SG/ALEAMOTUA 04/09/19

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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 4 of 2019

BETWEEN : KALO MATAELE SOUKOP
of Honolulu, Hawaii, USA

- *PLAINTIFF*

AND : 1. 'AIONA FA'ASUA MATAELE
of Wellington New Zealand

2. MINISTER OF LANDS

- *DEFENDANTS*

BEFORE HON. JUSTICE NIU AND ASSESSOR TU'IFUA

Counsel : **Mr. C. Edwards for applicant (first defendant).**

: **Mrs. D. Stephenson for respondent (plaintiff).**

Hearing : **2 September 2019.**

Ruling : **3 September 2019.**

RULING ON SECURITY FOR COSTS

[1] The first defendant has applied for security for costs in the sum of $10,000 to be paid by the plaintiff upon the ground that

(a) the plaintiff is ordinarily resident out of the jurisdiction, and

(b) the plaintiff may be unable to pay the costs of the defendants if ordered to do so.

[2] That application is based on Order 17 Rule 1 of the Supreme Court Rules 2007 which is applicable in the Land Court as well. That rule provides:

rec'd 04/09/19

"Where on the application of a defendant to any proceeding it appears to the Court that:

(a) the plaintiff is ordinarily resident out of the jurisdiction, or
(b) the plaintiff may be unable to pay the costs of the defendant if ordered to do so, or
(c) the plaintiff has not disclosed his true address to the Court,

the Court may, if after having regard to all the circumstances of the case it thinks just so to do, order that all the action be stayed until the plaintiff gives security for the defendant's costs of the proceeding in such sum and in such manner as the Court may determine."

[3] The plaintiff does not deny that she is ordinarily resident outside of the jurisdiction. In fact, she pleads that she resides in Hawaii, United States of America, in her statement of claim. But she denies that she may be unable to pay the costs of the defendant if ordered to do so because she is the lawful owner of two valuable leases of land situated in Tonga, with substantial buildings situated thereon, which may be ordered to be sold if she fails to pay the costs of the defendant, if so ordered by the Court.

And she argues that she has at least an arguable claim against the defendant and that she should not be required to pay security for costs up front no matter how poor she may be.

The claim and the defence

[4] The claim of the plaintiff against the defendant is that the 2 said leases are her sole property because they are both in the joint names of the defendant's late husband, Joe Mataele, and of herself, Kalolaine Soukop, and that upon the death of Joe Mataele, she became the sole owner as survivor of the two joint owners.

[5] The defendant had applied for probate of the will of Joe Mataele and had included the two said jointly owned leases as properties left to her by her deceased husband, and the Supreme Court had granted that probate to her in 2010 but to date she has not had that probate registered under S.131 of the Land Act.

[6] The defendant's defence to the claim of the plaintiff is that the plaintiff had abandoned and/or surrendered her interests in the two said leases to her late husband and that the two leases were her sole property by virtue of her late husband's will.

Documentary evidence

[7] Affidavit evidence have been provided by the plaintiff together with documents in support of her opposition to the defendant's application and affidavit in support of the application. The defendant had already filed in Court her production of documents in support of her defence to the plaintiff's claim. She filed those documents after she had filed her application for security for costs. Without having heard evidence about them, and without making any finding of fact about their contents, the documents appear to show that the two said leases, numbered 6147 and 6148, are presently still in the joint names of Joe Mataele and Kalolaine Soukop, and that despite the claim by the defendant that the plaintiff (Kalolaine Soukop) had abandoned and surrendered the two said leases to her late husband, no document was included to substantiate such claim. I am therefore left to accept, by a broad brush stroke, that the plaintiff, on the face of the two deeds of lease, is still the registered holder of the two leases. I have to apply S.126 of the Land Act to those leases – that until the transfers of the two leases from "Joe Mataele and Kalolaine Soukop" to "Joe Mataele" have been registered by the Minister of Lands in accordance with the provisions of S.128 of the Act, the interests of Kalolaine Soukop are not affected at all. And now that Kalolaine Soukop disputes that any such transfer was done and that it should not now be done, the Minister may not have any authority to register the transfer of the two leases. In fact, the defendant is now asking the Court, by way of counterclaim, to order the Minister to effect that transfer, and the plaintiff is opposing it.

[8] That is a real issue to be decided in this case, and on the face of the records now before me, namely the two deeds of lease, the plaintiff may have merit in her claim against the defendant, unless and until the defendant has proved in her counterclaim that the plaintiff had in fact abandoned and/or surrendered her interests in the two leases.

Joint Tenants or Tenants in Common

[9] There is also another issue which would arise if the counter claim of the defendant fails, and that is whether or not Joe Mataele's interests in the two leases ended upon his death. Because the two said lease are in the joint names of the plaintiff and late husband of the defendant, the leases may be held to be joint tenancies rather than tenancies in common in which case the plaintiff as survivor would be entitled to both of them as her sole property. But then again they may be held to be tenancies in common in which case they would be the properties of both the plaintiff and the defendant in equal but undivided shares. Whichever will be the case at the end of the trial, the least that the plaintiff would have would be a half share of both leases. That is of course, if the defendant is unable to prove that the plaintiff had already surrendered her interests in the 2 leases as she has claimed in her defence, which I have stated she has not shown by any document was the case.

Merit or arguable

[10] Mrs. Stephenson submitted that the plaintiff only needs to show that she has an arguable case against the defendant to make the required threshold. Mr. Edwards submitted that the test is not whether the plaintiff's case is arguable but whether the plaintiff has merit in her claim, to make the threshold. Different terminology have been used but they describe the same test – namely, that on the documents before the Court, that is, the pleadings, affidavits and documents produced as at that stage, there is a possibility that the claim of the plaintiff may be justified. That possibility may be strong or it may be weak, but as long as there is that possibility, the Court should not shut that claim down simply because the plaintiff has no means or is unable to pay security for costs. Justice requires the Court not to order the plaintiff to pay security for costs if that is the case. Otherwise an injustice may be committed by the Court instead.

[11] I am satisfied that the plaintiff does have a possibility, in fact, a real possibility, that her claim against the defendant may be justified and that it would not be just that I order her, she being a retiree, to pay security for costs in order that she can bring her claim in this Court.

Conclusion

[12] The burden of proving the grounds for the grant of an order for security for costs is upon the defendant. Not only does the defendant have to prove that the plaintiff ordinarily resides outside of the jurisdiction or that she may be unable to pay costs if ordered to do so, she must also prove that the plaintiff has no possibility of succeeding in her claim so that in all the circumstances of the case it is just that the order be made.

[13] The defendant has failed to prove that last element and I order that her application is dismissed with costs to the plaintiff, to be taxed if not agreed.

Niu J

NUKU'ALOFA: 3 September 2019 **J U D G E**