

In the High Court of Fiji at Suva  
Civil Jurisdiction

Civil Action No. HBC 346 of 2015  
Between

Emmett Kent Morgan  
formerly of Waterfront Building, now of Gordon Street  
Plaintiff  
And  
Ravindra Lal  
Savusavu  
Defendant

COUNSEL: Ms L.Vaurasi for the plaintiff  
Mr G. O'Driscoll with Mr R. Harper for the defendant in  
respect of the application for stay  
Dates of hearing : 25<sup>th</sup> July,2017 and 11<sup>th</sup>September, 2017  
Date of Judgment: 4<sup>th</sup> October, 2017

**Judgment**

1. By summons filed on 14<sup>th</sup> June,2017, the plaintiff appeals for leave to appeal an interlocutory judgment of the Master of 31<sup>st</sup> May,2017,ordering security for costs to be deposited in the Chief Registrar's account. On 16<sup>th</sup>June,2017, the plaintiff moved for extension of time to serve his application on the defendant. On 19<sup>th</sup>July,2017, the defendant filed affidavit in opposition.
2. Subsequently on 29<sup>th</sup>June,2017, the plaintiff filed summons for stay of the Master's judgment. On 25<sup>th</sup> July, 2017, on the application of Ms Vaurasi, counsel for the plaintiff, I fixed the stay application for argument on 11<sup>th</sup>September, 2017.

***The determination***

3. The plaintiff submits that there has not been an inordinate delay in making the application for leave and the reasons for the delay in service on the defendant have been sufficiently explained.

4. I find that the summons for leave together with a scanned copy of the affidavit of the plaintiff was filed at 11.55am on 14<sup>th</sup> June,2017, within the fourteen day time period stipulated in Or 59,r 11 and was to be served by the plaintiff on the defendant in Savusavu. On 10<sup>th</sup> July,2017, the original affidavit was filed.
5. I am satisfied that the plaintiff has provided cogent grounds to extend time to serve his leave application on the defendant. The application for extension of time is allowed.
6. I turn to the plaintiff's proposed grounds of appeal, which read as follows;
  - i. *The Learned Master erred in law and in fact in failing to make a finding of whether the Plaintiff is ordinarily resident out of the jurisdiction and whether having regard to all the circumstances of the case it is just to order security for costs.*
  - ii. *The Learned Master erred in law and in fact in ordering the Appellant to pay a sum of \$10,500.00 as Security for Costs without any ratio decidendi to justify the issuance of the costs.*
  - iii. *The Learned Master erred in law and in fact in ordering the Appellant to pay a sum of \$500.00 as cost to be paid to the Respondent, without any ratio decidendi to justify the issuance of the cost.*
  - iv. *The Learned Master erred in law and in fact in stating that the Respondent "be at liberty to make a second or consequent application to seek any addition. Security for Costs ordered is insufficient to cover for the actual costs that will be incurred in the final determination of this case,: without any legal reasoning or consideration of the principle of the law whereby the delay in the filing of the Security of Cost application, gives rise to a waiver of the Respondents entitlement for security for costs.*
  - v. *Alternatively, the Learned Master erred in law and in fact in holding that the Appellant is not a resident in Fiji by virtue of being an American National when the evidence clearly shows that:-*
    - a) *The Plaintiff has a Fiji Immigration work permit from 15 July 2015 to 15 July 2017 issued in his capacity as a Director and Shareholder for Morgan Enterprises Fiji Limited.*
    - b) *The Plaintiff travels outside of Fiji but always returns to Fiji as place of abode.*
    - c) *The Plaintiff residential address is at the Waterfront Buildings, Savusavu.*
    - d) *The Plaintiff owns real properties, being movable and immovable assets in Fiji as indicated in evidence ..*
  - vi. *The Learned Master erred in law and in fact when he failed to appreciate and give due weight to the Plaintiffs substantial assets within the jurisdiction which are available to satisfy costs order.*
  - vii. *The Learned Judge erred in law and in fact in ordering security for costs of \$10,500.00 without properly considering the case authorities, determination on costs in defamation matters.*

7. The main contention of the plaintiff is that the Master erred in law and in fact in holding that the plaintiff is not a resident in Fiji by virtue of being an American National, since he has a Fiji Immigration work permit from 15 July,2015 to 15 July,2017, issued as a Director and shareholder of Morgan Enterprises Fiji Limited; he travels out of Fiji, but always returns to Fiji “*as place of abode*”; his residential address is at the Waterfront Buildings, Savusavu and he owns substantial movable and immovable assets in Fiji and failing to make a finding that the plaintiff is ordinarily resident out of the jurisdiction and it was just to order security for costs.

8. Or.23, r. 1(1) states :

*Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-*

*a) That **the plaintiff is ordinarily resident out of the jurisdiction, or...***

*then if, having regard to all the circumstances of the case, **the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant’s costs of the action or other proceeding as it thinks just.**(emphasis added)*

9. In my view, the Master, upon a perusal of the copies of the plaintiff’s passport and paragraph 1 of the statement of claim quite correctly found that the plaintiff is a US national and has neither citizenship nor residency in Fiji. His work permit was issued as a Director and shareholder (having 1 ordinary share) of Morgan Enterprises(Fiji)Limited and ceased on 15<sup>th</sup> July, 2017. Moreover, the plaintiff has sued the defendant for in his personal capacity and not as a Director and shareholder of Morgan Enterprises Limited.

10. In *Furuuchi Suisan Company Limited v Hiroshi Tokuhisa and Others*, (Civil Action No. 95 of 2009) Byrne J cited Sir Nicolas Brown Wilkinson VC in *Porzelack KG v Porselack (UK) Limited*, [1987] 1 All ER 1074 at pgs 107-1077 as follows:

*The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction..*

11. In *Ali v Chandra*, [2014] FJHC 710 at paragraphs 3.26 -3.30 Kumar J stated:

*The threshold for exercise of discretion is that Respondent (Plaintiff) “does not ordinarily reside in Fiji.”*

*The term “resident” or “ordinarily resident” cannot be given a precise definition.*

*Whether a person is resident or ordinarily resident will depend on various factors such as person’s address, type of employment, duration of stay at a particular address, ownership of real properties and so on.*

*Once the Court determines that the Respondent (Plaintiff) “does not reside” or “does not ordinarily reside” in the country then Court has to exercise its discretion as to whether to make an Order for security for costs or not.*

*Of course in exercising discretion whether to make an Order for security costs, Court needs to take various factors into account. Some of the factors which Court may take into account are available of funds within jurisdiction properties owned by the Respondent within jurisdiction and their values: (Sharma v. Registrar of Titles) chances of Plaintiff’s claim succeeding (Para. 25.13.1 White Book, Vol. 1 2011).*

*It must be made clear that the factors listed in preceding paragraph are not exhaustive and Court is free in exercise of its discretion to take into consideration any relevant factors. (emphasis added)*

12. On the contention that there has been delay in filing the application for security for costs, I would refer to the following excerpt from ‘Notes’ to Or.23/1-3/2 in the *Supreme Court Practice*, 1988, Vol 1 under the caption “*Time for making application for security*” as reproduced by Pathik J in *Huang Tzung-Hao v A Team Corporation Ltd*, [2003] FJHC 288 :

*The right to security is not waived by service of the defence, and an order for security may be made at any stage of the proceedings (Re Smith (1896) 75 L.T. 46, C.A.; and see Arkwright v Newbold [1880] W.N. 59; Martano v. Maan (1880) 14 Ch.D.419, C.A.; Lydney, etc. Iron Ore Co. v. Bird (1880) 23 Ch. D. 358).*

*An application for security may be made after judgment for the costs of further proceedings directed by the judgment as e.g. the taking of an account before an Official Referee (Brown v. Haig) [1905] 2 Ch. 379).*

*Delay in making an application for security for costs, however, may be relevant to the exercise of court’s discretion to order security. Although in most cases delay is not a decisive factor, it may be treated as important, especially where it has led, or may have led the plaintiff to act to his detriment, or may cause him hardship in the future conduct of the action (Jenred Properties Ltd v. Ente Nazionale Italiano per il Turismo, Financial Times, October 29, 1985, C.A.).*

13. The following authorities cited by the Master clearly provide that it is in the discretion of the court to award security for costs and the amount thereto.

14. Lord Denning in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd*, [1973] 2 A.E.R. 273 at pgs 285-286.

*..The court has a discretion which it will exercise considering all the circumstances of the particular case.*

15. *Halsbury’s Law of England*, (4<sup>th</sup> Edition) Vol. 37 para 307 states:

*The amount of security for costs ordered to be given is in the discretion of the court, which will fix such sum as it thinks just to do so, having regards to all the circumstances of the case. It is not the practice to order security for costs on a full party and party, still less on an indemnity basis. In the case of a Plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up the stage of the proceedings for which security is ordered, but there is no hard and fast rule.*

16. In *Allan v Hill View Limited*, [2003] HBC 366 Connors J said:


*..... another matter of importance for the Court is exercising its discretion is the Plaintiff's prospect of success in the action and of course as in any such situation that does not require the Court at this point in time to make any detailed determination of the likelihood of success but merely to do so based on the pleadings as they appear before the court.*

17. In my view, the proposed grounds of appeal do not present a strong case and are unlikely to succeed.

18. The application for leave to appeal is declined. The question, therefore of granting a stay of the Master's judgment does not arise.

19. **Orders**

- (a) The plaintiff's application for extension of time to serve the application for leave on the defendant is allowed.
- (b) The application for leave to appeal and stay of the judgment of the Master is declined
- (c) The plaintiff shall pay the defendant costs summarily assessed in a sum of \$1250 within 14 days of this judgment.

The image shows the official seal of the High Court of Fiji, which is circular and contains the text 'HIGH COURT OF FIJI' and 'SUVA'. To the right of the seal is a handwritten signature in black ink.

**A.L.B.Brito-Mutunayagam**  
**Judge**  
**4<sup>th</sup> October, 2017**