

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 235 of 2016  
*XX HBC 72 of 2016*

BETWEEN : ANDRES LEHESTIK self-employed, an Estonian citizen of Tallin Estonia and owner of Vila Lot  
952 Great Harbour Drive, Pacific Harbour, Fiji.

FIRST PLAINTIFF

AND : RYAN MACDONALD self-employed Fiji Citizen, of 82 Sevua Circle, Pacific Harbour, Fiji.

SECOND PLAINTIFF

AND : FRANCES VERMA Self-employed, student carer and Fijian Citizen, currently in Possession and  
residence at Villa Lot 952 , Great Harbour Drive, Pacific Harbour, Fiji.

THIRD PLAINTIFF

AND : AVIN PRAKASH of Lot 1, Ravukase 1 Nadali, Nausori, Landlord.

FIRST DEFENDANT

AND : THE REGISTRAR OF TITLES of Suvavou House Government Buildings, Suva.

SECOND DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Isireli Fa - for the Plaintiff  
Mr. A. K. Singh - for the 1<sup>st</sup> Defendant  
No Appearance - 2<sup>nd</sup> Defendant-Nominal Defendant.

DATE OF JUDGMENT: 20<sup>th</sup> February, 2018.

JUDGMENT

*(First Defendant's Application for Security for Costs against the 1<sup>st</sup> Plaintiff  
AND Striking Out of the Plaintiff's Claim pursuant to Order 23 Rule 1 and  
Order 18 Rule 18 (1) of the High Court Rules, 1988 and the  
Inherent Jurisdiction of the Court respectively).*

A. INTRODUCTION

1. On 09<sup>th</sup> December, 2016, the First Defendant filed a Summons and sought the following orders-
  - (a) That the 1<sup>st</sup> Plaintiff namely Andres Lehestik do within 21 days give security for the 1<sup>st</sup> Defendant's costs to the satisfaction of this Court;
  - (b) That in default of such security the 1<sup>st</sup> Plaintiff's statement of claim herein be struck out;
  - (c) That in the meantime all proceedings herein other than the proceedings relating to giving of such security be stayed;
  - (d) That the 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiff's statement of claim be struck out against the 1<sup>st</sup> Defendant on the grounds that it discloses no reasonable cause of action and/or is vexatious and frivolous and/or is an abuse of the court process.
  - (e) That the Costs of this application be paid by the Plaintiffs; and
  - (f) Any other such orders that the Court deem just and appropriate.
2. This application is made pursuant to *Order 23 Rule 1 and Order 18 Rule 18 (1) (a), (b) and (d) of the High Court Rules, 1988.*
3. The 1<sup>st</sup> Defendant relies on the Affidavit in Support deposed by Avin Prakash.
4. The 2<sup>nd</sup> Plaintiff filed an Affidavit in opposition to the 1<sup>st</sup> Defendants application in his capacity as the Power of Attorney holder on behalf of the 1<sup>st</sup> Plaintiff, Andres Lehestik,
5. This court has two (2) applications to deliberate and determine on-
  - Security for costs against the 1<sup>st</sup> Plaintiff; AND
  - Striking out of the Plaintiff's Statement of Claim respectively.
6. It is only logical and appropriate that I deal with the 1<sup>st</sup> Defendant's Striking Out application first followed by the Security for Costs.

B. PLAINTIFFS' CASE

7. In 2007, the 1<sup>st</sup> Plaintiff purchased Villa Lot 952, situated on Lot 11 Deposit Plan No. 4042, Serua, Fiji and became the registered proprietor thereof.
8. In 2009, the 1<sup>st</sup> Plaintiff had dealings with the 1<sup>st</sup> Defendant who was engaged to provide building services to the 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Defendant caused a caveat to be lodged on the Title on 18<sup>th</sup> December, 2009.

9. The 1<sup>st</sup> Plaintiff has paid for the services provided by the 1<sup>st</sup> Defendant and has no outstanding liability to the 1<sup>st</sup> Defendant.
10. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are unaware of any proven debt to the 1<sup>st</sup> Defendant. They are not aware of any notifications or demands made to enforce a claim of debt by the 1<sup>st</sup> Defendant that would allow for the Transfer of the Title without proof of debt and enforcement proceedings ordered.
11. In 2011, a search of the Certificate of Title 16357 was undertaken and disclosed that the Caveat registered by the 2<sup>nd</sup> Defendant and a Charge registered in favour of the Fiji Revenue and Customs Authority in December, 2010.
12. To date, the 3<sup>rd</sup> Plaintiff has been in possession of the property as a caretaker for the 1<sup>st</sup> Plaintiff
13. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have now become aware that the 1<sup>st</sup> Defendant is now the Registered Proprietor of CT 16357.

C. 1<sup>st</sup> DEFENDANT'S CASE

14. That before the 1<sup>st</sup> Defendant became the last registered proprietor of the said property, the 1<sup>st</sup> Plaintiff was the owner of the said property and his rights were registered on the memorial of the title on the 18<sup>th</sup> May, 2007.
15. That the 1<sup>st</sup> Plaintiff had bought the said property from Hotels and Developments Limited for a consideration sum of \$60,000. (*Annexure "D" in the affidavit filed 09<sup>th</sup> December, 2016 refers*).
16. A Sale & Purchase agreement was executed between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant on 22<sup>nd</sup> December, 2009. Both parties then executed the Transfer on 05<sup>th</sup> January, 2010.
17. A Caveat was lodged by Fijian Builders & Constructions against the said property that was never registered and or executed by the Registrar of Titles.
18. That prior to the 1<sup>st</sup> Defendants name was registered on the Title, there existed a Charge on the Title lodged by the Commissioner of Inland Revenue on 17<sup>th</sup> December, 2010 for a sum of \$7057-50.
19. The Charge was subsequently cancelled by the Registrar of Titles and the property was registered in the 1<sup>st</sup> Defendants name and he remains the registered proprietor and owner of the property.
20. On 03<sup>rd</sup> May, 2016, the Court made orders in terms of Vacant Possession against the Plaintiff, Frances Verma.

D. THE LAW and PRACTICE

Striking Out:

21. The law on striking out pleadings and endorsements is stipulated at *Order 18 Rule 18 of the High Court Rules 1988* which states as follows-

*18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*

- a) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court;*

*and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

*(2) No evidence shall be admissible on an application under paragraph (1) (a).*

22. In Paulo Malo Radrodro vs Sione Hatu Tiakia & Others, HBS 204 of 2005, the Court stated that:

*"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:*

- a. A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered - Lord Pearson in *Drummond Jackson v British Medical Association* [1970] WLR 688.*
- b. Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable - Lindley LJ in *Attorney General of Duchy of Lancaster v L.N.W Ry* [1892] 3 Ch 274 at 277.*
- c. It is only in plain and obvious cases that recourse would be had to the summary process under this rule - Lindley MR in *Hubbuck v Wilkinson* [1899] Q.B. 86.*
- d. The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*
- e. "The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed - *ESSO Petroleum Company**

*Limited v Southport Corporation [1956] A.C at 238" - James M Ah Koy v Native Land Trust Board & Others - Civil Action No. HBC 0546 of 2004.*

f. *A dismissal of proceedings "often be required by the very essence of justice to be done".....  
- Lord Blackburn in Metropolitan - Pooley [1885] 10 OPP Case 210 at 221- so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation - Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"*

23. It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process. Reference is made to paragraph 18/19/18 of the Supreme Court Practice 1993 Vol.1-

At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol 1 it is stated as follows:-

*"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."*

*"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite[1990] 2 E.R. 990 C.A)."*

*"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665). (para 18/19/18).*

Security for Costs:

24. The Law on 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.*

25. 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.

E. ANALYSIS and DETERMINATION

26. The issues for this court to determine are the following -

(a). *Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff's Statement of Claim against the 1<sup>st</sup> Defendant be Struck Out on the grounds that it discloses no reasonable cause of action and /or vexatious and frivolous and/or is an abuse of the Court process? AND*

(b). *Whether the 1<sup>st</sup> Plaintiff namely Andres Lehestik be ordered to pay Security for Costs to the 1<sup>st</sup> Defendant as sought for in his application?*

Application to Strike Out:

1<sup>st</sup> Issue- Whether there is No Reasonable Cause of Action

27. 1<sup>st</sup> Defendant's argument is that the duly registered Power of Attorney has been given by the 1<sup>st</sup> Plaintiff to the 2<sup>nd</sup> Plaintiff.
28. The 2<sup>nd</sup> Plaintiff has no locus standi against the 1<sup>st</sup> Defendant as he has instituted this action in his personal capacity and not in the capacity of the Power of Attorney holder for the 1<sup>st</sup> Plaintiff. He adds that this is a clear case of abuse of process.
29. The Power of Attorney does not allow the 2<sup>nd</sup> Plaintiff to institute an action in his personal capacity. Therefore, no cause of action arises by the 2<sup>nd</sup> Plaintiff in his personal capacity against the 1<sup>st</sup> Defendant. This therefore confirms that the present action is scandalous, frivolous or vexatious.
30. In regards to the 3<sup>rd</sup> Plaintiff, she is an ex Tenant of the 1<sup>st</sup> Plaintiff and does not have any locus against the 1<sup>st</sup> Defendant in the Writ action. The Defence submitted that no cause of action of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs is an abuse of the process and such should be struck out.
31. It is for the Plaintiffs to establish that they have a Cause of Action in this case against the 1<sup>st</sup> Defendant in terms of the facts and the Pleadings filed herein.
32. On the other hand, the 1<sup>st</sup> Defendant must establish that the Plaintiffs does not have a Cause of Action in this case.

33. The Striking out application of the 1<sup>st</sup> Defendant is a summary proceeding and is only appropriate to cases which are plain and obvious.

34. However, the Plaintiffs submitted that paragraphs 1.0 - 4.0 of the Statement of Claim sets out the Plaintiff's status and their right to commence the proceedings as parties and the relevant paragraphs are set out hereunder-

1.0 The Plaintiffs is self-employed and a citizen of Estonia who purchases the property Lot 11 on DP 4042, Serva, Fiji as described on CT 16357;

2.0 That the 1<sup>st</sup> Plaintiff departed Fiji in 2010 and appointed the 2<sup>nd</sup> Plaintiff as his Power of Attorney registered No. 51329 on 12<sup>th</sup> May, 2010.

3.0 The 2<sup>nd</sup> Plaintiff is self- employed and a citizen of Fiji and is the holder of the 1<sup>st</sup> Plaintiff's Power of Attorney dated 11<sup>th</sup> May, 2010 and registered on 12<sup>th</sup> May, 2010.;

4.0 The 3<sup>rd</sup> Plaintiff is a citizen of Fiji and since November 2014 has been in possession of Lot 11, DP 4042 described on CT 16357 at the request and approval of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and is resident therein with her adopted daughter.'

35. The Plaintiffs added that paragraphs 4.0 of the 1<sup>st</sup> Defendants Summons is clearly without merits and should be "Struck Out" by the Courts.

36. I have carefully perused the Plaintiff's Writ of Summons and the Statement of Claim and made particular references to paragraphs 14.0 - 17 inclusive and set out the same hereunder-

"14.0- That on or about the 30th January, 2015 the 1<sup>st</sup> Defendant by unlawful and fraudulent means lodged a Transfer of CT 16357 to himself and the 2<sup>nd</sup> Defendant proceeded to unlawfully register the 1<sup>st</sup> Defendant as the Registered proprietor of CT 16357.'

15.0- That the 1<sup>st</sup> Plaintiff had at no time signed a transfer of CT 16357 capable of registration to the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Plaintiff has received no consideration from the 1<sup>st</sup> Defendant for the transfer to the 1<sup>st</sup> Defendant of CT 16357;

16.0- That the 1<sup>st</sup> Defendant has acted fraudulently and in breach of s. 41 of the Land Transfer Act 1971-

*(a) That the 1<sup>st</sup> Defendant without the knowledge and consent of the 1<sup>st</sup> Plaintiff caused to be registered a transfer of the Plaintiffs title to himself'*

*(b) That the 1<sup>st</sup> Defendant unlawfully attempting to seize the property of the 1<sup>st</sup> to 4<sup>th</sup> Plaintiff has caused them loss and damage;*

*(c) That the 1<sup>st</sup> Defendant knew that at the time that he transferred the 1<sup>st</sup> Plaintiff's property that he did not own it;*

17.0- That as a result of the Defendant's unlawful conduct, the 1<sup>st</sup> Plaintiff is no longer the registered proprietor of the same.'

37. I have also noted that this court delivered a Ruling on a substantive issue of "Vacant Possession" in HBC 72 of 2016.
38. However, this Court needs to hear and determine cases on an independent basis. That is each case before the court is dealt with its own facts unless the pending files for one reason or the other is consolidated and then the issues are determined together accordingly.
39. Therefore, it can be clearly ascertained from the pleadings filed herein by the Plaintiffs at paragraphs 14.0 - 17.0 within the Statement of Claim that the Plaintiffs are making serious allegations of Fraud against the conduct of the 1<sup>st</sup> Defendant succeeding in transferring the Title CT 16357 under his name.
40. Further the Plaintiff's apprised Court that the signature's on Sale & Purchase Agreement and on the Transfer is not the same. Whilst the 1<sup>st</sup> Defendant's signature on both documents appears the same on both documents, the 1<sup>st</sup> Plaintiff's signature on both documents is not the same. That the 1<sup>st</sup> Defendant has not denied that it has not paid for the consideration therefore: the 1<sup>st</sup> Defendant has clearly defrauded the Plaintiff by proceeding to register the transfer before paying the consideration. He added that the Sale & Purchase Agreement is subject to the Minister's consent and if no consent is granted then the Agreement terminates.
41. I make reference to *Sections 38 and 39 (1) of the Land Transfer Act*, as set out hereunder that can be regarded as the basis of the concept of "indefeasibility of title" of a registered proprietor. Under Torrens System of land law the registration is everything and only exception is fraud:

*"38. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.*

*"39-(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium if the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except...*

42. His Lordship Gates, succinctly stated the principles in relation to fraud and indefeasibility of title in the case of Prasad v Mohammed (2005) FJHC 124; HBC 0272J.1999L (03.06.2005) as follows-

*[13] In Fiji under the Torrens system of land registration, the register is everything: Subramani & Ano v Dharam Sheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Register of Titles under the Land*



*Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles [1906] 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176, PC. In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:*

43. I find that the Plaintiff has raised certain triable issues coupled with legal issues, in particular that the Sale & Purchase Agreement was subject to the Minister's Consent or not.
44. These issues can only be ironed out at a trial proper by testing out the evidence and any available exhibits of the parties to the proceedings and at the same time the 1<sup>st</sup> Defendant will have an advantage to cross examine the Plaintiffs and satisfy its standing in the matter accordingly.
45. Therefore, I find that the Plaintiff's substantive claim against the 1<sup>st</sup> Defendant has a Cause of Action and in light of the triable and legal issues, this matter needs to go for a full hearing for eventual determination of the pending substantive matter. This will also enable the Court to deliberate its decision in a just and fair manner.

Scandalous, Frivolous or Vexatious

46. Whether the Plaintiff's Claim is *Scandalous, Frivolous or Vexatious*?
47. The issue of whether a claim is scandalous, frivolous or vexatious has been discussed in the case of *FNPF Investment Limited v Venture Capital Partners (Fiji) Ltd [2003] FJHC 268* where Justice Amaratunga discussed as follows:

*'Supreme Court Rules of (White Book) 1988 p 322 18/19/14 states as follows 'Scandalous - The Court has a general jurisdiction to expunge scandalous mater to any record or proceeding (even in bill of costs, Re Miller (1884) 54 L.J. Ch 205) AS to scandal in affidavits, see Q.41, r6.*

*Allegation of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363.....)' The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P 666).....'*

48. "Frivolous or vexatious" - *By these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable per Lindy L.J in Att.-Gen. of Duchy of Lancaster v L. & N.W.Ry [1892] 3 Ch. 274, p 277; Day. William Hill (Park Lane) Ltd [1949] 1 K.B. 632; ..... The Pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the Court" (per Jeune P. in Young v Hilloway [1895] p 87, p 90 ..... " (Emphasis added)*
49. According to the 1<sup>st</sup> Defendant's submissions, the Power of Attorney given by the 1<sup>st</sup> Plaintiff to the 2<sup>nd</sup> Plaintiff does not allow the 2<sup>nd</sup> Plaintiff to institute an action in his personal capacity. He says this confirms that the present action is **Scandalous, frivolous and vexatious.**

50. Upon the perusal of the Plaintiff's Claim, it is too early in the stages of this proceeding to decide and ascertain which part(s) of the claim tantamount to scandalous, frivolous and/or vexatious matters or facts or whether the Power of Attorney given to the 2<sup>nd</sup> Plaintiff does not allow him to institute an action in his personal capacity.

Abuse of Process of Court

51. Whether the Plaintiff's Claim is an abuse of the process of the Court?
52. The 1<sup>st</sup> Defendant's argument is that the 2<sup>nd</sup> Plaintiff has no locus standi against the 1<sup>st</sup> Defendant as he has instituted this action in his personal capacity and not in the capacity of the Power of Attorney holder for the 1<sup>st</sup> Plaintiff. This is clear abuse of process.
53. Court's attention was also drawn to paragraphs 10.0, 13.0 and 18 (iv) of the statement of claim. In regards to the 3<sup>rd</sup> Plaintiff, she is an ex-tenant of the 1<sup>st</sup> Plaintiff and does not have the locus standi against the 1<sup>st</sup> Defendant in this writ action. That no cause of action has been pleaded by 3<sup>rd</sup> Plaintiff against the 1<sup>st</sup> Defendant and therefore the cause of action of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff is an abuse of the court process.
54. The Plaintiffs submitted that neither the 1<sup>st</sup> Defendant has filed any Acknowledgement of service nor any Statement of Defence to respond to the issues raised in the Plaintiff's Statement of Claim and the written submissions at paragraph 10.0 - 11.0. Instead the 1<sup>st</sup> Defendant has filed the application for security for costs as a shield against a legitimate claim by the 1<sup>st</sup> Plaintiff.
55. At this stage of the proceedings, it is too early in the stages to decide whether the Plaintiff's claim is an abuse of the court process. Prima facie, this case before the court is a summary proceedings in its nature. Summary procedure is only appropriate to cases which are plain and obvious.
56. However, after a careful consideration of the submissions made by both parties and upon the perusal of the Pleadings herein, it is obvious that the Plaintiff's Claim raises issues in terms of the facts and law. It is proper for this Court to allow a day in Court for to both parties to represent their respective cases to the court for Court's determination for once and for all.
57. After a careful consideration of the arguments, written submissions, principles and for aforesaid rational, the 1<sup>st</sup> Defendants Striking out application against the Plaintiff's fails.
58. The 1<sup>st</sup> Plaintiff is entitled to cost summarily assessed at \$500 to be paid by the 1<sup>st</sup> Defendant.

Security for Costs

59. Now, I will proceed to deal with the second application of the 1<sup>st</sup> Defendant;

60. The issue for this court to determine is 'Whether the 1<sup>st</sup> Defendant is entitled to Security for Costs' as sought for in his application?
61. The principal grounds upon which the 1<sup>st</sup> Defendant seeks the Order for security for Costs are:
  - (a) *That the 1<sup>st</sup> Plaintiff does not ordinarily reside in Fiji:*
  - (b) *That he would be incurring unnecessary costs in defending the matter.*
62. The 1<sup>st</sup> Defendant prays for an order that the 1<sup>st</sup> Plaintiff who resides out of jurisdiction of this court to give security for costs.
63. The 1<sup>st</sup> Defendant submitted that the 1<sup>st</sup> Plaintiff alleges fraud and the particulars provided by the 1<sup>st</sup> Plaintiff do not constitute fraud as all documents were duly executed and witnessed by a Solicitor.
64. Further, the 1<sup>st</sup> Plaintiff alleges that no consideration has been provided by the 1<sup>st</sup> Defendant as such the 1<sup>st</sup> Defendant had transferred the property fraudulently onto his name. The 1<sup>st</sup> Defendant added that the indefeasibility of the 1<sup>st</sup> Defendant's Title cannot be attacked on the grounds of inadequacy or non-payment of consideration.
65. According to the 1<sup>st</sup> Defendant, the Plaintiff's action does not have merits and there is no evidence of any fraud committed.
66. The 1<sup>st</sup> Defendant is asking for a sum of \$20,000 as Security for Costs.
67. The Plaintiff has neither admitted nor denied the fact that the 1<sup>st</sup> Plaintiff is an Estonian Citizen. However, when the Plaintiff filed his Writ of Summons where he mentions on the Writ that he is an Estonian Citizen of Tallin Estonia and owner of Villa Lot 952 Great Harbour Drive, Pacific Harbour, Fiji.
68. The Plaintiff further stated in his submissions that the property which is the subject matter of this case was transferred by Fraud and therefore the 1<sup>st</sup> Plaintiff is still the owner of the same.
69. The Plaintiff submitted that his case is set out at paragraphs 14.0 - 17.0 of the Statement of Claim. The 1<sup>st</sup> Defendant has not filed a Statement of Defence to rebut the allegations made by the Plaintiffs in their Statement of Claim opposing the 1<sup>st</sup> defendant's application.
70. 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.
71. 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.'*

72. In the High Court of Fiji in Furuuchi Susion 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".*

73. The 1<sup>st</sup> Defendant will only be entitled to costs if the Plaintiff's claim is ultimately dismissed with costs. The 1<sup>st</sup> 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.
74. 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.

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

*"Discretionary power to order security for costs (r1 - 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).*

76. 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 troy and stifle a genuine claim."*

77. 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.

78. 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.'

79. In the current case before this Court, the Plaintiff has argued that in terms of the Plaintiff's 'assets' in Fiji, the Plaintiff is the owner of the subject property since he alleges that the subject property was transferred in the 1<sup>st</sup> Defendant's name by fraud of which he was unaware until he came to know about the 1<sup>st</sup> Defendant's conduct.
80. The Plaintiffs filed a Writ of Summons and the Statement of Claim on 14<sup>th</sup> September, 2016. The 1<sup>st</sup> Defendant(s) to date have not filed any Statement of Defence.
81. The parties needed to move on with the substantive matter. It does not mean that when an interlocutory application is filed and impending court determination that the parties stop pursuing the substantive matter which is the case herein. The next cause which is the Defence should have been filed and if it is out of time then take the appropriate action to succeed in filing the same and not unnecessarily delay the proceedings because of any pending interlocutory application made in the circumstances.
82. Prima facie, bearing in mind the 1<sup>st</sup> Defendants contention as based hereinabove 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 substantive issue of Fraud. Likewise, the 1<sup>st</sup> 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.

83. 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.'*

84. 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.*

85. The balance of convenience lies in the Court accepting or refusing that the Plaintiffs and/or the 1<sup>st</sup> Defendant has a regular bona-fide claim which has a chance of success without making any detailed determination as to the likelihood of their success.
86. The 1<sup>st</sup> Defendant's main thrust is that since the 1<sup>st</sup> Plaintiff is resident out of this Jurisdiction, he should be required to pay security for costs. On the other hand, the 1<sup>st</sup> Defendant will only be entitled to costs if the Plaintiff's claim is dismissed.
87. 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 1<sup>st</sup> Defendant to counter the claim in terms of his Defence which so far he has failed to file.
88. 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 1<sup>st</sup> Defendant has sought for security for costs against the 1<sup>st</sup> Plaintiff.

#### Quantum of Costs

89. 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 (4<sup>th</sup> 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.'*

90. 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...'*

91. 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.
92. Not only that, the 1<sup>st</sup> Defendant may 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.
93. For the abovementioned rational, I grant the 1<sup>st</sup> Defendant's application and make an order that the 1<sup>st</sup> Plaintiff to pay a sum of \$3,500 as security for costs accordingly.
94. This particular sum is assessed by the court in the interim since there is no evidence of any pro forma invoice identifying the type of expenditure that will be incurred and further the 1<sup>st</sup> Defendant has sought for a sum of \$20,000 security for costs which seems to be plucked from the air without setting any foundation how that amount is arrived at.
95. In terms of entitlement to costs on this application, since the 1<sup>st</sup> Defendant's application for security for costs succeeds against the 1<sup>st</sup> Plaintiff, I am inclined to order summarily assessed costs of \$500 against the 1<sup>st</sup> Plaintiff to be paid to the 1<sup>st</sup> Defendant.
96. Following are the final orders made on both applications - Striking Out and Security for Costs respectively.

A. FINAL ORDERS

Striking Out Application:

- (i) The 1<sup>st</sup> Defendant's Summons seeking to strike out the Plaintiff's action is hereby dismissed.
- (ii) The 1<sup>st</sup> Defendant to pay summarily assessed costs of \$500 to the 1<sup>st</sup> Plaintiff within 14 days.

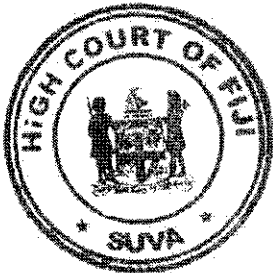
Security for Cost Application:

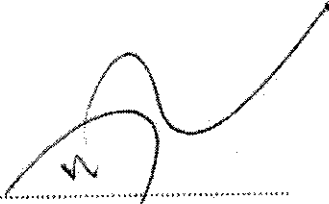
- (iii) The 1<sup>st</sup> Plaintiff is hereby ordered to pay a sum of \$3,500 as security for costs into the Chief Registrar's interest bearing account within 28 days.
- (iv) The 1<sup>st</sup> Plaintiff is hereby ordered to pay summarily assessed costs of \$500 to the 1<sup>st</sup> Defendant within 14 days.



- (v) Parties to proceed with the next appropriate cause of action in terms of the substantive claim.
- (vi) "Unless order" is hereby imposed against the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant for non-compliance of the payment of costs and the same will be activated striking out either the Plaintiff's Writ of Summons and the Statement of Claim and/or Defendant's Defence/case accordingly.
- (vii) Likewise 'Unless Order' is also imposed against the 1<sup>st</sup> Plaintiff and upon non-payment of the \$3,500 security for Costs within 28 days' time, the same will be activated striking out the Plaintiff's Writ of Summons and the statement of Claim.
- (viii) The case will now be scheduled for further directions accordingly.

DATED AT SUVA THIS 20<sup>TH</sup> DAY OF FEBRUARY 2018



  
MR VISHWA DATT SHARMA  
Master of the High Court

cc: Fa & Company, Suva  
A K Singh Lawyers, Nausori

