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16/10/14

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 10 of 2014

BETWEEN : MAPUI TAUFA'AO - Plaintiff

AND : MIKAELE TAUFA'AO - First Defendant

AND : SOSEFO TAUFA'AO - Second Defendant

AND : MINISTER OF LAND - Third Defendant

S.V. Fa'otusia for the Plaintiff

L.M. Niu SC for the First and Second Defendants

J. Lutui for the Third Defendant.

DECISION

- [1] This is an application by the First and Second Defendants brought pursuant to Order 17 of the Supreme Court Rules (applied by O.2 R2 of the Land Court Rules) for an order that the action be stayed until the Plaintiff provides security for their costs.
- [2] The sum sought is TOP\$10,000 and the grounds for the application are that the Plaintiff is ordinarily resident out of the jurisdiction in the U.S.A. where he has lived for over 40 years and that he has no or no significant assets in Tonga.

*rec'd 03/10/14
AK*

- [3] In a supporting affidavit filed on 3 September 2014 the Second Defendant avers that he lives in Australia and will incur significant expense additional to the usual expense of defending the action by reason of the need to travel to and from Tonga.
- [4] The application was opposed by Mr Fa'otusia. In a helpful written submission reference was made to *Fainga'a v Lelea* [2005] To LR 8 in which O.17 r 1 was discussed. As emphasised by the Court, security should only be ordered if just to do so in all the circumstances. Mr Fa'otusia pointed out that the Second Defendant was also resident outside the jurisdiction and suggested that to require the Plaintiff to provide security, but not the Defendants, was unfair. In his submission "the Defendants had created the problems upon which the circumstances of this case surfaced and upon themselves". I understood him to be conceding that the Court has no power to Order Defendants to provide security. In these circumstances it was submitted that no order should be made against the Plaintiff either.
- [5] In answer, Mr Niu relied on the Rule which, in his submission was one of the factors which has to be taken into account by a non resident contemplating commencing proceedings in Tonga. He pointed out that the Plaintiff did not suggest that he would be unable to furnish the security required. He also referred to the fact that the Defendants are the registered owners of the land in question. This raises a presumption in their favour. The Plaintiff may have difficulty in succeeding in his claim that the registration was fraudulently obtained.
- [6] The Court's power to order security when the Plaintiff is normally

resident overseas is of long standing. Examination of the principles involved (see e.g. White Book 2001 25.12 et seq) does not reveal any example of security being refused because a Defendant is also resident overseas.

- [7] I agree with Mr Niu that a Plaintiff wishing to commence proceedings in Tonga must comply with the Rules as they stand. It is after all the Plaintiff who commences the proceedings, not the Defendant who seeks to join them. At the same time I find the sum demanded too large. In my opinion \$5000 would suffice.

Result: The application succeeds in part.
The Plaintiff is to provide security in the amount of TOP\$5000.
Until that security is provided the proceedings will be stayed.

DATE: 10 October 2014.



JUDGE

N. Tu'uholoaki

10/10/2014