

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2017**

CLAIM NO. SKBHCV2013/0167

BETWEEN:

ELVIS HERBERT

Claimant/Respondent

And

CAMILITA JONES

Defendant/Applicant

Appearances:-

Mr. John Cato of Counsel for the Claimant/Respondent

Mr. Arudranauth Gossai of Counsel for the Defendant/Applicant

2017: March 29th

REASONS FOR DECISION

- [1] **CARTER J.:** The notice of application to strike the fixed date claim laid before the Court was filed on 7th November 2013. This application rests on whether the court should proceed with the fixed date claim, the substance of the claim having been already adjudicated upon by another court. The applicant submits that this Court does not have the jurisdiction to deal with this claim in those circumstances or alternatively that the claim should be struck as being an abuse of the process of the court.
- [2] There is no dispute between the parties that the respondent instituted proceedings in the Magistrate's court by Magisterial Suit no. 559 of 2010. A copy of this claim

was appended to the supplemental affidavit of the applicant filed 4th July 2014, for the court' consideration.¹

[3] The claim in the Magistrate's court (hereinafter referred to as the "Summary Claim") was an action to recover possession of house and premises situated at Central Street, Basseterre St Kitts; Arrears of rent of \$20,180.00 for the month of January 2010 to July 2012; and mense profits of \$650.00 per month up to the date of possession.

[4] The applicant deponed that:

"Sometime in the year 2010 the claimant instituted proceedings in the Magistrate's Court (Magisterial Suite No. 559 of 2010) seeking the recovery of arrears of rent which he alleged that I owe to him for the property in which I am the tenant. I did not owe any rent on the property as I was making payment to Mr. Nassibou Butler, Attorney-at-Law, who had written to me on 15th November, 2010 stating that he was the sole surviving executor of the estate of the owner (Victor Walters) of the said property.

I was present at the hearing before the learned Magistrate when a copy of documents were given to the Magistrate by Mr. Nassibou Butler and the Magistrate thereupon gave me a copy of the said documents and ordered that I continue to pay all rents for the said property to Mr. Butler. The documents were a copy of the Last Will and Testament of Victor Walters along with a copy of the Certificate of Title to the property.²

[5] The instant claim is an action for arrears of rent for the period January 2009 to the time of the filing of the claim, the 12th day of June 2013. Paragraph 3 of the Statement of claim³ is to the effect that the defendant was in arrears of rent for a period for which the applicant had *"refused or neglected to pay since 31st December 2008."*

[6] The applicant argues in submissions filed before this Court that, the *"instant fixed date claim form"* is *"seeking reliefs in a matter which has already been decided by the learned Magistrate and hence this court lacks the jurisdiction to hear the claim*

¹ Tendered and marked CJ1

² Paragraphs 4 and 5 of the Applicant's Affidavit in Support filed 8th November 2013

³ Statement of Claim filed 12th June 2013

and the instant claim amounts to an appeal to the decision of the learned magistrate.”⁴ In answer to this argument, the respondent states that there were no proceedings and therefore no order made in those proceedings on the Summary claim then before the Learned Magistrate. The respondent states that in the Magistrate’s Court, “the Learned Magistrate took a course of action (emphasis mine) ... and informed the Defendant that she must pay all arrears and the future rents to the complainant’s solicitor, Mr. Butler to be retained by him until the question of ownership of the property is finally decided elsewhere, because she did not have the jurisdiction to try the case.”

- [7] 26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

“(c) the statement of case or the part to be struck out is an abuse of the process of the court ...”

- [8] The principles that are engaged in an application to strike out a claim made on the basis of abuse of process are summarised by Lord Bingham of Cornhill in **Johnson v Gore Wood**⁵ in the following pronouncement:

"The[re] is [an] underlying public interest ... that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an

⁵ (2002) AC 2 AC 1 at page 31

approach to what should in my opinion be a broad, merits- based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. ... [I]t is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

- [9] The instant application is not one with regard to the ownership of the subject property at Central Street, Basseterre. It is an action for the recovery of arrears of rent. This Court does not doubt that there were proceedings before the Magistrate and that she took a course of action within the context of those proceedings on the Summary claim. The fact that the respondent may not want to entitle the Magistrate's "course of action" as an order of the Court does not make it any less so. The Magistrate made an order in those proceedings on the Summary claim. The evidence of the applicant is clear that the Magistrate based her decision on documents that were before her. If the respondent wished to contest that order it was open to him to appeal the Magistrate's decision.
- [10] The applicant has submitted that this Court cannot, in effect, make a determination on facts which were essentially the same as those before the Learned Magistrate, there having been no appeal against her decision. This Court agrees with the applicant's submission. The respondent does not argue that the facts and matters consisting of the instant claim are separate, distinct or changed from those before the Magistrate. Whether or not the respondent filed an application for judicial review of the Magistrate's decision has no relevance to the court's determination on this point; the said application was withdrawn by the respondent and the fact of having made the said application is entirely immaterial. It is a clear abuse of the court's process to allow the respondent to proceed with the claim filed herein. The

court is mindful that it should use its power to strike out a claim sparingly⁶ but it is also cognizant that in a clear case the court should not hesitate to uphold the integrity of the court's process.⁷

[11] The applicant also objects to the form of the claim before the court. As stated above, the instant claim is brought by fixed date claim form seeking arrears of rent, damages for breach of rent contract, mense profits and costs.

[12] Part 8:1 (4) of **CPR 2000** states that:

“(4)A claim form must be in Form 1 except in the circumstances set out in paragraph (5).”

[13] Paragraph 5 is clear that:

“(5)Form 2 (fixed date claim form) must be used – (a) in claims arising out of hire-purchase or credit sale agreements; (b)in proceedings for possession of land; (c)whenever its use is required by a rule or practice direction; and (d) where by any enactment proceedings are required to be commenced by originating summons or motion”

[14] This claim for the recovery of arrears of rents, breach of rental contract and mense profits and loss clearly does not fall within the ambit of the matters as stated in Part 8:1(5). In skeleton arguments filed by the respondent, Counsel for the respondent does not address this matter at all.

[15] The court is mindful of Rule 26.9 that where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order, and there is such failure, the court may make an order to put matters right. Given the court's finding above, this does not avail the respondent. Even if the court were to order that the fixed date claim form

⁶ Tawney Assets Limited v East Pine Management BVI High Court Civil Appeal No 7 of 2012

⁷ Hunter v. Chief Constable of the West Midlands Police (1982) AC 529 stated at p. 536

proceed as a claim form of its own volition it would not change outcome of the court's ruling on the abuse of process issue above.

[16] The applicant also submits that this Court should dismiss the claim on the basis pursuant to Rule 26.3 of **CPR 2000** that it does not disclose any reasonable ground for bringing the claim and non-compliance with Part 8.14. Again in the premises as outlined above, the court will not make any separate determination on this aspect of the application.

[17] The Court's Order

- (i) The Claim is struck as an abuse of the process of the Court.
- (ii) The court will award costs to the applicant in the sum of \$1000.00.
- (iii) This court apologizes to the parties for the time that has lapsed since this application was filed. It is unfortunate that the application was not brought to the attention of this Court for consideration until some 28 months after it was filed.

Marlene I Carter
High Court Judge