

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HPP 59 of 2013

IN THE MATTER of the Estate of MAHES aka  
MAHESH PRASAD late of Vunidawa, Naitasiri, Fiji,  
Dairy Farmer, Deceased.

BETWEEN : SALENDRA PRASAD of Vunidaw, Naitasiri, Farmer.

PLAINTIFF

AND : JANDRA PRASAD of Henderson, Auckland, New Zealand, Company Director.

DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Khatri. M - for the Plaintiff  
Mr. Ritesh Naidu - for the Defendant

Date of Ruling : 20<sup>th</sup> June, 2018

RULING

*[Plaintiff's application for Security for Costs pursuant to  
Order 23 (1) of the High Court Rules, 1988 and  
the Inherent Jurisdiction of the Court]*

**A. INTRODUCTION**

1. On 10<sup>th</sup> March, 2015, the Plaintiff filed a **Summons for Security for Costs** against the Defendant and sought for the following Order-
  - (a) *That the Defendant provide security for costs in an amount to be determined by the Court.*
  - (b) *The proceedings in relation to the Defendant's counterclaim be stayed until the Defendant provides the security ordered to be provided by him.*
  - (c) *The cost of this application be paid by the Defendant.*
  - (d) *Such further or other order as to the Court seems fit.*
2. This application is made pursuant to *Order 23 Rule 1 and Order 22 Rule 5 of the High Court Amendment Rules, 1988 and the Inherent Jurisdiction of this Court.*
3. The Defendant opposed the application and filed an Affidavit in Answer.
4. The Plaintiff filed an Affidavit in Reply.

**B. BACKGROUND**

5. This contentious probate action is in relation to the Estate of Mahes aka Mahesh Prasad. He died on 22 June 2013. The Plaintiff and the Defendant are both biological sons of the deceased. At the centre of this litigation is a purported will which was allegedly executed by the deceased on 6 May 2013. Pursuant to the will the Plaintiff is the sole executor and trustee as well as the sole beneficiary of the said estate.
6. The Defendant's contention is that the purported signature of the deceased on the said will was procured by fraud and/or that the deceased did not know and approve the contents of the said will and that the will was not voluntarily made. Further the Defendant alleges that the deceased never executed the Will before the persons who are witnesses to it. The subject property that is the centre of the litigation is a dairy farm containing an area of 139.9573 hectares situated in Vunidawa, Natasini.

**C. 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 Plaintiff is entitled to Security for Costs' as sought for in his summons?
9. The Plaintiff's contention is that the Defendant has a Counterclaim and ordinarily resides out of the jurisdiction of this Court without having any assets in Fiji.
10. The Defendant admits residing in Auckland, New Zealand but states that there is no inflexible rule that a Defendant resident abroad, who has filed a Counterclaim will be ordered to give security for costs. The Court has a residual discretion to grant security after considering all the circumstances of the case and whether it is just to do so.
11. Security for Costs is not ordered because the Defendant is ordinarily resident outside of Fiji; the Court must consider other facts incidental to the proceedings.
12. 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.'*

13. 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".*

14. The Plaintiff will only be entitled to costs if the Defendant's Counterclaim is ultimately dismissed with costs and/or the Plaintiff succeeds with his substantive claim. The Plaintiff is not entitled to security for costs as of right. If the Court feels that the Defendant has a good claim with good prospects for success, it may not be inclined to make any order for security for costs.

15. 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.

16. 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).*

17. 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."*

18. An exception applies if it is established that a foreign Defendant 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.
19. 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.'

20. In the current case before this Court, the Plaintiff argued -

- The Defendant has admitted that he is a resident of Henderson, Auckland, New Zealand;
- He said nothing about whether he owns any assets in Fiji;
- Order 23(1) of the High Court Rules applies to the Defendant to the intent that as a matter of discretion, the court should order security against him;
- However, the Defendant seeks to have the discretion exercised in his favour on the following basis of the contentions in his affidavit-
  - The counterclaim filed for the benefit of all children of the deceased;
  - Plaintiff's application for security is oppressive, an attempt to frustrate the Defendant from prosecuting his counterclaim and conduct of litigation;
  - Incurred substantial costs in defending this action;
  - Has the financial resources to be able to pay all of the costs.
- The Defendant's counterclaim is a claim for the court to pronounce against the validity of several Wills of the deceased;
- The Plaintiff denies the validity of the purported agreement dated 23<sup>rd</sup> July, 2013;
- The deceased's last Will dated 06<sup>th</sup> May, 2013 has allowed for his Widow Isha Latchi to be maintained from his Estate for her lifetime;
- The Plaintiff is the ultimate beneficiary of the deceased's estate in his last Will, and Isha Latchi initially had lodged a caveat against issuance of Grant but eventually withdrew the caveat;
- The Defendant is not a beneficiary in the last Will and cannot say that he has an entitlement to assets in Fiji; and
- That there is no delay in making this application for security for cost.



21. However, the **Defendant's** arguments are as follows-

- The counterclaim arises out of the same subject matter;
- The Plaintiff is guilty of inordinate delay in bringing this action;
- The Defendant has a strong counterclaim;
- The Plaintiff has not provided any details for security for costs;
- The action was filed in 2013. This application was filed on 10<sup>th</sup> March 2015, some 15 months after the Writ was issued;
- There has been significant delay in filing this application;
- This matter is ready for trial, Order 34 Summons was filed on 26<sup>th</sup> November, 2014;
- The Defendant has already spent \$8,000 in legal fees up to period 04<sup>th</sup> February 2014;
- To frustrate the Defendant from pursuing his counterclaim further would be very unfair on the Defendant;
- The Plaintiff should have filed this application at the initial stages when the counterclaim was served on him;
- Security has been refused where the moving party has delayed its application for such an order- Reference *Devenish v Jewel Food Stores Pty Ltd* {1990} HCA 35, 94 ALR 664 at 665-666.

22. The Plaintiffs filed the Writ of Summons and the Statement of Claim on 18<sup>th</sup> December, 2013. The Defendant filed his Statement of Defence and Counterclaim on 21<sup>st</sup> January, 2014.

21. Reply to Defence and Defence to Counterclaim was filed as per the requirements of the High Court Rules on 13<sup>th</sup> February, 2014. Reply to Defence was filed on 25<sup>th</sup> February, 2014.

22. Thereafter, orders were made on the Summons for Directions (SFD) and parties have filed and served their respective Affidavit Verifying List of Documents.

23. The parties formalised and filed the Pre-Trial Conference minutes.

24. Prima facie, bearing in mind the **Defendants** contention as based hereinabove together with his **Defence and Counterclaim**, and the **Statement of Claim** of the Plaintiff as set out within the Statement of Claim, and upon a careful consideration of all the affidavit evidence, the **Plaintiff may** have an arguable case with good prospects of success on the substantive issue. Likewise, the **Defendant may** also have a good prospect of defending otherwise and proving his **Counterclaim** as filed herein.

25. Further, the Plaintiff's Statement of Claim and the Defendant's Counterclaim arises out of the same subject matter. The Plaintiff in summary is seeking an order for a grant of Probate on the Deceased's last Will dated 06<sup>th</sup> May, 2013 and whereas the Defendant on his Counterclaim is seeking an order for the pronouncement against the validity of the said Will dated 06<sup>th</sup> May, 2013 accordingly. The Counterclaim filed as explained by the Defendant will benefit all of the deceased's children including the Plaintiff and the Deceased's Widow Isha Latchi.

**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. It is noted that there are two (2) Causes of Actions. The 1<sup>st</sup> cause of action filed by the Plaintiff in terms of his **Writ** and the 2<sup>nd</sup> cause of action arising from the Defendant's **Counterclaim**.

26. 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.'*

27. 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.'*

28. 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.
29. The **Defendant's** main thrust is that since the **Defendant** is resident out of this Jurisdiction, he should not be required to pay security for costs on this basis alone as the matter needs to be determined bearing in mind all the circumstances of the case as raised hereinabove. On the other hand, the Plaintiff will only be entitled to costs if the Defendant's Counterclaim fails and or the Plaintiff's substantive Claim succeeds.
30. 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. It is for the **Defendant** to counter the claim in terms of his Defence and the Counterclaim.

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

31. This is a **contentious probate action** initiated by the Plaintiff. The **Defendant** has also filed a **Counterclaim**. The subject matter of both claims rather hinges on the same wave length, whether the Will of the Deceased dated 06<sup>th</sup> May, 2013 should be given the validity and a Probate Grant be given by this Court and/or the Court should pronounce against the validity of the said Will.
32. The Plaintiff and the Defendant are siblings. They are both eligible to claim in the Deceased Estate of their deceased father Mahes. Whether they will be successful with their Substantive Claim/Counterclaim is a matter for trial Court to determine. The fact is that they are the children of the Deceased and prima facie since the Deceased Will is being challenged, the children have a legitimate right to claim in the Estate of the deceased, in this case by challenging the validity of the Wills. The widow of the deceased may also be entitled to a share in the Deceased Estate which the Defendant does not deny. The Defendant has a Counterclaim which at this stage of the proceedings cannot be



considered as not unmeritorious. Further, the substantive matter is awaiting an order of this court to enter the same for trial before a Judge of the High Court accordingly.

33. Bearing in mind the conduct of this Action by the Plaintiff and the Defendant, it is appropriate that I have considered not to make any order for costs at this stage of the proceedings rather at my discretion leave the cost issue to be made in the cause accordingly. Each party for the present time and/or for now should bear their own costs at the discretion of this Court.
34. For the abovementioned rational, I decline to grant the Plaintiff's application and proceed to make the following orders.

E. Orders

- (i) The Plaintiff's application for security for cost against the Defendant fails.
- (ii) The substantive matter to be expedited and the parties must move and complete the cause to enable the court to hear and determine the case accordingly.
- (iii) Each party for the present time to bear their own costs at the discretion of this Court.
- (iv) The case will now be scheduled for further directions accordingly.

DATED AT SUVA THIS 20<sup>th</sup> DAY OF JUNE 2018



MASTER  
VISHWA DATT SHARMA

cc. Parshotam Lawyers, Suva  
Naidu Lawyers, Suva