

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 151 OF 2023

BETWEEN : **MOHAMMED AIYUB** of 6262 Prince Albert Street, Vancouver BC Canada, a Beneficiary of the Estate of Khairati, Hotel Worker.
1ST PLAINTIFF

AND : **MOHAMMED HASSAN aka MAHMOOD HASSAN** of 13547 66 Avenue Surrey BC, Canada, v3w2b6, a Beneficiary of the Estate of Khairati, Driver.
2ND PLAINTIFF

AND : **MOHAMMED FARRED KHAIRATI** of 14582 85A Avenue Surrey BC, Canada, v3s5t6, a Beneficiary of the Estate of Khairati, Businessman.
3RD PLAINTIFF

AND : **MOHAMMED ABDUL GAFFAR KHAIRATI** of 14333 84th Avenue Surrey BC, Canada, v3w0w3, a Beneficiary of the Estate of Khairati, Cleaner.
4TH PLAINTIFF

AND : **MOHAMMED SHAHEEM KHAIRATI** formerly of Yalalevu, Ba, Fiji but presently of 283 Thames Street, Morinsville, Waikato, 3300 New Zealand and not of 179B and Trustee of the Estate of Mohammed Ibrahim.
1ST DEFENDANT

AND : **FAIZAL HUSSEIN KHAIRATI** formerly of Malolo Nadi, Fiji, Project manager but now residing in New Zealand and Trustee of the Estate of Khairati.
2ND DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. Koya A, for the Plaintiffs
Ms. Goundar A O/I, for the 1st Defendant.

HEARING : Disposed by way of written submissions.

WRITTEN SUBMISSIONS: Filed by the 1st Defendant on 2nd November 2023.
Filed by the Plaintiffs on 2nd February 2024.

DATE OF RULING : 12th February, 2024

RULING

(On Security for Costs)

A. INTRODUCTION

1. Before me is a Summons by the 1st Defendant filed on 9th October 2023, together with an Affidavit in Support sworn by him on 7th October 2023, seeking the following orders-
 1. *The four Plaintiffs be ordered within 14 days to give security for the costs of the **fourth** Defendant in the sum of \$45,800.00 (Forty Five Thousand Eight Hundred Dollars) or such other sum as the Court may think just by paying same into Court on the ground that the four Plaintiffs are ordinarily out of jurisdiction. The word "Fourth" above in the Summons should be read as "First".*
 2. *In default of giving of such security in this action within 14 days or such time the Court may allocate the Statement of Claim against the First Defendant be dismissed with costs.*
 3. *The Plaintiff to pay costs of this application in the sum of \$4,000.00;*
 4. *The First Defendant will rely on his Affidavit filed herein in support at the hearing of this application;*
 5. *Costs of this application be cost in cause.*
2. The Application states that it is made pursuant to Order 23 of the High Court Rules 1988 and the inherent jurisdiction of the Court. The Plaintiffs filed their Affidavit in Opposition sworn by the First Plaintiff on 20th December 2023, being authorized by the second, third and fourth Plaintiffs. The First Defendant has not filed his Affidavit in Reply, seemingly, as the Plaintiffs had filed their Affidavit in opposition on certain legal issues only.

B. BACKGROUND TO THIS CASE

3. The substantial action concerned commenced by the Plaintiffs hereof is essentially over a dispute among the beneficiaries of the Estate of "Khairati" in relation to the disposal of the property in the Certificate of Title No-7200 in terms of Settlement entered into between the parties on 15th February 2019 in the Lautoka Civil Action No-HBC 190 of 2016, wherein the 1st Defendant hereof was the Plaintiff and 1st to 4th plaintiffs hereof were the Defendants.
4. The Plaintiffs allege that during the process of the sale of the Estate property in the said Certificate of Title No-7200 as per the said Terms of Settlement, the First and Second Defendants wrongfully and with intent to injure the Plaintiffs by unlawful means conspired and combined together and defrauded the Plaintiffs.
5. They allege that the 2nd Defendant, being the Trustee of the Estate, accepted the Tender by the 1st Defendant and sold the said property unto him for \$110,000.00 while the property, which was in the market value of \$167,500.00, had fetched two higher Tenders, first one for a sum of \$125,000.00 from the 1st Plaintiff, and second one for \$180,500 from an outsider, namely, Mohamed Harun Hakim, and thereby caused the Plaintiffs (the Estate of Khairati) a loss of \$70,500.00 .

6. Accordingly, the Plaintiffs claim, as it can be ascertained from the prayers to their Statement of Claim, the following reliefs.

- i. Damages from the 1st and 2nd Defendants for fraud and collusion.
- ii. Damages in equity from the 2nd Defendant Trustee for breach of fiduciary duty.
- iii. Damages from the 1st & 2nd Defendant for conspiracy.
- iv. In the alternative an Order that the Certificate of Title No-7200 be transferred back to the Estate of Khairati and be advertised to be sold by way of tender in the manner stated in sub paragraphs (a) to (f).
- v. Interest, and
- vi. Costs to be taxed, if not agreed upon.

7. The Defendants, in their respective Statements of Defence, having denied the majority of the averments in the Statement of Claim, have moved for the dismissal of the action and cost on indemnity basis for defending this action.

C. THE LAW:

8. Security for costs of action, etc. (O.23, r.1)

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.

(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.

Manner of Giving Security (O.23 .r.2)

2. Where an Order is made requiring any party to give security for costs, the security shall be given in such manner, at such time, and on such terms (if any) as the Court may direct.

Saving for enactments (O.23.r.3)

3. This Order is without prejudice to the provisions of any enactment which empower the Court to require security to be given for the costs of any proceedings.

D. ANALYSIS and DETERMINATION

9. The 1st Defendant is seeking an order for security for costs to be made against the Plaintiffs on the ground that they are ordinarily resident out of the jurisdiction.

10. A quick perusal of the above rule clearly indicates that, the power given to the court is discretionary, 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.

11. 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".

12. 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).

13. 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.
14. 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, and these principles should not be considered to be exhaustive;

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.**

It is no longer an inflexible or a rigid rule that plaintiff resident abroad should provide security for costs (The Supreme Court Practice 1999).

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] UKLawRpCh 124; (1880) 14 Ch.D. 419, CA; Lydney, etc. Iron Ore CO. v. Bird [1883] UKLawRpCh 102; (1883) 23 Ch.D. 358); Brown v. Haig [1905] UKLawRpCh 91; [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).**

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 Turismo (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).**

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)).**

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] UKLawRpCh 266; (1884) 28 Ch.D. 232**).

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;

- i. If the defendant admits the liability.
- ii. If the claim of the plaintiff is bona fide and not sham.
- iii. 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.
- iv. If the defendant has no defence.

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**).

15. Security for costs is a common law legal concept of application only in costs jurisdictions, and is an order sought from a court in litigation. The general rule in costs jurisdiction is that "costs follow the event". In other words, the loser in legal proceedings must pay the legal costs of the successful party. Where a defendant has a reasonable apprehension that its legal costs will not be paid for by the Plaintiff if the defendant is successful, the defendant can apply to the court for an order that the plaintiff provide security for costs.
16. In the case in hand, as per the paragraph 1 of the prayers to the Summons, the 1st Defendant is seeking an Order directing the Plaintiffs to deposit as security for costs a total sum of \$ 45,800.00 or such other sum as the Court may think just, breakdown of which is given from paragraphs 13 to 26 of the Affidavit in support.

Alleged Absence of an Order Accepting the Affidavit in Support:

17. The 1st Plaintiff in his brief Affidavit in opposition states that he has been advised by his Counsel that unless the Court grants the 1st Defendant an Order to rely on his Affidavit in support, as prayed for in paragraph 4 of the prayer to the Summons, he will not be able to rely on the said Affidavit in support. He states further, that only when the Court makes the ruling granting the permission to rely on the said Affidavit in support, he (the Plaintiff) can file an Affidavit in opposition, and at this moment there is no Affidavit of the 1st Defendant for the Plaintiff to respond. Learned Counsel for the Plaintiff in his written submissions too has raised this argument.
18. The above argument of the Counsel for the Plaintiffs will not hold water and it should be disregarded at the outset. The reason being that the paragraph 4 of the prayer to the

Summons is not a prayer per se. It is only a statement embodied in the Summons to inform the Court and the Plaintiffs that the Applicant relies on the affidavit in support annexed to the Summons. No specific order is needed to have the Affidavit in support to be accepted by the Court and to be relied upon by the first Defendant/Applicant.

19. The fact that it was only by accepting and acting upon the impugned Affidavit in support, when the Summons was supported on 17th November 2023, the Court gave directions to file Affidavit in opposition and Reply, seems to have escaped the attention of the learned Counsel for the Plaintiffs. Accordingly, I decide to overrule the objection raised with regard to the Affidavit in support.

Alleged Defects in the Summons For Security For Costs.

20. Counsel for the Plaintiff, in his written submissions, has raised issues with regard to the propriety or correctness of the Summons on two aspects, firstly on not referring to the relevant rule (which is rule-1 (1) (a) under Order 23) in the Summons for security for costs. At a mere glance of the contents of the Summons and the supporting Affidavit, it is abundantly clear that the Application is made pursuant to rule 1(1) (a) of the Order 23 of the High Court Rule. The failure to refer the relevant rule and sub rules thereto need not necessarily have misdirected and/or prejudiced the Plaintiffs.

The next issue raised by the Plaintiff's Counsel was with regard to mentioning of the **First** Defendant as "**Fourth**" Defendant in two places of the Summons, which I have alluded to and corrected in paragraph 1 (1) above. Counsel for the Plaintiffs in his written submissions, has admitted that the Application has been made by none other than the **First** Defendant. Obviously, it appears to be an error occurred on the part of the Solicitors for the first Defendant, which too need not have prejudiced or misdirected the Plaintiffs or their Solicitors in any manner. It is my considered view that these type of errors need not necessarily obstruct the path to justice. The above defects, in my view, are not fatal to the Application.

Alleged Delay in Making the Application:

21. Counsel for the Plaintiff also alleges that the Application for Security for costs has been made belatedly. The writ of Summons hereof was filed on 12th July 2023 and it was, reportedly, posted only on the **24th August 2023** to be served on the Defendants in New Zealand. No evidence whatsoever is available to show as to on which date the same was in fact served on them or received by them. However, the Application in hand has been filed on 09th October 2023 within the period of around 6 weeks, after the First Defendant filing his acknowledgment of service and the Statement of Defense on 11th September 2023. A delay of 6 weeks on the part of the First Defendant in filing the Application, who is also, admittedly, living out of jurisdiction, cannot be considered as ground to deprive him of the opportunity of filing the Application for security for costs.

Merits of the Application:

22. The fact that the Plaintiffs are Resident in Canada is not disputed by them. It is also undisputed that all four Plaintiffs are the beneficiaries of late Khairati's Estate and the sale proceeds of the Estate property are lying into the credit of the former action No-HBC – 190 of 2016, pending to be distributed among the beneficiaries, including the Plaintiffs hereof, after payment of Estate Tax and receipt of the other alleged dues.
23. The first Defendant, in paragraph 70 and 71 of his Affidavit in support, has admitted that, although the four Plaintiffs do not own any properties in Fiji, each of them has one seventh 1/7 share in the Estate of Khairati. So, it appears that there need not be any apprehension on the part of the first Defendant about the possibility of recovering the Cost, if any ordered at the end of this action. However, concern is raised on the amount of their share each Plaintiff is to receive finally and the amount finally to be recovered as costs.

Arrears of Costs Ordered in Previous Action:

24. Parties are still engaged in protracted litigation both at this Court and before higher forums. It is also alleged by the 1st Defendant, in paragraphs 65 to 68 of his Affidavit in support that costs ordered in the action No-HBC 190 of 2016 by the High Court has not so far been paid . It is further alleged that out of the cost of \$5,000.00 ordered in the FCA Appeal No-14 of 2020, only \$3,000.00 has been paid by way of security for cost, and \$2,000.00 is yet to be paid by the Plaintiffs, but it is a subject of an Appeal before the Supreme Court. It is also alleged that out of the costs ordered in the FCA Appeal No- 13 of 2020, only a sum of \$1,500.00 has been paid by way of Security for costs and the balance \$3,500.00 is yet to be recovered. These allegations have not been duly refuted by the Plaintiffs in their Affidavit filed with limited opposition. The Plaintiffs, by relying on the, purported, ground that the first Defendant's Affidavit in support has not been sanctioned by Court, has avoided answering these allegations.
25. The fundamental principle is the right of a litigant to pursue and enforce rights in the courts. The court must have a concern to achieve a balance between ensuring that adequate and fair protection is provided to the Defendant, and avoiding injustice to an impecunious Plaintiff by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings. (*Case of Idoport Pty Ltd v National Australia Bank Ltd [2000] NSWLR 598 refers*).
26. Therefore, it follows that the discretion lies with the Court to order the Plaintiff to give security for the first Defendant's costs of this action only after the Court has given due regards to all the circumstances of the case.
27. However, the court reminds itself that it should not delve itself prematurely into the merits of the case at this stage rather deal with the pending issue of the security for costs. The Plaintiff's cause of action, as it can be ascertained from the Statement of Claim, is that of Fraud, collusion on the part of the first and second Defendants and breach of Fiduciary

Duty on the part of the second Defendant, hence a claim for losses and damages accordingly.

28. A consideration of the Plaintiffs' prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the cases of the parties at the early stages of proceedings. (**Case of fiduciary Ltd v Morningstar Research Pty Ltd [2004] NSWSC 664; (2004) 208 ALR 564** refers).
29. As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, then in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success. (**Case of KP Cable Investments Pty Ltd v Meltglow Pty Ltd [1995] FCA 76; (1995) 56 FCR 189** refers).
30. *'Where a Plaintiff is ordinarily resident overseas and has no assets in the jurisdiction, there must be weighty reasons why an order for security for costs should not be made. A Defendant is not expected to bear the uncertainty of enforcement in a foreign country. The difficulty in enforcing an order for costs overseas against a non-resident Plaintiff will usually be sufficient to ground an order, especially where there is no reciprocal right of enforcement in the relevant foreign jurisdiction'*.
31. There is no evidence whatsoever before me as to how much is presently lying to the credit of the action No-HBC 190 of 2016 for distribution among the beneficiaries, including the Plaintiffs, what is the amount to be paid as tax on Khairati's Estate and how much is due to the credit of the Estate of Khairati? In the absence of such evidence on the amount due to the Plaintiffs from the Estate, this Court is not in a position require the First Defendant to rely on an unascertained amount due to the Plaintiff from the Estate for the recovery of cost, if ordered at the end of this action.
32. As I alluded to in a foregoing paragraph, the First Defendant has estimated his would be costs, as per paragraphs 13 to 26 of his Affidavit in support, at \$45,800.00 and this has not been seriously refuted by the Plaintiffs by way of evidence through his Affidavit in opposition. However, the First Defendant, through his own evidence adduced by his Solicitor's letter dated 7th September 2023, marked as "J" and annexed to His Affidavit in support, has indicated to the Plaintiff's solicitors that his costs involved for this action will be only \$11050.00. The First Defendant cannot go against his own evidence adduced in his Affidavit in support.
33. The burden of proof of the alleged Fraud, Collusion and dereliction of Fiduciary Duty on the part of the Defendants is squarely on the Plaintiffs, particularly when the Tender process and the sale of the Estate Property in Certificate of Title No- 7200 in the action No- HBC 190 of 2016 was under the supervision and control of the Deputy Registrar and a Senior Court officer of the High Court of Lautoka. The First Defendant need not toil himself, by incurring such a heavy costs as predicted by him, until the above burden is discharged in the manner expected of the Plaintiffs.

34. The security for cost is rather ordered to secure the Defendant in an event of Plaintiff's claim being not successful at the conclusion. The amount of security for cost sought by the First Defendant in anticipation up to the conclusion of the case to meet the cost, if the Plaintiff's claim is dismissed, is exorbitant.
35. The Court can order security for cost up to a particular stage of the proceedings. A further Application will be required after passing that stage of the trial. The Defendant will be at liberty to make a decision whether a further Application for security of costs will be necessitated, having regards to all the circumstances of this case.

E. CONCLUSION:

36. Considering the circumstance of the case, I will order a sum of \$ 5,500.00 to be deposited as security for costs. This amount to be deposited into an interest bearing account in the High Court. Further, all Four Plaintiffs are directed to deposit the said sum of \$5,500.00 (\$ 1,375.00 by each Plaintiff) within 42 days from today. If the money is not deposited within 42 days as directed herein, the Plaintiffs' case will be struck out accordingly.

F. FINAL ORDERS:

- a. The Application by the First Defendant for Security is allowed.
- b. The amount for Security for costs hereby ordered is \$ 5,500.00.(Five Thousand Five Hundred Fijian Dollars)
- c. All four Plaintiffs are directed to deposit the said sum of \$5,500.00 (at \$1,375.00 each) within 42 days from today.
- d. If the money is not deposited within 42 days into an interest bearing account, the action against the First Defendant will be struck out accordingly.
- e. The matter be mentioned before the Master on 08th March 2024 at 8:30 am to deal with the Summons for direction and the Striking out Application, as per the said Summons filed of record.
- f. The cost of this application is assessed summarily at \$500 and it should be paid to the first Defendant within 28 days.


A.M. Mohamed Mackie
Judge



At the High Court of Lautoka on this 12th day of February, 2024.

SOLICITORS:

For the Plaintiffs:	Siddiq Koya Lawyers, Barrister & Solicitor
For the 1 st Defendant:	Mishra Prakash & Associates, Barristers & Solicitors
For the 2 nd Defendant:	Anishini Chand Lawyers, Barristers & Solicitors