

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

Solicitor General
Sean Fila & Upoua
R
04/08/16
CV 9 of 2016

BETWEEN: VIKA SIULOLOVAO TONGA

Plaintiff

**AND: (1) TEVITA HIKILA
(2) LIHATI HIKILA
(3) MANOA SITIVENI FINE
(4) TOAKASE HIKILA FINE**

Defendants

BEFORE THE LORD CHIEF JUSTICE

Counsel: Mrs. Sefokuli for plaintiff

Mr. L Niu SC for the defendants

Date of Hearing: 29 July 2016

Date of Ruling: 29 July 2016

RULING ON SECURITY FOR COSTS

[1] This ruling concerns an opposed application by the defendants for security for costs. They have applied for security for costs in reliance upon O.17 Rule 1(a) and specifically on the grounds that the plaintiff is

ordinarily resident out of the jurisdiction and has no assets in Tonga from which costs may be recovered if ordered. Counsel have filed papers in support and opposition to the application and I gave them an opportunity to expand on what is before me at a hearing this morning. At the conclusion of the hearing I indicated that I would grant the defendants' application and would provide brief reasons in writing later in the day. These are my reasons.

- [2] This claim is the product of a bitter family dispute. Some of the detail of that is set out in my ruling of 27 April 2016 on the plaintiff's application for an interim injunction (which I refused). Since then the claim has been recast and parties have been added and removed. The present claim is for damages of more than TOP\$120,000 for alleged conversion of property of the plaintiff. The defendants deny the claim in its entirety and there is a counterclaim filed. The counterclaim seeks damages for intimidation, the forcible eviction of the second defendant from his home, the unlawful occupation of a house said to be owned by the third and fourth defendants by one Augustine Tupou upon the plaintiff's instruction and also an order for the removal of part of a house built by the plaintiff on a town allotment called Lotokeli, which the third defendant says he is lawfully entitled to as heir.
- [3] The defendants seek security for costs in the sum of TOP\$5,000 on the basis that if the case proceeds to trial they will incur costs well in excess of that amount in their defence. Their estimate of likely costs is in excess of TOP\$10,000 along with travel costs of the third and fourth defendants (they reside in Australia, as does the plaintiff) of

more than TOP\$3,000. Apart from a very brief affidavit of the third and fourth defendants confirming that they believe such costs will be incurred there is no further evidence to justify the assessment of likely legal costs. I should note for completeness that the affidavit of the third and fourth defendants also deposes to the fact that the plaintiff has no assets in Tonga which might be available to pay costs should her claim be unsuccessful.

- [4] The plaintiff opposes the application. She confirms that she resides in Australia and that she has no assets in Tonga but says that the third and fourth defendants do not reside in Tonga either and also says that she is unable to pay TOP\$5,000 as security without any further explanation.

The principles to be applied

- [5] The principles to be applied in deciding whether to order the payment of security for costs were 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 which I do not need to set out here but I have considered in ruling on this application.
- [6] The Court of Appeal set out a four step enquiry in assessing applications of this sort. This 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] The Court of Appeal noted that in making its assessment, at each step of its consideration of the application the Court should not lose sight of the fact that the onus of persuading it 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 defendants if successful. The evidence provided is not wholly satisfactory because it is unsupported by any quotation/breakdown of the likely legal costs. That said, there is no doubt in my experience that the defendants will incur costs well in excess of TOP\$5,000 in defending the plaintiff's claim.
- [9] The second issue is whether the plaintiff is good for such an award. She has no assets in Tonga from which costs could be recovered and she has stated in her affidavit (although I do not accept her evidence

in this regard) that she does not have the means to provide the security sought. As noted, this dispute is bitter and there must be a real risk that any costs awarded to the defendants (should they be successful in their defence of the plaintiff's claim) will not be paid.

[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.

[11] Although my assessment can be only broad brush stroke at this stage, there is a significant amount of information before me with which to make an assessment of the plaintiff's case. It appears that the plaintiff's case may well face difficulties of proof both as to the unlawful taking of her property and as to its value. Secondly, there is a real risk in my view that the plaintiff will not meet an order of costs if unsuccessful for reasons I have mentioned. Thirdly, whilst the plaintiff has said she cannot pay security, and by implication that an order will stifle her claim, I do not accept her evidence. The amount sought is relatively modest and it is clear that the plaintiff has the means to travel between Tonga and Australia on a regular basis. There is no suggestion that any inability that the plaintiff may have to pay an award of costs has in any way been caused, or contributed to, by the conduct of the defendants or that this case raises issues of public importance. Finally, I have considered whether the fact that two of the defendants also reside overseas and have filed a counterclaim is a reason to refuse to make the order sought. I consider that this is not a factor which disentitles the defendants to

security. As I remarked to Counsel, it is open to the plaintiff to apply for security for costs herself and in the absence of good reasons to the contrary the Court's approach would be to treat all parties alike as far as the requirement to provide security is concerned (*The Silver Fir* [1980] 1 Lloyds Rep, 371 (CA) and see RSC paragraph 23-3/8)

[12] 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. In recent cases before this Court awards made for security for costs by agreement have generally been in the region of \$5,000, Awards made after a defended hearing have been higher than that. The amount sought is appropriate in my view.

[13] Taking all matters in to consideration I have decided in the exercise of my discretion to require payment of security in the sum of \$TOP5,000 as sought by the defendants.

THE RESULT

[14] The defendants' application for security for costs is successful. The plaintiff must provide security for the costs in the sum of \$5,000 within 21 days by paying that sum to the Registrar of the Supreme Court.

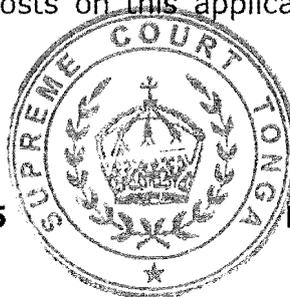
[15] In the event that payment is not made the defendants may apply to stay the plaintiff's claim.

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[16] The defendants' application for security was unsuccessfully opposed and they are entitled to costs on this application to be fixed by the Registrar if not agreed.

Nuku'alofa: 29 July 2015



A handwritten signature in black ink, appearing to be "Qua", is written over the seal.

Lord Chief Justice