



[2017] JMSC Civ. 32

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO C.L.B 032 OF 1999**

**IN THE CIVIL DIVISION**

|                |                       |                                 |
|----------------|-----------------------|---------------------------------|
| <b>BETWEEN</b> | <b>JAMES BROWN</b>    | <b>CLAIMANT</b>                 |
| <b>AND</b>     | <b>KARL RODNEY</b>    | <b>1<sup>ST</sup> DEFENDANT</b> |
| <b>AND</b>     | <b>MAUREEN RODNEY</b> | <b>2<sup>ND</sup> DEFENDANT</b> |

**IN CHAMBERS**

Joseph Jarrett and Claudia Forsythe instructed by Forsythe and Forsythe, for the claimant

Tanya Walters-Powell, of counsel, for the defendants

**Heard: November 7, 2016 and January 20, 2017**

**CLAIM FOR RECOVERY OF POSSESSION OF PROPERTY – DEFENDANTS’ APPLICATION TO STRIKE OUT CLAIMANT’S STATEMENT OF CASE – DEFENDANTS’ APPLICATION FOR SUMMARY JUDGMENT – CLAIM FORM PROCEEDINGS – WHETHER CLAIM OUGHT TO HAVE BEEN COMMENCED BY MEANS OF FIXED DATE CLAIM FORM – CONVERSION OF PROCEEDINGS – BASIS FOR STRIKING OUT STATEMENT OF CASE – ABUSE OF PROCESS – CONSIDERATION OF CLAIMANT’S STATEMENT OF CASE**

**ANDERSON, K., J**

[1] This is a claim for recovery of possession of property, being 2 acres of land at Wakefield, Buxton Town P.O in the parish of St. Catherine.

- [2] The Writ of Summons was filed in 1999.
- [3] The Writ of Summons as filed under the old rules of court, would have transitioned under the new rules. See: **rules 73.1**, reads along with **73.4 and 73.6 of the Civil Procedure Rules (C.P.R)** in that regard.
- [4] Thus, notice of appointment for case management conference was sent out by the Registrar to the parties. Same is dated May 18, 2004. The case management conference was held on September 27, 2004.
- [5] Accordingly, the rules of court which came into operation on January 1, 2003 apply to this claim.
- [6] **Rule 8.1 (4) of the C.P.R** requires that a Fixed Date Claim Form 'must be used' in respect of claims for possession of land.
- [7] Regrettably, this court did not make any order converting these proceedings to Fixed Date Claim Form proceedings. It is open to this court therefore, as a matter of case management, to convert these proceedings such that same now be treated as Fixed Date Claim Form proceedings. No new documents need to be filed.
- [8] On that ground alone, the defendants' application for summary judgment fails. **Rule 15.3 (c) of the C.P.R** provides that in respect of proceedings by way of Fixed Date Claim Form, the court is precluded from granting summary judgment. 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.

[10] The claimant has also applied to strike out the defendants' statement of case, based on several grounds. Those grounds are that:

- i) The claimant's statement of case and amended statement of case do not set his case; and*
- ii) Pursuant to **rule 26** the court is empowered to dismiss or give judgment on a claim after a decision on a preliminary issue.*
- iii) Pursuant to **rule 26.3** the court is empowered to strike out the statement of case it appears to the court that the claim is:
  - a. Same is an abuse of the process of the court;*
  - b. Discloses no reasonable grounds for bringing the claim; or*
  - c. Is prolix or does not comply with the requirements of Part 8.**
- iv) Furthering the over-riding objective would justify granting the orders sought. The time allocated for trial herein would be a waste of court time and costs.*
- v) That this is a fair, just and reasonable manner of disposing of this matter.'*

[11] Striking out of a claim, should always be a matter of last resort and thus, should only be ordered by a court in plain and obvious cases: **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 AC 1, esp at [96] – [97].

[12] The defence counsel and the defendant may be of the view that to strike out the claimant's claim would be a fair and just way to dispose of the claim, without this matter proceeding to trial. It would only though, be fair and just to do so, if this is a plain and obvious case, in respect of which, the claimant's claim should be struck out.

[13] **Rule 26.1 (j) of the C.P.R** allows this court to dismiss or give judgment on a claim after a decision on a preliminary issue.

- [14] At this stage though, the defendants are not in a position to apply for judgment, unless the claimants' claim against them, is struck out. Accordingly, **rule 26.1 (j)** of the **C.P.R** cannot be of any assistance to the defendants. Instead, what may be of assistance to them, is **rule 26.3 of the C.P.R**, which is a rule of court that permits this court to strike out a claimant's statement of case, in certain clearly designated circumstances which are limited in scope. Such limitation has arisen from how the wording of that particular rule of court, is interpreted by our courts.
- [15] The amended statement of case is not prolix. In fact it is extremely succinct, as it comprises only seven (7) paragraphs and set out two (2) reliefs being sought. Whilst it is correct that the claimants' amended statement of case did not comply with the requirements of **Part 8 of the C.P.R** in that the claim ought to have been pursued as a Fixed Date Claim Form proceeding and ought to have been supported by affidavit evidence, this court though, has made an order converting this claim to a Fixed Date Claim Form proceeding. Since witness statements have already been filed and served by the parties, this court will not require affidavit evidence to be hereafter, separately filed and served. In a matter of this nature, the costs which would have to be incurred by the parties, for such affidavits to be prepared, filed and served, cannot properly be justified.
- [16] Thus far, I have made reference to the claimant's amended statement of case. It is to be noted though, that the claimant filed a further amended statement of claim on November 5, 2007. At that time, **Jamaica's Civil Procedure Rules, 2002**, were in full effect. Also, by then, a case management conference had already been held. Same was presided over by Dukharan, J, (as he then was) on March 3, 2005.
- [17] Accordingly, permission of this court needed to have been obtained by the claimant, prior to the filing of same. See: **rule 20.4 (2) of the C.P.R** in that regard. No such permission was given by this court, prior to the claimant having filed his amended statement of claim. As can readily be recognized though, from a careful review of the claimant's amended statement of claim which was filed on

November 5, 2007, that court document is framed in precisely the same terms as was the claimant's amended statement of claim, which was filed on August 7, 2001. In that context, it is clear that the claimant's further amended statement of claim added nothing new to the claimant's overall statement of case and that, as such, no permission was required for the filing of same.

[18] What transpired thereafter, is that the claimant applied for an order of this court, to further amend his statement of claim, so as to include therein, an allegation of fraud on the part of the defendants. That application was filed on September 26, 2012. At that time, the claimant was represented by the law firm – Forsythe and Forsythe and in particular, attorney-at-law – Mr. Nelton Forsythe. The defendants were then represented by the law firm – Walters and Soares and in particular, attorney-at-law – Ms. Tanya Walters, who now goes by the name – Tanya Walters-Powell. Mrs. Walters-Powell, now appears as counsel for the defendants for the purposes of the present application which is presently under consideration. She does so, 'of counsel,' meaning that she is instructed by no one and appears in her own name and right.

[19] Interestingly, it occurred that, during a court hearing which was held before Miss Justice Christine McDonald, the claimant's application for court orders which was filed on September 26, 2012, was withdrawn by the claimant's then attorneys-at-law. The claimant is now represented by attorney Joseph Jarrett, instructed by Forsythe and Forsythe.

[20] In the circumstances, it is the claimant's amended statement of claim which must be under consideration by this court, for the purpose of determining whether the claimant's statement of case should be struck out.

[21] As regards whether the claimant's statement of case constitutes an abuse of process, it ought to first be recognized that **rule 26.3 (1) (b)** gives this court the power to strike out a statement of case which is an abuse of the court's process. As stated in **Hunter v Chief Constable of the West Midlands Police, by Ld.**

**Diplock** – [1982] AC 529, at 536, this is a power, '*which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.*'

- [22] This court cannot though, at this stage of these proceedings, strike out the claimant's claim as being an abuse of process. That is so because, as stated by the authors, in the text – Blackstone's Civil Practice, 2014, at paragraph 33.12 – '*Applications to strike out for abuse of process should be made shortly after service.*'
- [23] That was not what was done by the defendants in response to this claim, during the early stages thereof. Instead, they have applied to strike out on the ground that the claim constitutes an abuse of process, during the latter stage thereof. This matter has already proceeded through a pre-trial review and whereas the defendants' application now under consideration by this court, was filed on December 17, 2015, the defendants filed a defence and counterclaim from as long ago, as August 14, 2001.
- [24] Once the defendant has filed a defence and defended on the merits, he is taken as having acquiesced and it will then be too late to successfully pursue the defendant's contention that the claim is an abuse of process. In that regard, see: **Johnson v Gore Wood and Co.** – [2002] 2 AC 1 and **Coca Cola Co. v Ketteridge** – [2003] EWHC 2488 (Ch). In the circumstances, the defendants' application to strike out this claim on the ground of abuse of process, must and does fail.
- [25] In submissions that were made before me, orally, upon this claimant's hearing of the defendants' application to strike out this claim, defence counsel – Mrs. Walters-Powell, contended that this claim should be struck out on the ground that

the claim was issued after the expiration of the applicable limitation period for recovery of possession claims, that being 12 years.

- [26] Even if that be so and this has not been determined by me, for present purposes, it will still not assist the defendants in respect of this effort to succeed on their application which is now under consideration. That is so because, whilst a claim that is issued after a limitation period has expired, may be struck out on the ground that same constitutes an abuse of process, the same cannot be struck out on the ground that there exists no reasonable cause of action. In that regard, see: **Ronex Properties v John Laing Construction Ltd.** – [1983] QB 398.
- [27] For reasons earlier given, the defendants are taken to have acquiesced to the pursuit of this claim even if it is that same was filed after the limitation period had expired. In order for that not to be taken as so, the defendants would have, at the very least, had to have raised that contention, as part and parcel of the defendants' defence. That though, is not something which the defendants have done. Since a limitation period defence is only a procedural one, it follows logically, that it can be waived by a defendant.
- [28] Accordingly, by having failed to raise same earlier prior to having filed their defence, or as part and parcel of their defence, the defendants cannot, properly, at this stage, successfully pursue that contention.
- [29] The defendants are also contending that the claimant's claim should be struck out on the ground that the same discloses no 'reasonable cause of action.' **Rule 26.3 (1) (c) of the C.P.R** permits this court to strike out a claim on the basis that same discloses no 'reasonable grounds for bringing a claim.' I am prepared for present purposes, to equate the phrase – 'no reasonable cause of action,' with the phrase 'no reasonable grounds for bringing a claim.'
- [30] An application to strike out a party's statement of case on that basis must be distinguished from an application for summary judgment.

- [31] Upon an application for summary judgment, this court can consider the evidence expected to be relied on by the respective parties at trial. In that regard, see: **Three Rivers district Council v Bank of England (No. 3)** *supra*.
- [32] That though, is not the approach to be taken by this court, upon its consideration of an application to strike out on the ground that the statement of case discloses no reasonable grounds for bringing a claim in so far as, upon such an application, this court is constrained to only consider that which has been expressly set out in the claimant's statement of case. The phrase – 'statement of case' is defined in **rule 2.4 of the C.P.R** and for present purposes, it would be comprised of the claimant's writ of summons and amended statement of claim. On this point, see: **Gordon Stewart v John Issa** – SCCA No. 16 of 2009 and **City Properties Ltd. v New Era Finance Ltd.** – [2013] JMSC Civ. 23.
- [33] It is therefore not appropriate for present purposes, for this court to give any consideration to either the defendants' defence, or their counterclaim, or the respective parties' witness statements, for the purpose of determining, whether the claimant's statement of case discloses any reasonable grounds for bringing the claim. It is either that the claimant's statement of case discloses reasonable grounds for bringing the claim, or it does not. The answer as to whether the same does so or not, must be found from a careful consideration of only that which is, to use a descriptive phrase, 'within the four (4) corners of the claimant's statement of case.'
- [34] The claimant's statement of case is, as aforementioned, very brief. The claimant's writ of summons seeks the relief of recovery from the defendants of two (2) acres of land, 'which the defendants occupy as licensee.' The writ also seeks injunctive relief, 'to stop the defendants from continuing to build on the said land.'
- [35] In the plaintiff's amended statement of claim, it has been alleged as follows: That Henry Brown 'was' the father of the plaintiff and was originally the owner of



approaching 11 acres of land now occupied by the defendants. By his last Will and Testament dated March 18, 1966, Probate of which Will, was granted, 'on the 30<sup>th</sup> day of December, 1965,' by the resident Magistrate's Court for the parish of St. Catherine, 'the said Henry Brown devised two (2) acres of the said land to the plaintiff and the remaining portion to other family members who have subsequently died leaving the plaintiff as the sole beneficiary of the said land.'

**[36]** The plaintiff's amended statement of claim, in its final three (3) paragraphs of that seven (7) paragraph document states as follows: *'The defendants MAUREEN RODNEY AND CARL RODNEY are licensees of one WILBERT THOMAS, having alleged to have bought nine (9) acres of the said land from the said WILBERT THOMAS. That WILBERT THOMAS sold the said land without any right of title or any permission given by the plaintiff of the Crown. The defendants were given notice to quit and to date they are still on the said land and are in the process of constructing a concrete block and steel house on the said property despite the fact that they are aware that the said land was not owned by the alleged vendor.'*

**[37]** To put it at its highest, the plaintiff's amended statement of claim, is confusing.

**[38]** It is confusing in the following respects:

- i) If the plaintiff's now deceased father had prepared his last Will and Testament and same is dated March 18, 1966, how then could Probate of same, have been granted by a Resident Magistrate's Court, on December 30, 1965? As at that latter-mentioned date, the aforementioned Will, would, if the dates as stated, are correct, not then have been in existence.
- ii) How could the plaintiff lawfully have been bequeathed two (2) acres of an 11 acre parcel of land, to the plaintiff, without that parcel of land, having first been subdivided? Is that devise lawful in the circumstances? These questions are important and have been left completely unanswered by the plaintiff's amended statement of claim.
- iii) Is the disputed land, registered or unregistered land? Once again, this is another important question which has been left completely unanswered by the plaintiff's amended statement of claim.

- iv) If the other family members to whom the other nine (9) acres of land which were not initially bequeathed to the plaintiff, have died, how could that, as a matter of law, automatically lead to the plaintiff being the sole beneficiary of that land? Once again, that is yet another important unanswered question.
- v) If it is that the plaintiff was bequeathed the two (2) acres of land, by his father, now deceased, that would, at most, result in the plaintiff having an equitable claim to those two (2) acres, since until the transmission of that property from the executor or executors to the plaintiff has occurred, the plaintiff would certainly have no legal right to same. If therefore, this court has not been made specifically aware, in the plaintiff's amended statement of claim, what is the nature of any title that the defendants may have in respect of the said property, or even as to whether or not the defendants have any title to same, how then, can it be that the plaintiff has, in his amended statement of claim, considered along with his writ of summons, disclosed reasonable grounds for bringing this claim against the defendants?

**[39]** In the final analysis, it is apparent to this court, that the plaintiff's statement of case discloses no reasonable grounds for bringing this claim against the defendants.

**[40]** The defendants' application to strike out the plaintiff's statement of case, is granted and these are the orders that follow:

#### **Orders**

- i) The defendants' application to strike out the plaintiff's statement of case is granted and as such, the plaintiff's statement of case stands as struck out.
- ii) The costs of the defendants' application to strike out are awarded to the defendants and such costs shall be taxed, if not sooner agreed.
- iii) The defendants shall file and serve this order.
- iv) The trial dates previously scheduled, being: February 13 and 14, 2019, are vacated.

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**Hon. K. Anderson, J.**