or other. It is a discretion to be exercised in all the circumstances of the case.

05. The next important phrase in that rule is 'if having regard to all the circumstances of the case, the Court thinks it just to do so', which requires the court to consider all the circumstances of the case before it, in exercising the said discretion and to come to a conclusion that 'it is just to do so', before making any order and 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. 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".

06. It follows that, it is no longer an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. **The Supreme Court Practice 1999** (White Book), in Volume 1 at pages 429 and 430, and in paragraph 23/3/3, states clearly and explains the nature of the discretion given to the court. it reads that;

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 to be given. Rule 1 (1) provides that the Court may 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 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.6s, 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).

In exercising its discretion under r.1 (1) the Court will have regard to all the circumstances of the case. Security cannot now be ordered as of course from a foreign plaintiff but only if the Court thinks it just to order such security in the circumstances of the case.

07. The courts, both the local and overseas, have decided several cases and set down several principles which can guide the court in exercising its unfettered discretion under this rule. The examination of the rules of the court and the authorities reveal that, the following principles emerge 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; Ebbard 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 plaintiffs 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).
08. The plaintiff is the daughter of deceased Wajid Ali who died testate on 30.09.2015 due to cardiac arrest. The defendant is the elder brother of the deceased and paternal uncle of the plaintiff. The plaintiff alleges that, the defendant tendered the fraudulent and forged will of her late father and obtained Probate No 57691. The plaintiff further alleged that, the

pretended Will bequeaths the deceased's estate to the defendant to the exclusion of the plaintiff who is the daughter. The plaintiff pleaded serious allegation of fraud and forgery and the particulars are specifically pleaded as follows:

Particular of fraud and forgery

- i The alleged signature or mark of the deceased testator is forged.
- ii The alleged signature of the deceased on the document purporting to be the alleged Will does not bear resemblance to and is dissimilar when compare with other known signatures of the deceased.
- iii The dissimilarities are evident in the line quality/embellishments, slant letter formation pen, lifts and general movements.
- iv The signature on the pretended Will appears to be authored by another person and not the testator
- v The purported signature appears to be a simulation.

09. The plaintiff seeks various reliefs in her statement of claim. They are as follows:

- A. A Declaration that the pretended Will purportedly made by Wajid Ali deceased dated 28th day of September, 2015 is fraudulent and a forgery.
- B. A Declaration that the purported transfer of the industrial land by the Deceased is fraudulent the transaction is void.
- C. All consequential and ancillary orders to give effect to any or all Declarations or Inquiries.
- D. In Inquiry into the circumstance of the execution of the pretended Will with the intent to establish if the purported documents are fraudulent.
- E. An order in favour of the Plaintiff for the administration of the real and personal estate of the above-named deceased, with necessary orders for proper accounts direction and inquiries.
- F. An Order to make provisions for the costs of this application.
- G. An Order that that all the properties standing in the name of the deceased at the time of his death be distributed in terms of the provisions of the Succession Probate and Administration Act after allowing for a testamentary and funeral expenses of the deceased.
- H. Alternatively, an Order that the Plaintiff is entitled to an award for a share in the estate of her late father Wazid Ali under the Inheritance (Family Provisions) Act Cap 61 and as amended.

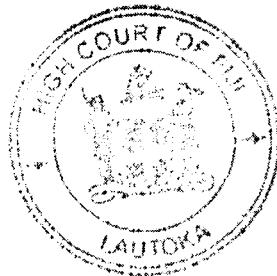
I. Any other Order or orders deemed just and expedient by the court.

10. The defendant acknowledged the writ and filed the statement of defence. Despite serious allegation of fraud and forgery pleaded in the statement of claim, the statement of defence only contains some bare denial and inconsistent averments in replying to the claim of the plaintiff. The defendant in paragraph 1 of his statement of defence admitted that, the plaintiff is the daughter of the deceased. However, he denied the same fact in paragraph 3 of his defence stating that he was not aware of that fact. The plaintiff alleged that, pretended will makes no provisions for her and completely disinherits her from the estate of her late father. The defendant, having been obtained the Probate based on that will had stated in paragraph 9 of his defence that, he was unaware of this fact and therefore can neither admit nor deny the same. The defendant who acts according to the Will of the deceased to administer the estate should have been aware or could not have been unaware of the beneficiaries under the respective Will. However, the defendant simply pleaded his ignorance of the contents of the Will. It appears from the averments in the statement of defence that, the defendant has evaded without proper defence to the claim.
11. The current summons filed by the defendant is supported by his affidavit as mentioned above. However, the defendant filed another affidavit sworn by one Johara Ali - the wife of the late Wajid Ali and mother of the plaintiff. The said affidavit completely denies the claim of the plaintiff and supports the defendant by placing several defences in his favour. There was no reason whatsoever by the defendant for filling such an affidavit. Neither the court directed the defendant to file such an affidavit, nor did the circumstances of the case warrant it, because the current summons is supported by his own affidavit. The plaintiff vehemently objected to that affidavit on the basis that, said Johara Ali is not a party to this action. Surprisingly, an associate of defendant's solicitors sworn and filed an affidavit in reply to that affidavit of the plaintiff. The said associate averred that, he was authorized by the defendant to swear such an affidavit. It appears from these affidavits that, the defendant tried to somehow stifle the action of the plaintiff, by showing numerous defences which he could not take up in his statement of defence.
12. The summons too was filed at the stage of discovery after the court directed the parties to file and serve the affidavit verifying list of documents. 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. However, there are some authorities that require an application for cost to be made promptly. The reason for this is to reduce the cost that may be incurred by the parties. The Supreme Court of Western Australia explained the impact of the timing of an application for security for costs upon the court's discretion in Ravi Nominees Pty Ltd v Phillips Fox (1992) 10 ACLC 1314 at page 1315 as follows;

An application for security for costs should be brought promptly and prosecuted promptly so that if it is going to delay the plaintiffs' claim,

while it is finding the security, or if it is going to frustrate the plaintiffs' claim completely and stop the action, it does so early on before the plaintiffs have incurred too many costs. An early hearing of such an application also benefits the defendant because it stops the plaintiffs' claim early before the defendant has incurred too many costs.

13. The delay on part of the defendant in filling the current summons for security for cost alone does not persuade this court the way the discretion under this rule is to be exercised. However, the evasive conduct of the defendant in answering claim when serious allegation of fraud and forgery is specifically pleaded; filling unwarranted affidavit sworn by deponent who is not a party to this action and authorizing an associate of his own solicitors to reply an affidavit filed by the plaintiff; coupled with the delay in making application indicate that, the current summons for security for cost is an attempt to stifle the plaintiff's action. In the meantime, the claim of the plaintiff seems to be bona fide and not sham. Therefore, having regard to all the circumstances of the case, I decide that, it is not just to order the plaintiff to provide security for cost in this matter.
14. In result, the final orders are;
 - a. The summons filed by the defendant seeking an order for security for costs is hereby dismissed; and
 - b. The cost will be in the cause.



At Lautoka
24.06.2022

U.L.
U.L. Mohamed Azhar
Master of the High Court