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IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY

AC 13 of 2018

BETWEEN : SIOSAIA PEKIPAKI

Appellant

AND : MELE'ANA MOIMOI

First Respondent

MINISTER OF LANDS

Second Respondent

Counsel: Mr. W C Edwards Snr SC for the Appellant (Respondent)
Mr. V Mo'ale for the First Respondent (Applicant)
Mrs. T Kafa for the Second Respondent

Hearing: 4 March 2019
Date of Ruling: 5 March 2019.

RULING ON APPLICATION FOR SECURITY FOR COSTS

The application

[1] This ruling concerns an application by Mele'ana Moimoi (the first respondent) that Siosaia Pekipaki (the appellant) provide security for her costs on his appeal. The first respondent also seeks orders that the appeal be stayed until the appellant gives security for costs and for the costs of this application.

[2] The application is opposed by the appellant. The second respondent takes a neutral stance.

recd 05/03/19

The facts

[3] The appeal is from a judgment given by Niu J in the Land Court (LA 23 of 2017) on 31 August 2018.

[4] This case concerns a registered lease of land in central Nuku'alofa. The lease was registered on 5 October 2010 for 60 years in the joint names of the appellant's mother, 'Ofa Pekipaki ('Ofa), and 'Ofa's brother, Tevita Moimoi (Tevita). The first respondent is the widow of Tevita and lives on the land with family.

[5] Tevita predeceased 'Ofa. When 'Ofa died the appellant was granted Letters of Administration to administer her estate. A dispute arose between the parties because of the first respondent's occupancy of the land.

[6] In the Land Court the appellant sought a declaration that upon Tevita's death the lease vested in 'Ofa as the surviving co-lessee and that the lease formed part of 'Ofa's estate. The first respondent defended the claim on the basis that Tevita and 'Ofa held the lease as tenants in common in equal shares and Tevita's share did not pass to 'Ofa upon his death. The first respondent argued that she and her children are entitled to Tevita's one half share in the lease under the Probate Act, although no Letters of Administration have been granted in respect of the estate.

[7] In the Land Court, Niu J dismissed the appellant's claim and held at [38] of his judgment that 'Ofa and Tevita were tenants in common each with an undivided one half share of the lease which 'now each constitute their respective estate for the benefit of their "heirs and representatives"".

[8] The appellant appealed from Niu J's ruling on 24 September 2018. The appeal is set down to be heard in the week commencing 8 April 2019.

[9] On 28 January 2019, the first respondent's application for security for costs was filed.

Jurisdiction

[10] Mr. Edwards accepts that the Court has the power to order security for costs. I recently held in *Friendly Islands Satellite Communications Limited v Public Service Association Inc ors* (Unreported, Court of Appeal, 28 February 2019, AC 15 of 2018, Paulsen P) that the Court of Appeal has a comparable power as the Supreme Court to order security for costs arising from s. 11 of the Court of Appeal Act and that (at [13]):

> It follows that the four step approach for determining applications for security for costs in actions before the Supreme Court under O. 17 Supreme Court Rules, as set out in *Public Service Association and anor v Kingdom of Tonga and anor* [2015] Tonga LR 439, will apply *mutatis mutandis* to the consideration of such applications in this Court.

[11] In *Public Service Association* it was noted that the Court has a broad and unfettered discretion to make an order for security for costs but that the discretion must be exercised in a principled manner. The onus of persuading the Court that an order for security for costs should be made rests upon the applicant (at [23] and [24]).

The first respondent's arguments

[12] The first respondent relies upon O. 17 rule 1 (a) and (b) of the Supreme Court Rules. She argues that the appellant should provide security for costs because he is ordinarily resident out of the jurisdiction (O. 17 rule 1(a)) and he may be unable to pay costs if ordered to do so (O. 17 rule 1(b)).

[13] The appellant accepts that he is ordinarily resident in Auckland, although he owns property in Tonga and regularly comes here.

[14] In support of the argument that the appellant may be unable to pay costs if ordered to do so, the first respondent says that the appellant has failed to pay costs awarded to her in the Land Court of $8,500.

[15] In response to evidence of the appellant that he has (as Administrator) at least a one half share of the lease, Mr. Mo'ale argues that the lease should not be taken into account as the first respondent does not agree to its sale and is living on the land.

[16] Other matters relied upon by the first respondent in support of the Court exercising its discretion to order security for costs were that the first respondent has a 'reasonable prospect' of successfully defeating the appeal, that the beneficiaries of 'Ofa's estate should be expected to fund the provision of security for costs when the litigation is being taken for their benefit and that the first respondent is an elderly widow suffering financial loss as she is continuously trying to meet legal costs caused by the appellant.

Discussion

[17] Despite all that Mr. Mo'ale has had to say, I have reached the very clear view that the appellant should not be required to provide security for costs for the following reasons.

[18] First, I am not satisfied (the onus being upon the first respondent) that the appellant will not be able to pay costs if he is unsuccessful in his appeal. The appellant has not paid the costs in the Land Court but equally there is no evidence that steps have been taken by the first respondent to recover them and I am satisfied that the appellant's failure to pay the costs is not due to an inability to do so.

[19] The unchallenged evidence before me is that the lease has a value of $1,500,000 to $2,000,000 and has not been mortgaged. On a worst case basis, the appellant will retain a one half interest in the lease. It is a lease of a prime commercial site in central Nuku'alofa and is a very valuable asset.

[20] I do not accept the submission that the lease should not be considered because the first respondent will not agree to its sale. For reasons that follow, the first respondent has no interest in the lease that would allow her to object to its sale and, in any event, she cannot expect to be granted security for costs if she creates the circumstances rendering the appellant unable to pay them.

[21] The appellant has been collecting rent from a commercial tenant operating its business on part of the property. I understand that the rent is in the region of $1,500 per month and is being collected and held in the administration bank account.

[22] In addition, the appellant has personal assets in Tonga. He has registered tax and town allotments which are not mortgaged. Whilst such interests in land may not, due to the nature of land tenure in Tonga, be directly available to satisfy an award of costs, the appellant states that his town allotment is fully developed with two dwelling houses and other structures built on the land against which enforcement proceedings could be taken to recover costs.

[23] Mr. Mo'ale advises me from the Bar that the first respondent has not paid his fees nor will he require her to do so pending the hearing of the appeal. On this basis the submission that she has been 'suffering' to pay her legal costs overstates the position.

[24] Although the appellant is ordinarily resident in Auckland, as a matter of principle I do not consider that the Court should require security from a person resident out of the jurisdiction who has substantial assets within the jurisdiction that are of sufficient value to satisfy any costs award that might be made against him. This is such a case.

[25] The submission that the beneficiaries of 'Ofa's estate should be required to provide security has no force in circumstances where the first respondent has not satisfied me that the appellant will not be good for any award of costs that might be made against him.

[26] There are other factors going to the justice of the case that lead me to the view that I should not exercise my discretion to order security. First, the decision under appeal was released before the Court of Appeal issued its ruling in *Wight v Wight* (Unreported, Court of Appeal, AC 3 of 2018, 7 September 2018, Handley, Blanchard and Hansen JJ). *Wight* is the leading case on the issues raised by the

appeal and there are aspects of the decision under appeal that may be subject to reconsideration in light of it. Mr. Mo'ale submitted that the first respondent has reasonable prospects of defeating the appeal but he provided no analysis to support the submission.

[27] Secondly, it was not challenged that following the death of 'Ofa the appellant satisfied arrears of rent payable under the lease amounting to around $9,000 to avoid forfeiture. If the first respondent successfully defends the appeal she may (I put it no higher than that) as a result of the appellant's action obtain a very substantial benefit that would not otherwise have been available to her.

[28] Thirdly, Letters of Administration have not been granted in respect of Tevita's estate because the Minister's consent is required under s. 12 of the Probate Act and has not been forthcoming to date. On the authority of *Wight* (see [37] of the ruling) the first respondent has no beneficial interest in the lease. It appears also that because of the manner in which the appellant formulated his claim the Land Court was asked to determine a matter that was not in fact a live controversy as between the appellant and the first respondent.

[29] Mr. Edwards accepted that the appellant would have been better to have applied to the Land Court to evict the first respondent (as the plaintiff did in *Wight*) but said that given her age and circumstances he preferred another course. Be that as it may, I consider it relevant that the first respondent has, despite lacking any beneficial interest in the lease, been allowed to remain on the land. I understand also that the appellant will not take any action to evict her pending the determination of the appeal.

[30] Finally, whilst it is not determinative in this case, there is force in Mr. Edwards' submission that the first respondent has delayed in making this application. He referred me to the Court of Appeal's ruling in *Public Service Association* (at [26(c)]) where it was said:

> If there has been a substantial unexplained elapsing of time between the service of the proceeding and the making of the application, and during that period the

plaintiff has devoted time and resources to progressing the proceedings, it may be unfair to belatedly put an obstacle in the way in the form of an order the plaintiff may now have difficulty meeting.

[31] Typically appeals to the Court of Appeal will be heard within six months of filing. It is incumbent upon Counsel to make any application for security for costs promptly once an appeal is filed and not as an after-thought when the hearing is approaching. Applications made at a late stage may be refused if delay has caused the other party to act to his detriment or caused hardship in the conduct of the case.

[32] This application for security was filed around four months after the appeal was filed and just two months before the appeal was to be heard. By that time preparations had already begun to make the appeal ready for hearing. It should have been filed much earlier.

Result

[33] The first respondent's application is unsuccessful and is dismissed.

[34] The appellant is entitled to costs on the application which are to be costs in the cause.

NUKU'ALOFA: 5 March 2019

COURT OF APPEAL TONGA

PRESIDENT