



[2022] JMSC Civ. 244

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV03789

BETWEEN	AFRICAN METHODIST EPISCOPAL ZION CHURCH	1ST CLAIMANT
AND	REVEREND LLOYD BENNETT	2ND CLAIMANT
AND	MICHAEL REID	DEFENDANT

IN CHAMBERS

Miss Schana Johnson instructed by SNJ, Attorneys-at-Law for the Claimants.

Miss Gillian Mullings instructed by Naylor & Mullings, Attorneys-at-law for the Defendant.

HEARD: October 6 and 28, 2022

**Civil Procedure Rules – Application for summary judgment pursuant to Rule 15.2(a)
– Application to strike out statement of case pursuant to Rule 26.3(1)(c) – Whether
the Claimants have a real prospect of succeeding in the claim – Whether the
Claimants’ statement of case discloses any reasonable grounds for bringing claim
– Whether CPR r. 15.3(c) and r. 8.1(4) apply.**

MASON (Ag), J.

BACKGROUND

[1] This is a preliminary Notice of Application for Court Orders filed on behalf of the Defendant on June 30, 2022, for the Court to grant summary judgment on the Claimants’

claim pursuant to r. 15.2(a) of the CPR on the ground that the Claimants have no real prospect of succeeding on the claim or issues therein.

THE CLAIM

[2] The Claimants filed a Fixed Date Claim Form along with Particulars of Claim on October 7, 2020, and an Amended Fixed Date Claim Form on February 10, 2022. The Claimants' Fixed Date Claim Form sought recovery of possession of premises located at 127 ½ Mountain View Avenue, Kingston 3. In the Amended Fixed Date Claim Form, the Claimants sought an additional order for a declaration that the 1st Claimant is the legal and beneficial owner of the subject property. The Claimants allege that the Defendant is a licensee of the Claimants and that having been served with a Notice to Quit in May 2020, the Defendant is to vacate the premises and deliver up possession to the Claimants.

[3] The Defendant filed a Defence and Counterclaim and Amended Defence and Counterclaim on January 7, 2021, and February 22, 2022 respectively. The Defendant contends that the Claimants are not the legal and beneficial owners of the subject property as they have failed to provide documentary proof of same. The Defendant also contends that, in any event, the right of the original owners on the title, Herbert Shaw and James Hoggard have been extinguished. As a result, the Defendant also sought certain orders for declarations in respect of the subject property.

THE APPLICATION

[4] The Defendant in his Notice of Application seeks the following orders:

"1. That there be summary judgement for the Defendant against the Claimant for the orders sought in the Amended Fixed Claim Form herein filed February 10, 2022.

2. In the alternative to (1), that the 1st Claimant be struck out as a party to the claim as the African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971 on which it relies on is ultra vires and further has no retrospective effect as to give the 1st Claimant a title, whether legal or equitable, to the property.

3. *That the claim herein of both Claimants be struck out as they have no locus standi to proceed or maintain this claim.*

4. *Such further and/ or other relief as this Honourable Court may deem just.*

[5] The grounds on which the orders are being sought are as follows: -

“1. Pursuant to Rule 15.2(a) of the Civil Procedure Rules 2006, as amended, the court may give summary judgement on the claim if it considers that the Claimant has no real prospect of succeeding on the claim or the issues therein.

2. Pursuant to Rule 26.3(1)(c) of the Civil Procedure Rules 2006, as amended, the court may strike out a statement of case or part thereof if it appears to the court that that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.

3. The Claimant has no claim in law.

4. The African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971 entails no retrospective provisions that stipulate that transactions done before its enactment are governed by the provisions of the Act.

5. The Claimant has put no evidence before the court that satisfies the requirements of the Statute of Frauds as to land transactions, particularly there is no documentation that shows that there was a vesting transaction between Herbert Bell Shaw and James Clinton Hoggard.

6. Further and in the absence of the requisite documentation, the African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971 on which the Claimants rely is ultra vires to section 15 of the Charter of Fundamental Rights and Freedom entrenched in the Constitution of Jamaica

7. Aside from the African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971 which the Claimants asserts provides them standing, the Claimants have not put before the Court any evidence to support they have the requisite authority to bring this claim on behalf of Herbert Bell Shaw and James Clinton Hoggard.”

[6] The Notice of Application was supported by Affidavit of Abigail Henry, Associate Attorney-at-Law instructed by the law firm Naylor & Mullings, Attorneys-at-Law who represent the Defendant. In her Affidavit, Ms. Henry stated the following:-

“4. The African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971 on which the Claimants rely does not contain a

retrospective provision that qualifies or stipulates that land transactions done by its members and/or clergy before 1971 are governed by its provisions.

5. Further the African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971 suggests that the 1st Claimant owns any land purchased by its members and/or clergy without a need for compliance with the Statute of Frauds. This allegation would suggest that the provisions of the Act also contravene with section 15 of the Charter of Fundamental Rights and Freedoms entrenched in the Constitution of Jamaica.

6. Consequent to the foregoing, the Claimant has no claim in law nor a real prospect of succeeding on the claim or the issues therein.

7. Further, if the provisions of the African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971 do not govern transactions before its enactment, the Claimants have no legal authority to act on behalf of Herbert Bell Shaw and James Clinton Hoggard to institute a claim for recovery of possession on their behalf.”

[7] Written Submissions were filed on behalf of both the Claimants and the Defendant. The Court is grateful to the parties for their submissions and I have summarised the submissions as follows:-

SUBMISSIONS ON BEHALF OF THE APPLICANT

a). No locus standi

[8] Counsel for the Applicant/Defendant, Miss Gillian Mullings submitted that the Claimants lack requisite locus standi to initiate the claim and as such the Court has authority pursuant to r. 15.2 to strike out the claim, as there can be no real prospect of success where a Claimant lacks the requisite standing. Counsel pointed to section 4 of the **African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971**, which could not effectively vest the property in the 1st Claimant because it is retrospective in nature, and based on the principle against retroactivity, the Act should not be retroactively applied unless expressly stated in its provisions.

b). Ultra vires

[9] Counsel further submitted that even if Parliament intended the Act to be applied retroactively, the entire enactment would be in contravention of section 15 of the **Charter of Fundamental Rights and Freedoms** of Jamaica.

[10] Counsel relied on a line of cases on the issue of retrospectivity. Counsel cited **Othniel Dawes and Robert Crooks v The Minister of Labour and Social Security** [2013] JMSC Civ. 64; **Yew Bon Tew v Kendeeran Bas Mara** [1983] A.C. 553, 558 and **Annette Brown v Orphiel Brown** [2010] JMCA Civ. 12.

c). No proof of Statute of Frauds requirements

[11] Miss Mullings further argued that the Claimants have no authority to bring the claim on behalf of the title owners, Mr. Hoggard and Mr. Shaw as they have provided no documentary proof that they are authorised to pursue this claim on their behalf. Counsel argued that it is trite law that land transactions must be in writing, as required by the Statute of Frauds. The Claimants, however, have not put before the Court any signed vesting order or agreement from either title owners, Mr. Shaw and Mr. Haggard demonstrating their intention to vest the subject property acquired by them in the 1st Claimant.

RESPONDENT'S SUBMISSIONS

[12] Counsel for the Respondents/Claimants, Miss Schana Johnson, submitted that the Claimants have the requisite standing to bring this claim due to the fact that they acquired a beneficial interest in the subject property based on a presumed resulting trust that arose in favour of the 1st Claimant in 1967 when Bishop Herbert Bell Shaw and James Clinton Hoggard purchased the property on trust for the use and benefit of the 1st Claimant. Counsel relied on **Dyer v Dyer** (1788) 2 Cox 92.

[13] Counsel further submitted that in order to determine whether a resulting trust was created in favour of the 1st Claimant, the Court must look to the intention of the parties which can be gleaned from their subsequent conduct. Counsel relied on **Leroy McGregor v Verda Francis** [2013] JMSC Civ. 172 and **Carroll Nelson v Leonardo Brown** Claim No. 2007 HCV3493.

[14] Miss Johnson further argued that there is evidence before the Court that there was a common intention that the title holders, Bishop Shaw and Mr. Hoggard intended that

the 1st Claimant would have a beneficial interest in the Church based on the conduct of the parties. This evidence came from persons associated with or closely connected to the 1st Claimant.

[15] Counsel further submitted that by virtue of section 2 of the **Trustees' (Religious Educational and Charitable) Vesting Act 1835**, the subject property is vested in the 1st Claimant and its trustees and their successors in office. As a result, the 1st Claimant has acquired a right to possession of the property.

[16] Counsel also submitted that another piece of legislation, specifically section 4 of the ***African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971*** has the effect of vesting property acquired by the church's officials for the use and benefit of the church to the said church.

[17] Finally, Counsel submitted that the Defendant's claim for adverse possession cannot succeed, on the ground that the title owner has not discontinued occupation or possession of the subject property. The Defendant is a licensee as he has been put into possession by officials or agents of the 1st Claimant. Counsel relied on **Hurbert Samuels v Pauline Karenga** [2019] JMCA App 10.

ISSUES

[18] The Court has considered the written submissions, all the authorities and affidavit evidence provided in the matter. The issues the Court has identified for consideration are:

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- I. **Whether the Claimants have a real prospect of succeeding in the claim.**
- II. **Whether the Claimants' statement of case should be struck out on the basis that it discloses no reasonable grounds for bringing the claim.**

LAW AND ANALYSIS

ISSUE I: Whether the Claimants have a real prospect of succeeding in the claim.

[19] CPR r. 15. 2(a) provides that the Court may grant summary judgment on the claim where it considers that the Claimants have no real prospect of succeeding in the claim. Before granting an order for summary judgment, the Court must be satisfied that the statement of case discloses “*no real prospect of succeeding*”. In order to have a real prospect of success, the case must show that there is a “*real*” as opposed to a “*fanciful*” prospect of success. The words “*real or fanciful prospect*” of success were described by Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91 as being self-explanatory without the need for much amplification.

[20] Lord Hutton in **Three Rivers District Council v Bank of England (No 3)** [2001] 2 All ER 513 stated that granting summary judgment is a discretionary power, the exercise of which must be done without embarking on a mini trial of the issues.

[21] The principles in **Swain v Hillman (Supra)** have been cited with approval in several cases before the Jamaican Court of Appeal. They include **Tikal Limited and others v Amalgamated Distributors Limited** [2015] JMCA App 11; **Island Car Rentals Limited (Montego Bay) v Headley Lindo** [2015] JMCA App 2; and **Marvalyn Taylor-Wright v Sagicor Bank Jamaica Limited** [2016] JMCA Civ 38.

[22] The authorities show that the prime test of “*no real prospect of success*” requires that the learned trial judge do an assessment of the party’s case to determine its probable ultimate success or failure. A judge should therefore direct her focus to the ultimate result of the action rather than the initial contention of each party. See also **Gordon Stewart et al v Merrick Samuels** SCCA No. 2/2005, page 94, Harrison JA.

[23] The starting point is therefore an examination of the nature of pleadings filed on behalf of the respective parties. The Claimants allege that they are the legal and beneficial owners of the subject property. In paragraph 1 of the Particulars of Claim, the Claimants claim that they are the registered proprietors of the property and attached a Certificate of

Title marked "AMEZ1" for identification. However, based on the Certificate of Title provided, it appears the registered proprietors for the property are Herbert Bell Shaw and James Clinton Hoggard and not the Claimants.

[24] In paragraph 2 of the Particulars of Claim, the Claimants claim that the 2nd Claimant is the authorised representative of the 1st Claimant and attached a letter of authorisation dated September 10, 2010, and marked "AMEZ2" for identification. The letter was signed by Bishop George E. Battle, Jr. and authorised Reverend Lloyd Bennett and/or Reverend Guthrie Finikin to act on his behalf in the positions related to the Shaw Mitzpah African Methodist Episcopal Zion Church in Kingston, Jamaica.

[25] The substantive claim is supported by Affidavit of Anthony Winston Pinnock, an individual who claims to be acquainted with the 1st Claimant from "as long as he can remember".

[26] The Defendant's pleadings seriously challenge the Claimants' case in various respects. The Amended Defence and Counterclaim at paragraph 18 states:-

"18. The Defendant has been in open, undisturbed and continuous possession of the subject property for in excess of twelve (12) years and has acquired rights therein by adverse possession against any existing title. The rights of the original owners on title, Herbert Shaw and James Hoggard, have since been extinguished.

[27] The Defendant's affidavit evidence in support of his Defence and Counterclaim states at paragraphs 19, 24 and 25 respectively, as follows: -

"19. I have been in open, undisturbed and continuous possession of the subject property for in excess of twelve (12) years and have acquired rights therein by adverse possession against any existing title. The rights of the original owners on title, Herbert Shaw and James Hoggard, have since been extinguished.

24. By virtue of the matters set out herein, I have acquired an equitable interest in the subject property and have not trespassed as alleged or at all and I have a right to occupy the premises.

25. The 1st Claimant has not proved that the original owners on title vested land on their behalf before their incorporation and in any event, Further,

any such interest has also been extinguished under the provisions of the Statute of Limitations.”

[28] The Defendant not only contends that he has a greater equitable interest and rights in the subject property by way of a claim to adverse possession, but also challenges the validity of the Claimants’ claim in law on several complex issues in both fact and law. The Defendant’s pleadings raise triable issues in fact and law, in relation to the Claimants’ standing or authority to bring the claim as well as the constitutionality and validity of the ***African Methodist Episcopal Zion Church (Incorporation and Vesting) Act 1971*** in vesting the subject property in the 1st Claimant.

[29] When assessing the Claimants’ case, the Claimants are required to convince the Court that their prospect of succeeding on the claim or an issue is real, even if it is improbable. This principle was analysed in **Bolton Pharmaceutical Co. Ltd. v Doncaster Pharmaceuticals Group Ltd. and others** [2006] ECWA Civ. 661. Mummery LJ. stated that the Court should hesitate to grant an application for summary judgment if *“reasonable grounds exist for believing that a fuller investigation into the facts of the case would add or alter the evidence available to a trial judge and so affect the outcome of the case.”*

[30] It is therefore not a matter for the Court at this preliminary stage to make a determination as to whether the claim will be successful. The Court only needs to be satisfied that the claim contains substantial factual assertions and serious issues, which based upon further investigation, would enable the Court to make a final determination. The Defendant has provided more than just mere denials in his defence. He has challenged the Claimants’ right to possession of the subject property by setting out grounds for asserting that he has a greater beneficial or equitable interest in the property by way of adverse possession, in such a way that there appears to be strong, convincing factual assertions that he has a real prospect of successfully defending the claim.

[31] Both the Claimants and the Defendant have raised substantial factual and legal assertions in relation to both their rights of possession to the property. These serious issues ought properly to be determined at a trial of this matter.

[32] In any event, the Court is precluded from granting summary judgment by virtue of CPR r. 8.1(4) and 15.3(c). CPR r. 8.1(4) provides that claims for possession of land must be by way of Fixed Date Claim Form. CPR r. 15.3(c) further provides that summary judgment is not available for proceedings brought by way of Fixed Date Claim Form.

[33] In **James Brown v Karl Rodney and Maureen Rodney** [2017] JMSC Civ. 32, the claim was for recovery of possession of property located in Wakefield, St. Catherine. Anderson J. at paragraphs 8 and 9 stated: -

“8. ...It would make a mockery of rules 8.1(4) and 15.3(c) of the C.P.R if summary judgment could properly be granted in respect of a claim such as this.

9. Accordingly, the defendants’ application for summary judgment, must and does fail.”

[34] Based on the reasons provided above, the application for summary judgment is therefore refused.

ISSUE II: *Whether the Claimants’ statement of case should be struck out on the basis that it discloses no reasonable grounds for bringing the claim.*

[35] CPR r. 26.3(1)(c) provides that the Court may strike out a statement of case or part thereof if it appears to the Court that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim.

[36] The decision to strike out a statement of case (similar to the decision to grant summary judgment), whether in whole or in part is a severe measure that is within the discretionary power of the Court and must be exercised with extreme caution. The position in respect of striking out was explained by Harris JA. (at page 29) in **S & T Distributors Limited and S & T Limited v CIBC Jamaica Limited and Royal & Sun Alliance** SCC 112/04 delivered on the 31st of July, 2007. The Court stated that when considering an application to strike out, a balancing act must be carried out by the court; it must balance the implication of striking out against the cause of action sought to be struck out.

[37] The power to strike out a statement of case on the basis that it discloses no reasonable cause of action is a summary power that should be exercised sparingly and should only be made in plain and obvious cases. (See **Drummond Jackson v British Medical Association and Others** [1970] 1 WLR 688, Lord Pearson at page 695). In determining an application to strike out, the Court should also not embark on a mini trial (**Wenlock v Moloney** [1965] 1 WLR 1238).

[38] In **S & T Distributors Limited (Supra)**, Harris JA. explained that a claim will be struck out as disclosing no reasonable cause of action only where it is “*obvious that the claimant has no real prospect of prosecuting the claim.*”

[39] In **Branch Developments Limited (t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ. 002, McDonald-Bishop J. (as she then was) stated at paragraph 29:-

“Striking out of a party’s case is the most severe sanction that may be imposed...under the court’s coercive power. It is draconian and so the power to do so must not be hurriedly exercised as it has the effect of depriving a person access to the courts which could result in a denial of justice.”

[40] It has already been determined that both the Claimants and the Defendant have better than merely arguable cases which are sustainable in law. The fact that the parties’ cases require serious, prolonged, and complex arguments, and the parties’ positions can be supported by viva voce examination of persons who can speak directly to the land, subject to the rules of evidence. The matter is then presumed to be one subject to further investigation and therefore not an appropriate case for striking out.

[41] The Defendant has not sought to strike out any particular paragraphs or statements made in any document from the Claimants’ statement of case. However, the Defendant challenged the Claimants’ case on the ground that is not actionable in law on factual and legal grounds.

[42] The Defendant challenged the validity and effect of the ***African Methodist Episcopal Zion Church (Incorporation and Vesting) Act, 1971***, specifically section 4,

to vest the subject property in the 1st Claimant based on the presumption against retroactive application of legislation in the absence of express provision. The Defendant also challenged the effect of the said Act as it relates to creating any trust or other beneficial interest in favour of the 1st Claimant pursuant to the alleged 1967 transfer of the subject property to Mr. Shaw and Mr. Hoggard (the true legal title owners), on the basis that the Claimants provided no documentary proof, such as a vesting agreement or trust instrument.

[43] The Defendant asserts that the Claimants' pleadings fail to substantiate their claim to legal or beneficial ownership of the subject property, as there is no documentary proof provided by the Claimants connecting legal title to the land in the name of Mr. Shaw and Mr. Hoggard to the 1st Claimant.

[44] The Court has assessed the parties' respective positions and affidavit evidence filed and has concluded that there are serious issues of fact, law and evidence that require further investigation, in order to decide the outcome of such issues. Further investigation of these issues ought to be conducted at a trial of this matter. It would therefore not be in the best interest of justice or in furtherance of the overriding objectives to strike out the Claimants' statement of case as there is no evidence to suggest the claim is *plainly and obviously weak*. The claim appears to be one that has real and arguable grounds.

[45] The Court will not exercise its discretionary power, at this preliminary stage, to make any pronouncement on the likelihood of success of the claim, only that there is a prospect of succeeding on one or more issues at trial, and that the prospect appears to be "real" rather than "fanciful". Whether or not the Claimants have successfully made out their claim, is a matter to be determined at trial by the trial Judge. This will go towards a final determination of the success of the Claimants versus success of the Defendant. Either way, the parties must be given the opportunity to proceed to trial and present their case. At that point, the trial judge will balance the scales in respect of the parties' rights to possession of the subject property. The striking out of either party's case is one that finally disposes of the matter. I am not prepared to conclude that a striking out order is the appropriate course to take in this matter at this juncture.

[46] The application to strike out the Claimants' statement of case is therefore refused.

ORDERS

[47] I therefore make the following orders:

1. Summary Judgment for the Defendant against the Claimants is refused.
2. The Application to Strike Out the Claimants statement of case is refused.
3. Costs be costs in the claim.
4. The Applicant/Defendant's Attorney-at-Law shall prepare, file, and serve this order.