COMMONWEALTH OF THE BAHAMS

IN THE SUPREME COURT

Common Law & Equity Division

2024/CLE/GEN 00106

B E T W E E N

WENTWORTH MUSGROVE

Claimant

AND

WINIFRED MUSGROVE-TAYLOR

Defendant

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Mr Raynard Rigby, KC and Asha Lewis for the Claimant
Mr Sidney Dorsett for the Defendant

Hearing Date: June 18, 2024; August 29, 2024

Strike out application – Civil Procedure Rules, 2022-Part 26.3(1)(a) and Part 26.3(1)(c) - whether plain and obvious case for striking out – whether action brought using an incorrect form – whether the court can put matters right if a party proceeds with an incorrect form

RULING

Darville Gomez, J

[1.] The Court gave its oral decision in the instant action on September 3, 2024 and promised to provide its written reasons later; I do so now.

Background

[2.] On March 12, 2024 the Court ordered an interim injunction restraining the Defendant from interfering with the Claimant's bee farm which is located on property which is the subject of dispute in the instant action.

The Application

[3.] By a Notice of Application filed on May 29, 2024 the Defendant has applied for:

1.1 An order dismissing the Originating Application of the claimant under Rule 26.3(1)(a) and (c) of the Supreme Court Civil Procedure Rules, 2022 (the "CPR") as being frivolous,

vexatious and an abuse of the process of the court; and (2) under the inherent jurisdiction of the Court.

1.2 An Order that recitals and statements in the Indenture of Conveyance allegedly dated 2nd July, A.D., 2006 between Hosea Musgrove Sr., as vendor of the one part and Patrick Musgrove and Wentworth Musgrove as purchasers of the other part ("the 2006 Conveyance") was shown to be inaccurate and is null and void.

1.3 An Order that the 2006 Conveyance be delivered up to the Supreme Court for cancellation.

1.4 An Order that references to the 2006 Conveyance in the records of the Department of the Registrar General be expunged immediately and completely.

1.5 A mandatory injunction be issued restraining the claimant, his servants, agents and otherwise howsoever at all times hereafter from trespassing on any part of Lot E, in Parcel 5, of the Arthur Musgrove Tract, more particularly shown on Plan 491 EX and restraining the continued storage of the apiary, fence, gate, vehicle, and any other possessions belonging to the claimant on the land of the defendant and the hole in the wall.

2. The grounds of the application are:

2.1 The defendant can show that recital, statements and descriptions of facts and matters in the 2006 Conveyance are inaccurate.

2.2 Therefore, the 2006 Conveyance should be impugned under Section 3(3) and (4) of the Conveyancing and Law of Property Act.

2.3 Gratuitous averments in the Second Affidavit of the claimant confirmed that other relatives of the claimant and defendant are entitled to the 180 acres.

2.4 That being the case, it is impossible for the claimant to claim a possessory title to the alleged 180 acres or at all as he overlooks that exclusive use is an ingredient of a possessory title.

2.5 Therefore, once Section 3(3) and (4) are applied to the 2006 Conveyance the claimant will no longer have an alleged documentary title. And once the voluntary admission against interest by statement made an oath is considered the claimant will no longer be able to assert that he has a possessory title. He covertly entered the defendant's land. That cannot be equated with possession under the Limitation Act. No person is deemed to have been in possession of any land in the Bahamas by reason of having made a mere entry thereon. All of the ingredients must be present including the animus possidendi. Once the 2006 Conveyance is impugned under Section 3(3) of the Act that ends any claim to having documentary title. Then as gratuitous averments of the claimant destroy the vital ingredient of exclusive possession the claimant cannot show a possessory title existed.

2.6 The injunction should be discharged. This action should be struck out for all of the reasons mentioned above and also because it is impossible of success.

[4.] It is supported by an Affidavit of the Defendant filed on May 29, 2024 in which she explained how the Musgrove family came to own the disputed property. The disputed property of 180 acres she claimed was owned solely by their great-grandfather, James Musgrove who left it in his Will to his six children as tenants in common. She relied upon a Deed of Assent prepared by the deceased attorney, L. B. Johnson which recited the Will where James Musgrove stated *"I do hereby Will and Bequeath all of my real and personal property.... to be divided equally to all my children namely: (i) James Musgrove; (ii) Solomon Musgrove; (iii) Nathaniel Musgrove; (iv) Arthur Musgrove; (v) Margaret Rolle; (vi) Dorothea Clarke; (vii) Eva Devant.*

[5.] The Defendant's Affidavit of May 29, 2024 contains a miscellany allegations including (i) that she was improperly served; (ii) that the action be stayed until she has been properly served and because the alleged family tree in the Claimant's affidavit is illegible; (iii) that the Claimant broke a hole in their great-grandfather's wall to invade her section; (iv) that the Claimant is not entitled to the declaration that he is seeking because it is impossible in law.

[6.] There are five Affidavits in total filed in the instant action by the Defendant each similarly containing a miscellany of allegations including her belief that the Claimant's father did not have valid documentary title to the disputed land.

[7.] There are three Affidavits of the Claimant filed in the instant action. In his Second Affidavit he referred to the Family Tree which had been filed in his first Affidavit and explained his relationship to James Musgrove and additionally an admission that the Defendant is entitled to a portion of the property. However, he has alleged that she is on the wrong portion of land; as far as he is aware, her land is to the south.

Issues

[8.] There are in essence three issues to be addressed: (i) whether the Court ought to exercise its discretion pursuant to Parts 26.3(1)(a) and 26.3(1)(c) and strike out the Claimant's claim; (ii) whether the Court ought to issue a mandatory injunction against the Claimant; and (iii) whether the interim injunction in favour of the Claimant ought to be discharged.

[9.] **HELD:**

(i) I refuse to strike out the Claimant's statement of case pursuant to Part 26.3(1)(a) and Part 26.3(1)(b);
(ii) I refuse to grant a mandatory injunction in favour of the Defendant:
(iii) I discharge the interim injunction granted on March 12, 2024.

Submissions

Jurisdiction to strike out a statement of case

[10.] It is undisputed that Part 26.3 of the Civil Procedure Rules, 2022 (the "CPR") provides for the circumstances in which the Court is empowered to strike out a statement of case or a part thereof. The Defendant has relied upon Part 26.3(1)(a) and 26.3(1)(c) as follows:

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;

(c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings.

Strike Out pursuant to CPR, Part 26.3(1)(a)

[11.] The Defendant complained about whether service of the court process was properly effected upon her because she claimed that she was not served because the documents were "*pitched in the front of her yard and, true to form, the person who brought it there, I believe it as the claimant, declared "I'ne have no time for you"*.

[12.] This submission was vaguely addressed by reference to case authorities, save the allegation made that it was improper for the Claimant to purport to serve her by throwing court process in a chair in her yard and referred to rule 9.2 of the CPR.

[13.] It would appear that this formed the basis for the Defendant's application to strike out the statement of case of the Claimant pursuant to Part 26.3(1)(a).

Strike out pursuant to CPR, Part 26.3(1)(c)

[14.] In relation to striking out applications other than on the basis of Part 26.3(1)(a), there are an assortment of cases including **Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd.** [1986] AC 368 cited by the Claimant as well as **Three Rivers District Council v Bank of England (no 3)** [2001] 2 All ER 513. Reference was made to the dicta of McDonald Bishop, J (as she then was) in the Jamaican case of **Branch Developments Limited (t/a Iberostar Rosehall Beach Hotel) v The Bank of Nova Scotia Limited** 2014 JMSC Civ 002:

> *"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 the denial of justice. "*

[15.] The Court must also bear in mind the overriding objective in exercising its discretion to strike out. **Walsh v Misseldine** [2001] CPLR 201

[16.] The Claimant has submitted that this is not a fit and proper case in which a strike out application can be advanced, as the issue of land entitlement and the issue of the authenticity of the 2006 Conveyance are serious issues that cannot be summarily assessed in a strike out application.

[17.] Further, the Claimant relied upon section 88 of the Evidence Act which states that the onus is on the Claimant (in the instant action, the Defendant) to prove that the Defendant (in the instant action, the Claimant) is not the rightful owner of the disputed land which reads as follows:

"88. When the question is whether any person is owner of any thing of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

[18.] Further, reliance was placed by the Claimant upon **Halsburys Law of England** which provides the explanation for the context of section 88:

The claimant must prove that he is entitled to recover the land as against the person in possession. He recovers on the strength of his own title, not on the weakness of the defendant's. However, this does not mean that he is bound to show a title good against all the world. Possession in itself is a good title against all the world. Possession in itself is a good title as against everyone except the true owner, and if one who has been in possession is wrongly dispossessed, he is entitled to recover possession against the wrongdoer, notwithstanding that the true title may be shown to be in a third person. If the claimant's ownership is proved or admitted, the burden is on the defendant to confess and avoid by setting up a title or right to possession consistent with the fact of ownership being vested in the claimant.

[19.] The Defendant on the other hand has relied upon inter alia, **Edward O'Donnell v Diane Ward et al** [2018] CLE/Gen 01248 in which Klein J stated at paragraph 93:

"A bare allegation that a party has been in free and undisturbed occupation of a particular piece of property from a particular date is not a proper pleading of adverse possession. The mere statement of a general proposition of law without pleading the acts which are said to justify that conclusion is insufficient: Re Parton, Townsend"……………No particular of "the adverse possession are pleaded showing how the possession was said to be continuous over the period in question and the court is left unfortunately to try and piece together from the written and oral evidence the acts the defendant relies upon to establish a claim of adverse possession. Had an objection been taken on this ground by the plaintiffs as a preliminary issue or at trial, I would have dismissed the counterclaim". [Emphasis mine]

[20.] The Defendant asserted that the Claimant always knew that this was a contentious matter and an originating application procedure never applied and that a Fixed Date Claim Form should have been utilized to speed matters.

Analysis/Conclusion

[21.] The Court does have the discretion to strike out a statement of case where a party has failed to comply with the CPR. Under the CPR, Part 5.3 a document is personally served on an individual by "*handing it or leaving it with the person to be served*". While the best practice is for the server to attempt to hand the document to the person whilst explaining what it is and if the person to be served will not take it or brushes it aside, leave it as nearly in their possession as possible (whilst repeating the explanation).

[22.] There are case authorities which support that service was properly effected by leaving the document at the feet of the individual being served or as in **Gorbachev v Guriev** [2019] EWHC 2684 where service was recorded on the mobile phones of the two process servers who were present.

[23.] In the instant action, the details of the alleged improper service by the Claimant upon the Defendant was insufficient for the Court to make a finding that the service was not properly effected.

[24.] Therefore, for these reasons, I refuse to strike out the statement of case on the basis of Part 26.3(1)(a) of the CPR.

[25.] As it relates to Part 26.3(1)(c), it is pellucid to the Court that there is a considerable dispute of facts regarding the ownership of the disputed land with extensive allegations by the Defendant as to her entitlement by reference to information contained in various documents and also from her own knowledge or belief of the Musgrove family history.

[26.] However, the parties each agree that they are related, that the property was owned by James Musgrove and was left to his children.

[27.] The Claimant on the one hand, has asserted ownership of the disputed land by virtue of a 2006 Conveyance (which the Defendant has impugned). The Defendant on the other hand, has alleged ownership through her great-grandfather, James Musgrove. However, it is common ground between both of the parties that the root of the title to the disputed land originated from James Musgrove who was the original owner of the entire tract.

[28.] The Claimant has not asserted ownership by virtue of adverse possession, rather through the 2006 Conveyance. His father, he claimed occupied a residence and farmed on the disputed property. Therefore, the dicta of Klein J, referred to by the Defendant in the **Edward O'Donnell** case which is applicable to an adverse possession claim is irrelevant and unhelpful in the instant action.

[29.] There is a substantial point of law regarding the entitlement to the disputed land by the parties that does not admit of a plain and obvious answer. The Court would be required to conduct a thorough review of inter alia, the 2006 Conveyance which has been impugned by the Defendant, the Will of James Musgrove, the Grants of Representation issued in the estate of James Musgrove and his beneficiaries, a Family Tree, a Deed of Assent, and a Certificate of Title. Further, given that some of the beneficiaries died prior to the Inheritance Act, 2002 it would appear that there are issues of whether the heirs were legitimate or not and who was the eldest son.

[30.] Therefore, this requirement for a minute and protracted examination of documents referred to by both of the parties, means that this action is not a plain and obvious one for striking out. **Wenlock v Moloney** [1965] 1 WLR 1238; **Three Rivers District Council v Bank of England (No 3)** [2003 2 AC 1. Further, when the test of whether the claim is bound to fail is applied, it is not clear that this case falls into that category because, even a case 'fraught with difficulty' will not be struck out. **Smith v Chief Constable of Sussex** [2008] PIQR P12.

[31.] Accordingly, I do not find that the Statement of Case is frivolous or vexatious or even an abuse of process.

[32.] Additionally, for the same reasons that I am unable to strike out the action, I am unable to grant a mandatory injunction in favour of the Defendant against the Claimant. However, the interim

injunction in favour of the Claimant granted on March 12, 2024 will be discharged on the basis that costs would be an adequate remedy.

[33.] However, I concur with the Defendant that this action ought not to have been brought by Originating Application because it is now patently obvious given the substantial amount of disputed facts between the parties that it ought to have been commenced as a Standard Claim or a Fixed Date Claim (as submitted by the Defendant). It would have been apparent to the Claimant at the outset that there was likely to be a dispute between himself and the Defendant regarding entitlement to the disputed land given the nature of his claim to it.

[34.] In **Matthew Thomas v Dr Ralph Gonsalves** SVGHVAP2014/0009, it was held that the Judge had a discretion to put matters right if a party proceeds with an incorrect form. Similarly, in the Bahamian case, **Dr. Betram-Sears v Bahamas Medical Council** 2023/CLE/gen 00346 the Honourable Senior Justice Fraser converted a Standard Claim Form action to a Judicial Review Application at the first Case Management hearing. Finally, in **Hannigan v Hannigan** [2002] 2 F.C.R. 650 the Court held that it would be disproportionate and unjust to strike out a claim made on the wrong form when the defendant had been given all the information required to understand what the claimant was seeking.

[35.] Therefore, I find that the action as commenced by the Claimant is not in a form appropriate or proper to the circumstances of the case, viz., the facts are substantially disputed. Thus, the proper or more suitable form for the commencement of such an action is by Standard Claim Form. Also, I am mindful of the fact that the action is in its early stages and to date there has been no Case Management Conference.

[36.] Accordingly, for all of the above reasons, I make the following orders sought in the Notice of Application filed on May 29, 2024 by the Defendant:

(i) I refuse to dismiss the action pursuant to Part 26.3(1)(a) and Part 26.3(1)(c) of the Civil Procedure Rules, 2022 as being frivolous, vexatious and an abuse of the process of the court; and under the inherent jurisdiction of the Court;

(ii) I refuse to issue a mandatory injunction restraining the Claimant, his servants, agents and otherwise howsoever at all times hereafter from trespassing on any part of Lot E, in Parcel 5, of the Arthur Musgrove Tract, more particularly shown on Plan 491 EX and restraining the continued storage of the apiary, fence, gate, vehicle and any other possessions belonging to the claimant on the land of the defendant and the hole in the wall.

(iii) I refuse the remaining relief sought in the Notice of Application filed on May 29, 2024;

(iv) the Claimant is to convert the Originating Application filed on February 22, 2022 to a Standard Claim action and file and serve the same upon the Defendant within 21 days from the date of delivery of this written decision;

(v) the Defendant is to file a Defence within 14 days from the date of service of the Standard Claim Form;

(vi) the Case Management Conference (the "CMC") hearing will be scheduled on a date mutually convenient to the Court and parties after service of the Defence;

(vii) the interim injunction granted on March 12, 2024 is discharged and the Claimant has 60 days to remove the bee farm from the disputed land;

(viii) the Court accepts the Defendant's undertaking not to construct a building or erect any structure whatsoever on the disputed land until the matter is determined by the Court;

(viv) the Court will hear the parties on costs at the date scheduled for the CMC.

Dated this 16th day of September, 2024

Camille Darville Gomez

Justice