COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2019/PRO/npr/00012

IN THE ESTATE of **Garnell Louise Miller-Powell** late of 3 Coral Road, City of Freeport on the Island of Grand Bahama one of the Islands of the Commonwealth of The Bahamas, deceased.

BETWEEN

LLOYD CABLETON POWELL

Plaintiff

AND

JETHRO MILLER

1st Defendant

AND

LINMERTH MILLER

2nd Defendant

AND

LEONARDO MILLER

3rd Defendant

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Mr. Osman Johnson for the Plaintiff**

Jethro Miller for the Defendants

Ruling Date: **3rd April, 2023**

RULING

1. By Amended Summons filed on the 9th June A.D. 2020, the Defendants seek an Order pursuant to **Order 18 Rule 19 (1) (d)** of the **Rules of the Supreme Court** and/or inherent jurisdiction of the court that the Writ of Summons filed by the Plaintiff on the 20th day of December, A.D. 2018 be struck out or stayed on the basis that:
    a. That the Plaintiff commenced this action in Nassau even though he was already served with a Writ by the Executors in the Supreme Court in Freeport, Grand Bahama in Action No: **2018/PRO/FP/00005** commenced on December 21st A.D. 2018. Both actions being for the same purpose, the administration of the Estate of Garnell Lousie Miller-Powell. As a result, the Plaintiff is abusing

the process of the courts.

2. Since the hearing of this application the First Defendant has sadly died.

Defendants / Applicants Submissions

3. The Defendant seeks an order pursuant to **Order 18 Rule 19 (1)(d) of the RSC** on the basis that, in or about March 2018 contentious probate proceedings regarding the Estate of Garnell Louise Miller-Powell were initiated (Action # **2018/PRO/fp/00005**) in the Supreme Court in Freeport, Grand Bahama, to which the Plaintiff entered a Defence. (Freeport Action)

4. After entering a defence in the Freeport action the Plaintiff then commenced the present action arising out of the same facts, within the courts in New Providence (Action # **2019/PRO/npr/00012**). (Nassau Action)

5. The Plaintiff's actions of filing two caveats in the application to administer the estate of Garnell Louise Miller-Powell, have prevented the estate from being administered and he has in fact abused the process of the court.

6. This Nassau action is a further abuse of process by commencing this action in Nassau when it should have been heard in Grand Bahama unless transferred to Nassau for a good reason.

7. The Defendants rely on **Burstall v Beyfus (1884) 26 ChD 35** and **Johnson v Gorewood (2002) 2 AC 1** where Lord Bingham stated:-

> **"... The underlying public interest is the same; 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 interest of the parties and the public as a whole. The bringing of a claim or the raising a defence in a later proceeding, may without more, amount to an 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 at all... the rule has in my view a valuable part to play in protecting the interest of justice"**

8. In **Henderson v Henderson,** the Privy Council held that there is a presumption against bringing successive actions.

Plaintiff's / Respondent Submissions

9. The Plaintiff / Respondent asserts that the Defendants' application to strike out, is entirely without merit, and is also an abuse of the Court's process and must be viewed in the context of the Defendants' own conduct in this matter.

10. The Plaintiff furthers purports that the Defendants' application represents a collateral attack on the Plaintiff's right to relief before the Supreme Court, which results in further delay of the progression of this action, thereby increasing the loss, damage, and expense to the Plaintiff.

11. The Plaintiff opposes the Defendants application for striking out under **Order 18 Rule 19 of the Rules of the Supreme Court (RSC).**

12. In addition to this the Plaintiff submit that the 1st Defendant's application to strike out should also not be granted as the First Defendant has no reasonable cause of action and that it would be an abuse of the courts process to allow this application to succeed.

13. The Plaintiff also made submissions with regard to delay in the making and hearing of this application and the Defendants failure to file a Defence.

14. He further objected on the ground that no evidence is allowed as the application appears to be rely on Order 18 Rule 19 (1) (a), as not having any reasonable cause of action. He referred the court to various authorities in support of this submission inclusive of **Drummond – Jackson v British Medical Association and others (1970) CA.**

15. In opposition to the ground that this application was an abuse of process, the Plaintiff rely on **Oswald Reichel v Rev. John Magrath (1889) HLE.**

DECISION

16. **Order 18 Rule 19 (1) of the Rules of the Supreme Court** states:-

"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading r in the indorsement, on the ground that-

(a) It discloses no reasonable cause of action or defence, as the case may be; or
(b) It is scandalous, frivolous or vexatious; or
(c) It may prejudice, embarrass or delay the fair trial of the action; or
(d) It is otherwise an abuse of the process of the court, and may order the action to be stayed or dismisses or judgement to be entered accordingly, as the case may be."

17. In "**Ogdens on Civil Court Action Practice and Precedents"** it was stated that "*It connotes that the powers of the Court must be used bonafide and properly, and must not be abused. The Court will prevent the improper use of its machinery and will not allow it to be used as a means of vexatious and oppressive behavior in the process of litigation.* "

18. In paragraph 5 of the Amended Summons the Defendants seek the order pursuant to O18 R 19 1 (b), (c) and (d). They do not rely on Order 18 R 19 (1) (a).

19. Accordingly the submissions by the Plaintiff that no evidence is permissible when applying under Order 18 R 19 (1) (a) is not applicable to this application as the Defendants do not rely on that ground.

20. They filed a supplemental affidavit in support of the summons on the 9th June 2020 with the evidence they rely on in support of their application. This affidavit subsequently became the subject of a separate application by the Plaintiff to strike

portions of the same which suspended the hearing of this application.

21. The power to strike out an action due to the abuse of the Court's process is an inherited power pursuant to **Order 18 Rule 19 of the RSC**. Lord Diplock in the case of **Hunter v Chief Constable of West Midlands Police [1982] AC 529 at p 536** asserts that this power,

"**which the court must possess to prevent the 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 administration of justice into disrepute among right thinking people.**"

22. Further as referred to earlier Lord Bingham in **Johnson v Gore Wood [2002] 2 A.C. 1** states that

> "**... The underlying public interest is the same; 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 interest of the parties and the public as a whole.**"

23. **Tan Swee Wan v Johnny Lian Tian Young [2016] SGHC 2016** provides the guiding principles behind each of the four grounds for strike out under Order 18 of the RSC which I adopt. George Wei J stated:-

> "**...I shall briefly set them out below:**
>
> (a) **O 18 r 19 (1)(a): "it discloses no reasonable cause of action", this involves an action which does not even have "some chance of success when only the allegations in the pleading are considered": Gabirel Peter & Partners (suring as a firm) v Wee Chong Jin and others [1997] 3 SLR® 649 ("Gabriel Peter") at [21].**
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> (b) **O 18 r 19 (1)(b): "it is scandalous, frivolous or vexatious".**
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> (i) **A matter is "scandalous" where it does not even have a "tendency to show" the truth of any allegation material to the relief sought: Law Swee Lin Linda v AG [2006] 2 SLR(R) 565 at [67], citing Christie v Christie (1872)-1973) LR 8 Ch App 499 at 503.**
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> (ii) **"Frivolous or vexatious" means "obviously unsustainable" or "wrong", A case that is "plainly and obviously sustainable" is one which is either legally or factually unsustainable. A case is legally unsustainable if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks". A case is factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of fats is contradicted by all the documents or other material on which it is based": The "Bunga Melati 5" [2012] 4 SLR 546 at [39].**
>
> (iii) **O 18 r 19(1)(b) could also apply to a case where the party bringing an action is not acting bonda fide and merely wishes to annoy or embarrass his opponent, or where there was a lack of purpose or**

seriousness in the party's conduct of proceedings" The "Osprey" [1999] 3 SLR(R) 1999 at [8].

(c) O 18 r 19(1)(c): "it may prejudice, embarrass or delay the fair trial of the action". Pleadings which could be struck out on this ground include those which are unnecessary, which include improper or irrelevant details, or where allegations unrelated to the issues were made for the purpose of embarrassing or vexing the opposing party: see Jeffrey Pinsler SC, Principles of Civil Procedure (Academy Publishing, 2013) at para 9.008.

d. 18 r 19(1)(d): "it is otherwise an abuse of the process of the Court". An abuse of process of court means using the court machinery as a means of vexation and oppression in the process of litigation. For example, where a claim is brought not for the purposes of relief but for some other collateral or ulterior motive: Gabriel Peter at [22]."

24. Further, in Trial Farms Investments Limited et al v Pittstown Point Landing Limited SC Action No. 2017/CLE/gen/00398, the court considered the law in relation to Order 18 Rule 19 where it stated:-

"45. The issue to be determined here is whether this action is an abuse of the process of the court or falls within any of the other grounds under O18 R19. On the face of the pleading there appears to be causes of action but it must be determined whether they are sustainable in law or whether they are an abuse of the process of the court.

46. Abuse of the process of the Court too has been judicially considered and determined in numerous cases. In Hunter v Chief Constable (1982) AC529 and 536, Lord Diplock defines the power to strike for abuse of the process.

"[abuse of process] concerns the inherent 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 it 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. The circumstances in which abuse of process can arise are very varied . . . It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

47. Examples of abuse of the process of the court have been judicially determined to include:-

(1) Attacking a final previous decision by way of a new action when the Plaintiff was a party to the same and had the opportunity to raise and contest the issue in the previous decision. Hunter v Chief Constable of the West Midlands Police and others: Ward and others v Fiensilver (as a personal representative of the Estate of Bernard Olcott) 2014 3 BHSJ No.59

(2) Raising issues which should have and could have been raised in the earlier proceedings.

(3) Evidence being relied on which has no substantial foundation [Don Hager Lawrence v Lord Norreys and others HL1890 210.]

...50. In Thomas v Attorney-General (No 2) (1988) 39 WIR 372 , a decision of the Judicial Board of Privy Council (on appeal from the Court of Appeal of Trinidad and Tobago), Lord Jauncey of Tullichettle explained that:

"...It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same

applies not only where the remedy sought and the grounds therefor are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action. The classic statement on the subject is contained in the following passage from the judgment of Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 at page 115:

> '... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

... In *Yat Tung Investment Co v Dao Heng Bank Ltd* [1975] AC 581 at page 590, Lord Kilbrandon, in delivering the opinion of the Board, referred to the above quoted passage in the judgment of Wigram V-C and continued:

> 'The shutting out of a "subject of litigation" – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.'
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> It is clear from these authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules. It is against this background that the appellant's submissions must be examined."

The authorities are clear that all issues relating to the same subject matter should be raised in a single action and not in a multiplicity of actions. To allow the multiplicity of actions is to allow the courts process to be abused.

25. Finally in Continental Finance Trading Co. SA v Golimer (1992) BHS J. No 94: Sawyer J stated:-

> "61. In my view those principles are equally applicable to an application to dismiss an action on the ground that is vexatious under Order 18, r.19 of the Rules of the Supreme Court for in both instances the court is exercising an extraordinary power, i.e. to stop an action without its having been heard on the merits. Here clearly more than one action has been started by CFT in respect of the same company – i.e., GHI and in the same court.
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> 62. It appears clear to me therefore that as all 3 actions are brought in the same Supreme Court on the same Equity Side and since parties are required to avoid a multiplicity of proceedings where one proceeding will do, I am satisfied that this action is prima facie vexatious even though the remedy sought in it may differ from that sought in either 606 of 1991 or 230 of 1992, in light of the rules

of pleading all the reliefs or remedies claimed by the CFT could be claimed in the same action even if, eg. one part had to be decided first as preliminary issue.

63. Even if I am wrong in holding that this action is prima facie vexatious, I would hold that it is otherwise an abuse of the process of the Court for it states as a fact, a matter which is sub judice (technically or substantially) in two other actions also brought by CFT.

66. I considered whether I ought to stay this action rather than striking it out but as no one has applied for a stay and as I was satisfied that the action is vexatious and an abuse of the process of the court I order, that it be dismissed even though I accept that the plaintiff should not be driven from the judgment seat because in this case the plaintiff is not being driven from the judgment seat as it has already instituted 2 other actions in which it may, by amendment, if it wishes, seek virtually the same relief that is sought in this case. "

26. By filing this claim the Plaintiff is contributing to the multiplicity of actions. He is hindering the efficiency and economy of the court, which must be upheld and protected as held in **Johnson v Gore Wood (supra)**.

27. Upon a review of the affidavit in support, the Defendants aver that probate proceedings were commenced in Freeport seeking to grant approval to administer the estate of Garnell Miller-Powell in March 2018. Caveats were filed by the Plaintiff which resulted in the Executors (the present Defendants, except the First named Defendant) commencing a contentious probate action number 2018/PRO/FP/00050 in December of 2018.

28. In the Freeport action the Plaintiff is the Defendant and he has filed both an unconditional appearance and defence in the same.

29. Upon a review of the writ in that action, the Executors sought certain declarations and consequential relief arising from the dispute as to whether the Deceased died intestate or had a will. The Executors were in possession of a will and the Plaintiff (the husband of the deceased) claimed that the Deceased had died intestate. Conflicting applications for administration of the Deceased's estate were filed by each side with caveats in each action filed by the other side.

30. The Freeport action has not been determined.

31. In this Nassau action which was commenced in January of 2019, the Plaintiff claims to be the Administrator of the Deceased Estate and is seeking to obtain an order pronouncing against any testamentary grant and consequential relief flowing therefrom.

32. It is clear that both actions relate to the same issues. This action seeks relief which can be obtained in the first action. The Plaintiff will not be prejudiced and can easily file a counterclaim with the necessary leave.

33. I accept the submissions of the Defendants that in this case is duplicitous.

34. I find that this action is duplicitous and contravenes the authorities referred to above.

35. I hereby order that this action be struck-out with costs to the Defendants to be taxed if not agreed.

Dated this 3rd April, 2023

Hon. Madam Justice G. Diane Stewart