

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: HBM 46 of 2012

Leslie Gee Way Wong and Marissa Wong

Appellants

And Bernard Robert Evans and Vera Heritage Evans aka Vila Heritage
Evans

Respondents

Appearances: The appellants absent and unrepresented

Mr I. Fa for the respondents

Date of hearing: 3rd May, 2013

JUDGMENT

1. The appellants filed an appeal from a receiving order made by the Magistrate's Court, on 18th October, 2011.
2. By summons dated 14 June, 2012, the respondents seek an order that the appellants provide security for costs in the sum of \$ 6000.
3. In an affidavit in support, the second respondent, urges the following grounds in support of the application:
 - a) The second appellant has left Fiji, and the first appellant is currently under a prohibition order from leaving Fiji.
 - b) There are numerous litigations matters currently before the courts between the appellants and respondents.
 - c) The respondents have incurred considerable costs in various litigation matter. The respondents list the payments made to Fa and Company, in this regard.

- d) The respondents will be unable to enforce any adverse costs made against the appellants, at the conclusion of this appeal.
4. The first appellant, filed affidavit in opposition, to the summons on 26 October, 2012, stating that he has been advised that:
- his appeal is meritorious,
 - he is resident in Fiji, and
 - the respondents are not entitled to make this application under the High Court Rules.

5. ***The hearing***

On 3 May, 2013, Mr Fa, counsel for the respondents supported the application for security for costs. He rested his case on Or 23 1(1) (b) of the High Court Rules.

6. ***The determination***

- 6.1. The matter before me is an appeal from the Magistrate's Court and is governed by the Magistrates' Court Act (cap 14).
- 6.2. Order XXXV11, rule 2 of the Magistrates' Courts Rules enables the lower court in its discretion, to order the appellant to grant security.

Order XXXV11, rule 10 empowers the appellate court *where necessary, (to) require security for costs ..., in addition to what the court below has thought fit to direct.*

- 6.3. Or 23 1(1)(b) of the High Court Rules states:

*Where, on the application of a defendant to an **action or other proceeding** in the High Court, it appears to the Court-*

(a)...

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) to 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 it ordered to do so, or..

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 cost of the action or other proceedings as it thinks just. (emphasis added)

6.4. The *White Book, The Supreme Court Practice*, Vol 1,(1995),at para 23/1-3/1 in its explanatory note to or 23 1(1)(b), provides :

Action or other proceeding. *The proceedings referred to in rule are required to be an action or in the nature of an action and r.1 is wide enough to include any matter in which the jurisdiction of the Court is invoked by originating process.*

6.5. In my view, the provisions referred to in the preceding sub-paragraphs, enables me to consider the application before me.

6.6. The first appellant has not disputed that the second appellant has left Fiji.

6.7. In my view, this constitutes a sufficient ground, to grant the application for security of costs.

7. Notice of motion filed by the appellant

7.1. There is before me a notice of motion dated 13th May,2013, filed by the appellants.

7.2. The affidavit in support of this application pleads that Ms Mataciwa, solicitor, Lajendra Associates had on 14 November, 2012, noted the date of argument as 10th May, 2013, instead of 3rd May, 2013.

7.3. I do not accept this explanation, as satisfactory. Counsel are expected to be diligent and check the cause list. In any event, no application is made for re-listing of the interlocutory hearing, on this ground.

7.4. The affidavit makes request that *“to efficiently deal with this matter and expeditiously dispose it off we are requesting that as initially listed by the Court that the Summons for Security for Cost and the substantive Appeal be heard together..and deliver one Ruling”*, as *“this will save the.. Court a lot of time as well as expedite the matter as the Court will not have to deliver two separate decisions”*.

7.5. The application for security for cost and the substantive appeal were listed together for argument on 3rd May, 2013. The question of security for costs would come to

pass, once a decision is made on the final appeal. I hence heard the interlocutory application, in the first instance. The substantive appeal is yet to be heard.

7.6. The notice of motion of the appellant, is dismissed.

8. Orders

- a) The appellants shall provide security for costs in the sum of \$ 2500.
- b) The notice of motion of the appellants is declined.
- c) I make no order as to costs.

3rd October, 2013

A.L.B.Brito-Mutunayagam
Judge