

*[Signature]*  
17/08/16

**BETWEEN: VAKAUTAPOLA LAUAKI**

**Plaintiff**

**AND: (1) LUSIA VAKA'UTA  
(2) VAISINGANO & SESEFO VATIKANI  
(3) MINISTER OF LANDS**

**Defendants**

**BEFORE THE PRESIDENT PAULSEN**

**Counsel: Mrs. F Vaihu for the plaintiff**

**Mr. 'A Pouvalu for the first and second defendants**

**✓ Mr. 'A Kefu SC for the third defendant**

**Date of Hearing: On the papers at the request of Counsel**

**Date of Ruling: 17 August 2016**

**RULING**

[1] This ruling concerns an opposed application by the first and second defendants seeking security for costs. They have 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.

- [2] The plaintiff seeks to evict the first and second defendants from land registered to the plaintiff and asserts that they are squatters. The first and second defendants say that they are not squatters, that they have lived on the land since 1961 and that the land should never have been registered to the plaintiff. They also claim that the plaintiff's claim is time barred. They are in the process of joining the Minister of Lands as a party and intend to seek cancellation of the plaintiff's registration.
- [3] The first defendant has filed the briefest of affidavits in which he deposes that the plaintiff resides in Hawaii and has no assets in Tonga and may be unable to pay costs to the defendants if he is ordered to do so. The defendants seek security for costs of \$6,000 but the first defendant's affidavit provides no justification for that sum nor any estimate of the length of the hearing nor any breakdown or estimate of the defendants' likely costs should the action proceed to a hearing.
- [4] Although the plaintiff opposes the application for security for costs he has filed no affidavit and accordingly the first defendant's evidence is effectively unchallenged and for present purposes its content is accepted.
- [5] In a memorandum Mrs. Vaihu has submitted that the amount claimed for security for costs is excessive and that an appropriate amount is \$3,000. She submitted that the trial is likely to last only one day and that the defendants have added to their costs by joining the Minister of Lands. She also submits that the application is made simply to discourage the plaintiff from pursuing his claim. There is no evidence before me to support any of those submissions.

**The principles to be applied**

- [6] The principles to be applied in deciding whether to order the payment of security for costs were recently 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. The Court of Appeal set out a four step enquiry in assessing applications of this sort. The Court must assess:
- [6.1] The approximate level of costs likely to be awarded to the defendant if successful.
  - [6.2] Whether the plaintiff will be good for such an award.
  - [6.3] 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.
  - [6.4] In those circumstances, the amount of the security that should be ordered and the means by which it should be satisfied.
- [7] At each step of its consideration of the application the onus of persuading the Court to make an order for security is borne by the applicant/defendant.

**Discussion of this case**

- [8] The first issue that I need to consider is the approximate level of costs likely to be awarded to the first and second defendants if successful. The evidence provided by the defendants on this issue is entirely inadequate. I have commented a number of times in other cases that applications of this kind ought to be supported by a quotation/breakdown of the defendants' likely legal costs. From my personal experience and having regard to the issues that are likely to arise in this case, the number of parties and my own assessment that the case will, contrary to Mrs. Vaihu's submission, almost certainly take longer than one day, the costs of the defendants can be expected to be in the region of the \$6,000 that they seek as security for costs.
- [9] The second issue is whether the plaintiff is good for such an award. The unchallenged evidence is that the plaintiff lives overseas and has no assets in Tonga and may not be able to pay costs. If the plaintiff disputed any of this he ought to have filed an affidavit in opposition to the application but he did not do so.
- [10] 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. First, I must consider the respective strengths and weaknesses of the parties' cases bearing in mind that at this stage it can only be a broad brush assessment. It appears to me that the defendants may well have a strong case for remaining on the land given the circumstances

under which they say they went on to the land, the length of time they have been there and the steps taken to establish a home. That is not to say however that the plaintiff's registration will be successfully challenged. Secondly, in light of the plaintiff's failure to challenge the first defendant's evidence I must accept that there is a risk that the plaintiff will not pay costs if unsuccessful. Thirdly, there is no suggestion that the ordering of the payment of security will stifle the plaintiff's claim and no evidential basis for the submission that the application is made simply to discourage the plaintiff. In all the circumstances I think it is appropriate to award security for costs in the exercise of my discretion.

[11] 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 trend in cases similar to this has been that security for costs has been awarded in the region of \$5,000. The plaintiff seeks security for \$6,000 but in the absence of any affidavit evidence to support that figure I believe an award in the amount of \$5,000 is appropriate.

**THE RESULT**

[12] The application for security for costs is successful. The plaintiff must provide security for the costs of the first and second defendants in the sum of \$5,000 within 21 days to the satisfaction of the Registrar of the Supreme Court.

**Nuku'alofa: 17 August 2016**



**PRESIDENT**

