

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

CIVIL ACTION NO: HPP 45 OF 2021

BETWEEN : **RODNEY REDDY** of Botany, New South Wales, Australia, Mechanic

PLAINTIFF

AND : **MOREEN MANI REDDY** of Nakavu, Nadi, Domestic Duties

DEFENDANT

Counsel : **Plaintiff: Mr. Nand S**
: **Respondent: Mr. Anil Singh J**
Date of Hearing : **21.7.2023 (8.30 am)**
Date of Judgment : **21.7. 2023 (3.00 pm)**

JUDGMENT

INTRODUCTION

1. Defendant filed summons seeking security for cost on 14.3.2023 on the basis that Plaintiff ordinarily reside overseas. This is a Probate Action and it was filed in 2021 seeking an order as to validity of the last will of late Munsami Reddy. This action is fixed for hearing on 9.10.2023 despite the pending application for security for cost and this prompted an expedited hearing and determination of this interlocutory application, for case management purposes.
2. Plaintiff in the writ of summons and statement of claim indicated its address as 'Botany, New South Wales, Australia', which is obviously not an address which can be located for service or any execution. Plaintiff states that he is a citizen of Fiji and frequently visit Fiji for financial assistance to his siblings. He is having a motor car but there was no valuation of that presented. Apart from that there are no properties belonging to him. Though he said he had substantially supported his sibling, his bank account provided at

this hearing lacks such evidence. He had not submitted evidence to prove his investments in Fiji, despite being a citizen.

3. Plaintiff had waited more than ten years from grant of Probate to file this action seeking to challenge the last will of his late father who had eight children including Plaintiff. None of the issues had joined the Plaintiff in this action and the sole beneficiary of the estate of their late father is Defendant. Plaintiff had not explained the long delay in institution of this action and belated amendment to the statement of claim that resulted additional expenses and delay. Defendant is alleging abuse of process by Plaintiff. It is not disputed that Plaintiff ordinarily reside overseas despite his frequent visits to Fiji as stated in the affidavit in opposition. Considering all the circumstances a security for cost is ordered for a sum of \$7,000 to be deposited within two months. (on or before 19.9.2023)

ANALYSIS

4. Order 23 rule 1 (1) (a) of High Court Rules 1988 states.

***“ORDER 23
SECURITY FOR COSTS***

Security for costs of action

“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. That the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal 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 proceeding as it thinks just.” (emphasis is added)

5. The application for security for cost was filed with the change of solicitors of the Defendant in 2022, and also amendment of statement of claim by Plaintiff allowed subject to a cost. This shows seriousness of Plaintiff .

6. It is clear that Plaintiff had waited more than ten years to institute this action to challenge the last will of his late father and there was no explanation as to the delay. Plaintiff is not a beneficiary of the estate of his late father according to the last will, which he challenges in 2021, after his father's death in 2008 and obtaining the probate by Defendant. If Plaintiff visited Fiji frequently and provided financial assistance to siblings and also invested money, he was aware of the estate of late father being administered by Defendant who is not a sibling of Plaintiff.

5. In the High Court of Fiji in *Furuuchi Suisan 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 coming from outside the jurisdiction as it is to plaintiff's resident within the jurisdiction”.

His Lordship further stated

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”.

6. The above authorities suggest that fairness on the part of the Defendant requires an award for security for costs against a Plaintiff who is resident outside the jurisdiction. In this action despite citizenship the residence of Plaintiff is abroad and he voluntarily submitted, his address in the writ accordingly and estopped from denying it.

7. Supreme Court Rules (UK) (White Book) 1999 page 428 states as follows:

“Rule 1(1) states that if, having regard to all the circumstances of the case, the Court think it just to do, it may order security for costs in any one of four

situations. The first mentioned (and, from a practical point of view the most important) is that the plaintiff is ordinary resident out of the jurisdiction (r.1 (1) (a). In modern times the Court's exercise of discretion under this head has been affected by E.C. Treaty Considerations". (emphasis is added)

8. As far back in 1999 in England and other countries in European Community, the Brussels Convention affected the discriminatory behavior of the law which hinders international trade in awarding security for cost solely on the ground of the plaintiff being a foreigner or residence. This has no application to Probate Action.
- 9 It is not desirable to award security for cost solely on the ground of Plaintiff being a resident in another jurisdiction. The award of security for cost solely on the ground that the Plaintiff is a foreigner would be a hindrance to international trade and courts in exercising its discretion should not consider the residence of the Plaintiff as the only ground to award the security for cost. This can be deduced from the following quote from the White Book which clearly state that "It is no longer, for example, and inflexible or rigid rule that plaintiff resident abroad should provide security for costs." See (23/3/3) White Book 1999. So, in an appropriate case the Court can refuse security for cost though the Plaintiff is a foreigner and does not have assets in the jurisdiction.
10. Supreme Court Rule (UK) White Book 1999 429-430(23/3/3) of the state as follows:

"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 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, and inflexible or rigid rule that plaintiff resident abroad should provide security for costs. In particular, the former)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).

In exercising its discretion under r1(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. For the circumstances which the Court might take into

account whether to order security for costs, see per Lord Denning M.R. in Sir Lidsay Parkinson & Co Ltd v Friplan Ltd (1973) Q.B 609 at 626 -627; (1973) 2 All E.R. 273 at 285-86 and

..... If there is a strong prima facie presumption that the defendant will fail his defence to the action, the Court may refuse him any security for costs (see per Collins J. in Crozat v Brogden (1894) 2 Q.B. 30 at 33 (the judgment of the CA in that case was in substance reversed by the former O 65 r. 6B, made in 1920, which in substance is repeated in r.1(1). See also Tident International Freight Services Ltd v Manchester Ship Canal Co (1990) BCLC 263, CA. It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has not defence to the claim.....

In considering an application for security for costs the Court must take account of the plaintiff's prospects of success, admissions by the defendant, open offers and payments into Court; but a defendant should not be adversely affected in seeking security merely because he has attempted to reach a settlement. Evidence for negotiations conducted "without prejudice" should not be admitted without his consent (Simaan Contracting Co v Pilkington Glass Ltd (1987) 1 W/L.R. 516"

11. Plaintiff in the affidavit in opposition stated that he has a motor vehicle, but the value of that was not submitted. In the circumstances it is not a suitable asset to be considered as security for this action.
12. Apart from motor vehicle Plaintiff is not having any fixed or movable property in Fiji. He was unable to provide even a term deposit or bank account with sufficient balance though he is a citizen of Fiji, (annexed as R5 to affidavit in opposition), to confirm his remittances to Fiji. He claimed that he had sufficient investments in some fixed assets, but there was no proof of income or remittances, at this hearing.
13. In the circumstances considering the conduct of Plaintiff and other circumstances Plaintiff is ordered to deposit a security for cost in this action.
14. As the action is already fixed for hearing considering the costs ordered in similar actions and circumstances such as delay, stage of the action etc. A security of \$7,000 is ordered to be deposited in an interest bearing account with Chief Registrar.
15. As the Plaintiff is successful, he is entitled for the cost of this application assessed summarily at \$1,000 to be paid within 21 days.

FINAL ORDERS

- a. Plaintiff is directed to deposit \$7,000 in an interest bearing account in favor of this action with Chief Registrar.
- b. Plaintiff is granted two months to deposit this amount (i.e. by 19.9.2023)
- c. Cost of this application is summarily assessed at \$1,000 to be paid within 21 days.

Dated at Suva this 21st day of July, 2023.



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Justice Deepthi Amaratunga
High Court, Suva