

21/02/17

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**BETWEEN:** TANIELA & MELAIA TU'AKOI

**Plaintiffs**

**AND:** (1) MANASE HALAHINGANO  
(2) PETISILI HALAHINGANO

**Defendants**

**BEFORE THE PRESIDENT PAULSEN**

**Counsel:** Mrs. 'O Pouono for the plaintiffs  
Miss Tonga for the defendants

**Date of Hearing:** 17 February 2017

**Date of Ruling:** 17 February 2017

**RULING**

[1] This is yet another ruling concerning an opposed application for security for costs. The defendants have applied for security for costs in reliance upon O.17 Rule 1(a) and (b) and specifically on the grounds that the plaintiffs are ordinarily resident out of the jurisdiction in the United States of America and that the plaintiffs may be unable to pay costs to the defendants if ordered to do so.

- [2] The pleadings reveal that in 1993 the plaintiff, Taniela Tu'akoi, was registered as the holder of a town allotment at Luotoi. It is not at all clear to me why the second named plaintiff is a party to this action but for present purposes nothing need turn on that and I will refer throughout to the 'plaintiffs'. The previous owner of the land was Vili Talatala who remained living on the land with the plaintiffs' consent until his death in 2007 or 2008. The defendants lived on the land also and cared for Vili Talatala. I understand that the second defendant had been customarily adopted by Vili Talatala and grew up living on the land. After Vili Talatala died the defendants were asked to vacate the land but have refused to do so. The plaintiffs seek an order for their eviction and damages. In their statement of defence the defendants appear to challenge the plaintiffs' registration as having been unlawful and also claim that the action is time barred.
- [3] In support of the application for security for costs the second defendant has made the briefest of affidavits in which she deposes that the plaintiffs reside in Hawaii and have no assets in Tonga. The defendants seek security for costs of TOP\$8,000 but provide no justification for that sum nor any estimate of the length of the hearing nor any breakdown/estimate of their likely costs should the action proceed to a hearing.
- [4] The plaintiffs oppose the application for security for costs. There is an affidavit of Petiola Vaipulu filed in opposition to the application. She is a niece of the plaintiffs. She asserts that the plaintiffs land is worth at least TOP\$20,000 and that the amount sought by the defendants is excessive. She says that the hearing is likely to take just 2 days and that the costs of the hearing should not exceed TOP\$3,000. The affidavit asserts that the defendants have no defence.

[5] I should add at this juncture that there is much to be said for Miss Tonga's criticism of this affidavit. It is not at all clear to me how Miss. Vaipulu can possibly have personal knowledge of the matters to which she has deposed. In the end result it makes little difference to this application however.

**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 is the approximate level of costs likely to be awarded to the defendants if successful. The evidence provided by the defendants is entirely inadequate. I have repeatedly commented in rulings that applications of this kind ought to be supported by a quotation/breakdown of the defendants' likely legal costs. Once again this has not been provided. From my experience, and having regard to the straightforward nature of this case, I think the hearing is likely to last just one day and the costs of the defendants can be expected to be less than TOP\$5,000.
- [9] The second issue is whether the plaintiffs are good for such an award. The plaintiffs live overseas. The plaintiffs have land in Tonga but that land is the subject of this claim and could not be realised to pay costs. The plaintiffs have no other assets in Tonga. I must accept that there is a risk that the plaintiffs may not be good for costs.
- [10] The third issue is whether justice requires the plaintiffs 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. In considering the justice of the case I must consider the respective strengths and weaknesses of the parties' positions bearing in mind that at this stage it can only be a broad brush assessment. It appears to me that the defendants' case is not strong. Whilst challenging the plaintiffs' grant they have not joined the Minister and any challenge to the registration is likely to be time barred in any event. The principal defence is that the plaintiffs' claim is time barred, yet on the facts disclosed to date that seems to me to be unlikely. Whilst the defendants have lived on the land for many years it does not appear that

time began to run against the plaintiffs until the death of Mr. Talatala, which was within 10 years of the commencement of this action.

[11] Those matters aside, there is clearly a risk that should the defendants be successful costs will not be paid and there is no suggestion that the ordering of the payment of security will stifle the plaintiffs' claim. I do not think this application is made simply to discourage the plaintiffs either. 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 case is straightforward. The hearing should not be more than one day. The defendants' case is not strong and the defendants have failed to put before me evidence as to their likely costs. In those circumstances I believe an award in the amount of TOP\$3,500 is appropriate.

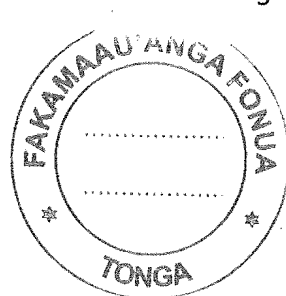
**THE RESULT**

[12] The application for security for costs is successful. The plaintiffs must provide security for the costs of the first and second defendants in the sum of TOP\$3,500 within 21 days to the satisfaction of the Registrar of the Supreme Court, failing which the action will be stayed.

[13] Costs are reserved.

[14] The parties have not complied with their discovery obligations and must do so forthwith. This action is listed to be called again before me at 9am on 17 March 2017.

**Nuku'alofa: 17 February 2017**



A handwritten signature in black ink, appearing to be a stylized name, written over the seal.

**PRESIDENT**