

**IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY**

Sear, Ah + Uploa
Solicitor General
LA 17 of 2015
R
21/07/16

BETWEEN: HUNI FIFITA

Plaintiff

**AND: (1) FAKATOUFIFITA
(2) MINISTER OF LANDS**

Defendants

BEFORE THE PRESIDENT PAULSEN

Counsel: Mr. 'O Pouono for the plaintiff

Mr. W C Edwards Snr for the first defendant

Mr. 'A Kefu for the second defendant (excused from the hearing)

Date of Hearing: 8 July 2016

Date of Ruling: 11 July 2016

RULING ON SECURITY FOR COSTS

[1] This ruling concerns an opposed application by the first defendant for security for costs. He has applied for security for costs in reliance upon O.17 Rule 1(a) and specifically on the ground that the plaintiff is ordinarily resident out of the jurisdiction.

rec'd 14/7/16

- [2] The first defendant has since 1995 been the holder of the titles Fakatoufifita and Tu'ilakepa and is also the registered holder of a town allotment at Neiafu known as Lolotoa and a tax allotment at 'Umuna known as Vaitu'ulilo. The plaintiff alleges that the first defendant obtained registration of this land through a deliberate misrepresentation to the Minister that he was the rightful heir. The plaintiff seeks cancellation of the registrations and then, cryptically, asks the Court to determine, after hearing from all interested parties, who should be registered as the holder of the land. However, in his submissions Mr. Pouono advises me that it is the plaintiff's intention to claim the land for himself or for his eldest son.
- [3] This application comes about because the plaintiff resides in New Zealand although, surprisingly given the nature of his claim and the prohibition in section 48 of the Land Act, in his affidavit in opposition to this application he has disclosed that since 1977 he has been the registered holder of a town allotment at Kolofo'ou.
- [4] The first defendant seeks security for costs in the sum of \$12,000 on the basis that if the case proceeds to trial (and it is set down already) he will incur costs in that amount in his own defence. There is no further evidence to justify that figure as one would expect on an application such as this.
- [5] The plaintiff opposes the application. He says that he has assets in the jurisdiction which are available to pay any costs award that is made against him and, in particular, that he has two residential buildings on his town allotment that are together worth \$110,000. He has attached

to his affidavit what purports to be a valuation of the buildings from South Seas Developer which I shall say a little more about later in the ruling.

The principles to be applied

- [6] The principles to be applied in deciding whether to order the payment of security for costs were considered by the Court of Appeal in *Public Service Association Incorporated v Kingdom of Tonga* (Unreported Court of Appeal, AC 9 of 2015, 16 September 2015). The relevant principles are set out in paragraphs 22 to 27 of the judgment which I do not need to set out here but I have considered in ruling on this application.
- [7] The Court of Appeal set out a four step enquiry in assessing applications of this sort. This Court must assess:
- [7.1] The approximate level of costs likely to be awarded to the defendant if successful.
 - [7.2] Whether the plaintiff will be good for such an award.
 - [7.3] Whether, in the light of the circumstances of the case, justice requires that the plaintiff should be required to give some security for those costs.
 - [7.4] In those circumstances, the amount of the security that should be ordered and the means by which it should be satisfied.

- [8] The Court of Appeal noted that in making its assessment, at each step of its consideration of the application the Court should not lose sight of the fact that the onus of persuading it to make an order for security is borne by the applicant/defendant.

Discussion of this case

- [9] The first issue that I need to consider is the approximate level of costs likely to be awarded to the first defendant if successful. As I have foreshadowed, the evidence provided by the first defendant on this issue is inadequate. The assertion that legal costs in the region of \$12,000 will be incurred by the first defendant is unsupported by any quotation/breakdown of his likely legal costs. However, from my experience, and having regard to the issues that are likely to arise in this case, the estimate of likely costs advanced on behalf of the first defendant is not necessarily unreasonable.
- [10] The second issue is whether the plaintiff is good for such an award. In this regard there is a rather unusual feature to this case. For reasons I need not go into, at its core the plaintiff's case is a challenge to the right of the first defendant to hold his titles and hereditary estates. This has been the subject of prior litigation under LA24 of 2009 but that case did not go to trial because the plaintiff failed to pay security for costs awarded against him. The essential facts are quite properly acknowledged in a memorandum of the plaintiff's counsel. In those circumstances clearly there is a risk that the plaintiff will not pay costs awarded against him in this proceeding.

[11] I am not moved by the plaintiff's evidence that he has assets in Tonga in the form of the residential buildings. I do not accept the valuations put before the Court have any probative value. It is not clear what valuation experience or qualifications the person who prepared the valuation has (except that they are described as a real estate developer), what their instructions were, what the basis of valuation is and what the first defendant might expect to recover from the sale of the plaintiff's houses (or the materials that make them up) should he be forced to have resort to them.

[12] The third issue is whether justice requires the plaintiff to give some security for costs. This involves the weighing up of factors which can include all of those noted by the Court of Appeal in paragraph 26 of its judgment. I have considered them all. The factors that seem to me to most directly support the granting of security are the following.

[13] The plaintiff's case in my view faces difficulties. Leaving aside any other issues (and there are a number raised in the pleadings) it appears to me that there is a real prospect (I need not put it higher than that) that the claim is time barred and will be defeated on that basis.

[14] Secondly, there is a real risk in my view that the plaintiff will not meet an order of costs if unsuccessful. He has shown that by his failure to pay security for costs when ordered to do so in other related proceedings.

[15] Thirdly, it has not been suggested that the ordering of the payment of security will stifle the plaintiff's claim. There is no suggestion either

that any inability that the plaintiff may have to pay an award of costs has in any way been caused, or contributed to, by the conduct of the first defendant or that this case raises issues of public importance.

[16] In all the circumstances I think it is appropriate to award security in the exercise of my discretion.

[17] The final matter I must therefore consider is the amount of the security to be awarded and the manner in which it is to be provided. The first defendant says he will incur costs of \$12,000. In recent cases before this Court awards made for security for cost by agreement have generally been in the region of \$5,000. Awards made after a defended hearing have been higher than that.

[18] In all the circumstances, and bearing in mind the lack of proper evidence from the first defendant as to the legal costs that are likely to be incurred I have decided in the exercise of my discretion to require payment of security in the sum of \$7,500.

THE RESULT

[19] The first defendant's application for security for costs is successful.

[20] The plaintiff must provide security for the costs of the first defendant in the sum of \$7,500 within 21 days by paying that sum to the Registrar of the Supreme Court.

[21] Pending such payment this action will be stayed.

[22] The first defendant is entitled to his costs on this application to be fixed by the Registrar if not ag

Nuku'alofa: 11 July 2016



PRÉSIDENT