



[2015] JMSC Civ. 66

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2013 HCV 03376**

BETWEEN	LOWELL CAMERON	1ST CLAIMANT
AND	ERROL DENNIS	2ND CLAIMANT
AND	ROBERT PIKE	1ST DEFENDANT
AND	HOPETON PIKE	2ND DEFENDANT

IN CHAMBERS

Barrington Frankson and Alethia Meiklejohn, instructed by Frankson & Richmond, for the Claimants

Dr. Keste Miller, of counsel, for the Defendants

Seymour Stewart & Rachel Adams, instructed by Seymour Stewart & Company, for the St. Catherine Parish Council

Heard: March 10 & 12, 2015

APPLICATION TO JOIN A PARTY AS DEFENDANT TO A CLAIM – APPLICATION TO AMEND A CLAIM – ABUSE OF PROCESS – ISSUE ESTOPPEL – POSSIBLE FAILURE TO COMPLY WITH RULE 10.5 OF THE CIVIL PROCEDURE RULES (CPR)

ANDERSON, J

[1] This is a claim for trespass and nuisance arising from the alleged blockage by the defendants, of the road to the Teasdale subdivision, Old Harbour, in the parish of St. Catherine.

[2] The subject-matter of this claim had previously been before a court of competent jurisdiction – that being the St. Catherine Resident Magistrate’s Court, in Plaintiff No. 511 of 2000 and in the claim, before that court, the claimants herein, had made claim against the defendants herein, for trespass in respect of their ‘right’ to usage of the said road. This has been specifically alleged in paragraph 11 of the claimants’ particulars of claim herein. Judgment on that claim in the Magistrate’s Court was given in favour of the claimants on September 24, 2001, both on their claim and on a counterclaim which was filed against them, in that court, arising from the claim which they had earlier filed against the defendants. In addition, a permanent injunction was granted by that court, restraining the blockage of the road.

[3] The claimants allege that they have been unable to secure the assistance of the St. Catherine Resident Magistrate’s Court in enforcing that permanent injunction, as they have been advised that the files in respect of the said claim are unavailable as they may have been consumed by a fire in the court office in 2003. The claimants have alleged this, in paragraph 20 of their particulars of claim. The claimants filed amended particulars on December 4, 2013 and in that document, they reiterated, at paragraphs 13 and 14, what it is that they had previously alleged at paragraph 11 of their original particulars of claim.

[4] What is clear here therefore, is that it is the claimants who are re-litigating an issue which was previously fulsomely addressed and adjudicated on by the St. Catherine Resident Magistrate’s Court. They have re-litigated same, before this court. The Resident Magistrate’s Court of St. Catherine is bound to enforce its judgment and a record of its judgment order exists, as well as a record of the claim and counterclaim, which resulted in that judgment order. If that court refuses to take the necessary steps to enforce the order that it granted, then perhaps – although I make no decision, whether preliminary or final, on this point, that court can be subject to an order of mandamus being issued against it, requiring it to comply with the law in that regard.

[5] The defendants have filed a defence and counterclaim and in their defence, have made 'no admission' to paragraphs 11, 12, 13, 14, 15 and 16 of the claimants' amended particulars of claim. In short therefore, the defendants have not denied the allegation that this matter – in terms of the essentials thereof, was in all respects, previously addressed by and adjudicated upon, by the St. Catherine Resident Magistrate's Court. It is not properly open to the defendants to put the claimants to proof of same, by simply making no admission as to same. It is not properly open to the defendants to so do, because, firstly, they have provided no reason in their defence, as to why they have not admitted same and in any event, the reason why they have made no admission to same, is obvious, since the defendants surely must be aware, fully, as to whether the subject matter of this claim and counterclaim were or were not previously addressed and resolved by the Resident Magistrate's Court in Plaintiff No. 511 of 2000. The defendants therefore, either must specifically admit or specifically deny that specific allegation made by the claimants and moreover, if they decide to specifically deny that allegation, then they are legally obliged to put forward an alternative version of events in that specific respect. See **rule 10.5 of Civil Procedure Rules (CPR)**.

[6] Another background matter of note, for the purposes of this claim, is that on May 15, 2014, when this matter came up for hearing before Miss Justice Christine McDonald, counsel for the defendants gave an undertaking to instruct his clients to remove the obstacle – to the relevant road and await the hearing of the matter. In addition, when this matter again came up for hearing before Mrs. Justice Cole-Smith, on June 5, 2014, the 1st defendant had undertaken to have the road 'fixed' before the next court date. That next court date was July 24, 2014. At present, this court does not know what the present status of that road is, in terms of the obstacles placed thereon by the defendants.

[7] The defendants are now seeking to join the St. Catherine Parish Council as a defendant to this claim and for that purpose, are seeking that this court permit them to amend their claim form and particulars of claim. Case Management orders were earlier made by this court, in respect of this claim.

[8] The rule of court which is specifically applicable to an application for joinder of a party to a claim is: **Rule 19 (Part 11)**. The rule of court which is specifically applicable to amendments of statements of case, with the court's permission, is **rule 20.4 (Part 12)**.

[9] An application to join a party to, or to remove a party from a claim, is not to be equated with an application for the amendment of a claim. If it were otherwise, then **Part 19 of the CPR** would not have been specifically enacted into law. **Part 19** makes it clear that an application can be made by an existing party to add another person as a party to that claim and that the court may add a party, at or after the Case Management Conference. An application to add a party must be supported by evidence on affidavit. That evidence has been provided to this court, in respect, of this application, by the defendants' counsel – Dr. Keste Miller. The application of the defendants, seeks to have the St. Catherine Parish Council be made a 'defendant' to this claim. The St. Catherine Parish Council was represented by attorney Seymour Stewart during the hearing of the defendants' said application and his client is not objecting to the said application.

[10] At first glance, this may seem rather surprising, since, typically, an entity that can lawfully be sued – such as the St. Catherine Parish Council, would, never wish to be made a defendant to any claim and would thus ordinarily be expected to object to being made a defendant to any claim. In the particular circumstances of this particular case though, it is not surprising that the St. Catherine Parish Council has not objected to the defendants' application that they be made, by order of this court, a defendant to this claim. I will explain this further on in these reasons.

[11] As has been deposed to by Dr. Miller, who is the attorney for the defendants, in the defendants' affidavit which was filed in support of this application, the defendants had, on April 24, 2009, filed a claim against the St. Catherine Parish Council, which claim is intituled as Claim No. 2009 HCV 02136. It must be recognized, as regards that

claim, that, regrettably and perhaps, it must, be stated, with respect to the defendants, not attended to by the most noble of intent (albeit that this court does not now make any specific finding in that respect), the claimants herein, were not even joined as interested parties with respect to that particular claim. In that claim, the claimants, who are the defendants in this claim, sought a declaration that the reserve road running into their land, is a private road for their sole use and benefit and for the St. Catherine Parish Council to take steps to rectify any error in having previously designated that reserve road, as a public road.

[12] On April 26, 2013, Claim No. 2009 HCV 02136, came up for hearing before this court and a consent order was then made by this court. The most significant of the orders then made by this court, insofar as the matters concerning this present claim are concerned, was as follows:

*'That the private access way which has hitherto been used as a reserved road into and out of the Teasdale sub-division which runs into and through the claimants' property being all that parcel of land part of Bannister Hall in the parish of St. Catherine containing by estimation, six acres more or less, butting and bounding as follows: northerly by Parish Council Road from Sargood Road leading to Pretty Bottom in the parish of St. Catherine, southerly by land part of Bannister registered at Volume 797 and Folio 52, easterly by land part of Bannister Hall and westerly by land part of Bannister Hall **IS NOT A PUBLIC ROAD** falling, within the purview of the defendant and IS NOT the authorized roadway into or out of the said sub-division as approved by resolution adopted by the defendant at a meeting of its building and town and Planning Committee held on July 18, 1983 (Council meeting August 11, 1983) and amended by Resolution adopted by the said Committee at a meeting held on December 14, 1987 (Council meeting January 1, 1988).'*

[13] In the circumstances, it is not at all surprising that the defendants herein, wish for the St. Catherine Parish Council to be joined as defendants to this claim. This would no doubt be so, because the claimants herein, are contending, by means of their amended particulars of claim, that the road which is the subject of this claim, is the only access road to the Teasdale subdivision and that when the Certificates of Title for lots in the

Teasdale subdivision were issued, access to the said lots was designated as going by way of the said road known as Teasdale Main Road. The defendants have, in response to these allegations of the claimants, put the claimants to strict proof of same and have specifically averred that the said roadway is not the authorized roadway into, or out of the Teasdale subdivision and is not a public road falling within the purview of the St. Catherine Parish Council.

[14] The defendants' statement of case appears, at least at first glance, to be defective, in making no admission as to any of the averments made in paragraphs 3, 4, 5, 6 and 7 of the claimants' amended particular of claim, but not providing any reasons as to why no such admission has been made, or as to why those particular averments are being resisted by the defendants. See: **rules 10.5 (3) (c) and 10.5 (5) of the CPR** in that regard.

[15] The claimants have resisted the application by the defendants to join the St. Catherine Parish Council as a party-specifically in that regard as a defendant to this claim. They have done so, primarily on the ground that the defendants are seeking to re-litigate an issue which has already been finally adjudicated on, as between the same parties, albeit, in a lower court. As such, it is their contention that *res judicata* and issue estoppel apply. Additionally, it is their contention on that the defence should be struck out by this court. As regards their last-mentioned contention, it is to be noted that the same was by no means, strongly made, much less, insisted upon by Mr. Frankson and wisely so, since, as I had then pointed out to attorney Frankson, such an application should be or should have been placed before this court in writing, on notice to the defendants and further, that this court could hardly be expected to now make such an order, on an application made by the defendants, to join a party as another defendant.

[16] Suffice it to state, as regards the claimants' counsel's contention, in response to the defendant's application, that it is a wholly unmeritorious one. Undoubtedly, it is the claimants who are re-litigating an issue which was earlier decided upon by the St. Catherine Resident Magistrate's Court, in respect of a claim which was also, as is this

one, issued by them, against the current defendants to this claim. In the circumstances, it could and would not be proper for the claimants to contend that in response to this re-litigated claim, the defendants should not be raising issues that were previously, finally adjudicated upon, in the St. Catherine Resident Magistrate's Court. The defendants have been forced to do that, because the claimants have so forced them, by re-litigating the subject matter of this claim.

[17] There is no doubt that it would be desirable to add the St. Catherine Parish Council as an interested 'third party' with respect to this claim, so that all issues in dispute between the parties, can be properly resolved, if the same do indeed, hereafter have to be properly resolved by this court. The problem with that though, is that this claim may very well constitute an abuse of process, because it is embarking upon re-litigation of issues that have already been finally determined by a court of competent jurisdiction.

[18] In the circumstances, it may very well be imprudent of this court, to join a party to this claim as a defendant, in order to enable resolution of issues that are in dispute in a claim which is now before this court, when, as a matter of law, those issues can no longer, properly be in dispute. If this court believes that a claim may have been made in circumstances which amount to an abuse of process, that issue should first be resolved by this court, before this court makes an order joining a party to that claim, so that the said issue can be resolved by that other court. If the claim is not properly before this court in the first place, it cannot be in the interests of justice, to join any other party to this claim, thereby, potentially at least, significantly wasting time and costs and in the end, not doing justice to either party, since the parties would all then be responding to a claim, which perhaps, should never have been before this court in the first place. The law as regards re-litigation of disputes and abuse of process and issue estoppel, is clearly set out in the text – **Blackstone's Civil Practice 2014, at paragraphs 33.15 and 33.16**. See: **Hunter v Chief Constable of West Midlands Police** – [1982] AC 529 and **Arnold v National Westminster Bank plc** – [1991] 2 AC 93 and **Johnson v Gore Wood & Co.** – [2002] 2 AC 1. It should also be carefully noted and recognized, that it is

considered to be an abuse of process to raise in a second claim, an issue which should have been raised against someone who was a party to earlier proceedings. See: **Henderson v Henderson** – [1843] 3 Hare 100 and **Talbot v Berkshire County Council** – [1994] QB 290.

[19] Of course also, this court is very much mindful that adding a party as a defendant to a claim, upon application by another defendant, must of necessity, be a very unusual course for any court to take. This must be so, since it would result in a claim being pursued against someone or some legal entity, by claimants, in circumstances wherein, it was not those claimants who chose to pursue their claim as against that additional and newly- joined party to the claim, but rather it was the court that so chose, albeit on the application of existing defendants (as herein made).

[20] The proper course for the defendants to take, in a matter such as this, would be to seek to have the St. Catherine Parish Council joined as no more than an 'interested third party', or alternatively and perhaps better yet, file an ancillary claim against the St. Catherine Parish Council and in that ancillary claim, name that council as the ancillary defendant and seek a contribution or indemnity from that Parish Council, in the event that, the claimants' claim against the defendants, succeeds.

[21] It would not be proper to join the St. Catherine Parish Council as a defendant to this claim, as the claimants presently do not have any dispute with them and most certainly, are not seeking any relief (s) from them. At most therefore, without there being any ancillary claim being pursued against them, by the defendants, this court could properly do no more than join them as an interested third party with respect to this claim. The defendants though, have applied for no such order. **Rule 11.13 of the CPR** prohibits an applicant from even so much as asking, at any hearing of an application for court orders, for any order which was not sought in that application, unless the court gives permission. No such permission was sought and thus, none such, will or can properly now be granted by this court. As such, the application made by the defendants to join the St. Catherine Parish Council as a defendant to this claim, does not permit this

court to join the St. Catherine Parish Council as an interested third party with respect to this claim. It follows too, from what was set out earlier in these reasons for ruling, that this court does agree with the claimants' counsel's submission that if there can now properly exist as between anyone, any dispute as regards what is the nature of the disputed access road to Teasdale, such dispute would really now exist, in view of the Magistrate's Court's adjudication of this matter, only as between the defendants and the St. Catherine Parish Council.

[22] In the circumstances, it follows inexorably, that the defendants' application for court orders filed on February 27, 2015, seeking to join the St. Catherine Parish Council as a defendant to this claim, must be denied. That is the order which this court will make, in that respect. That however, is by no means, the end of this matter, even at this stage. This court has a continuous duty to effectively manage all cases which come before it for adjudication and in that regard, it will schedule a date and time for this claim to again come up for hearing before me, in order for this court to address its mind specifically, as to whether or not this amended claim is an abuse of process and/or whether issue estoppel arises in respect of this claim and if so, in what respect and also, whether or not, the amended defence is, in all respects as far as the setting out of the defendants' statements of case is concerned, in compliance with pertinent rules of court.

[23] This court's orders are as follows:

- i) The defendants' application for court orders filed on February 27, 2015, is denied.
- ii) There shall be heard by this court, in a hearing which shall be held before Mr. Justice K. Anderson, in Chambers, on July 13, 2015, commencing at 10 a.m., for three hours, the issues as to whether or not the claimants' amended form and amended particular of claim or any aspect thereof and/or the defence, or any aspect of the defence, constitutes an abuse of process and/or constitutes issue estoppel and whether the defence is in compliance with rule 10.5 of the CPR and this court is, after having heard from the parties on those issues, empowered to make the appropriate court orders.

- iii) Orders Nos. 2 and 3 of this court's orders as made on March 10, 2015, are vacated. The parties shall respectively, file and serve Skeleton Arguments and Authorities as regards all of the issues specified in Orders No. 2 above and the same shall be filed and served, by or before June 30, 2015.
- iv) The claimants shall file a bundle comprised of all documents pertinent to this claim and an index to that bundle. That bundle shall be filed and the index to that bundle, shall be filed and served, by or before June 30, 2015.
- v) The parties shall collaborate and shall collectively file a bundle of all documents which were filed in the St. Catherine Resident Magistrate's Court Plaintiff No. 511 of 2000 (to the fullest extent possible for them to do so) and said bundle along with an index to same, shall be filed, by or before June 30, 2015 and that index shall be filed and served (if necessary) – so that each party shall have access to same, by or before same date.
- vi) If either party shall fail to fully comply, in any respect, with Orders Nos. 3 to 5 above, then, in such event, that party's statement of case shall stand as struck out, without the need for further court order.
- vii) There shall be no affidavit evidence filed in respect of any of the issues to be addressed by this court, in accordance with Order No. 2 above.
- viii) The trial dates of June 25 and 26, 2015, earlier set by this court and the earlier order for a pre-trial review to be held with respect to this claim are vacated and no trial date for pre-trial review, shall hereafter be scheduled until after the issues referred to in Order No. 2 hereof, have first been determined by this court.
- ix) Costs of the application are awarded in favour of the claimants and said costs are summarily assessed in the sum of \$40,000.00.
- x) The claimants shall file and serve this order and in serving same, as well as in serving any documents required to be served by them pursuant to this court's orders of today, the claimants and the defendants shall serve such documents on the office of Attorney Seymour Stewart, of 7 Duke Street, Kingston, for and on behalf of the St. Catherine Parish Council.

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Hon. K. Anderson, J.