

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 2 of 2019

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BETWEEN : MAFI FANGA 'I PALUKI UATESONI

- Plaintiff

AND : SOAPE TOMASI

- Defendant

BEFORE HON. JUSTICE NIU

Counsel : Mrs. F. Vaihu for plaintiff.
Mrs. P. Tupou for defendant

Hearing : Application by defendant for security for costs
27 May 2017.

Ruling : 4 June 2019..

RULING

[1] This is an application by the defendant for security for costs in the sum of \$6,000 to be paid by the plaintiff because he says that the plaintiff is ordinarily resident out of the jurisdiction (as in Order 17 Rule 1(a)) and that the plaintiff may be unable to pay the costs of the defendant if ordered to do so (as in Order 17 Rule 1(b)). He says that the plaintiff resides in New Zealand.

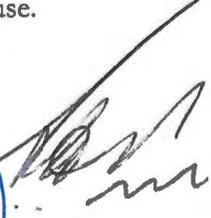
- [2] The plaintiff opposes the application. He says that he is ordinarily resident in Tonga because he is only in New Zealand for 2 years on a work visa and will be back in 2021 and that he will be able to pay the defendant's costs if ordered to do so. He says that it is in the interests of justice that his claim against the defendant is heard in this Court, and that that will not be able to be heard, if security for costs is ordered against him, because he just cannot afford to pay such security. Mrs. Vaihu informed me at the hearing that that is the position, the plaintiff just does not have the money.
- [3] The position therefore, on the evidence before me, is that the plaintiff, who is only 25, has no \$6,000 to pay as security, but that may be by the end of the trial he may be able to pay the costs of the defendant if he is ordered to pay it. If now ordered to pay the required security of \$6,000 and he does not pay it, his claim will be stayed and this matter will just ly in Court. The defendant will continue to live on the land, despite the grant which has been made to the plaintiff. What then was the point of the grant of the land by the Minister of Lands to the plaintiff?
- [4] The defendant has joined the Minister of Lands as third party in these proceedings. I issued leave on 9 April 2019 to the defendant to issue a third party notice upon the Minister and the defendant did issue that notice upon the Minister on 11 April 2019 by serving it on the Crown Law Office.
- [5] The claim of the defendant against the Minister is that he failed to afford to the defendant an opportunity of being heard before he decided to make the grant of the land to the plaintiff, thereby breaching the principle of natural justice. He says that he had lodged a claim for the land with the Minister in about August 2018 before the Minister made the grant to the plaintiff in December 2018.
- [6] If that claim of the defendant is correct then it may well be that the grant made to the plaintiff was invalid, as was the case in *Tafa -v- Viau* [2006] Tonga LR 287, and as was decided in that case, fresh applications had to be made by the

parties to the Minister and the Minister had to hear both parties before he would make a decision as to who he would grant the land to.

- [7] In that case, the Minister was not a party, but in the present case, the Minister is, and he may be ordered as a party to pay the costs of the defendant instead, if the defendant is successful in his claim in his third party notice against the Minister.
- [8] I am required to have regard to all the circumstances of the case when I am considering an application for security for costs, and I consider that it would not be just that the plaintiff cannot be allowed to bring his claim against the defendant or that the defendant be not allowed to bring his claim against the Minister. I consider that both claims be proceeded with so that this matter may be brought to a conclusion sooner than later, especially when the plaintiff is in New Zealand to work to send the material to build on this particular land on which the defendant presently resides.
- [9] As to the defendant's defence that the claim of the plaintiff is barred by S.170 of the Land Act, I do not think that that defence may hold up because no cause of action had accrued to anyone through whom the plaintiff is claiming. He did not succeed to the land as heir but as grantee of a fresh grant made by the Minister to him.
- [10] I consider that if the defendant is successful in his claim against the Minister, which is his basic defence, he may be entitled to his costs against the Minister rather than against the plaintiff.
- [11] For the reasons I have given, I decline to order that the plaintiff pays security for costs. The costs of the application be costs in the cause.

NUKU'ALOFA: 4 June 2019.




L. M. Niu
JUDGE