

IN THE SUPREME COURT OF BELIZE, A. D. 2016

CLAIM NO. 189 OF 2016

	(MANUEL POP	CLAIMANT
	(
BETWEEN	(AND	
	(
	(RUPERT MYLES	FIRST DEFENDANT
	(ATTORNEY GENERAL OF BELIZE	SECOND DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mrs. Monica Magnusson Coc and Mrs. Magali Marin Young, SC, for the Claimant

Mr. Oscar Selgado for the First Defendant

Mr. Nigel Hawke for the Second Defendant

R U L I N G

- 1) This is an Application to Strike out Claim brought by the Second Defendant against the Claimant. The substantive claim was filed on April 6th, 2016 seeking *inter alia*, damages for trespass to land, constitutional redress and

enforcement of court orders against the Government of Belize. The Claimant is the First Alcalde of the Maya village of Santa Cruz in the Toledo District of Belize, and he brings this claim in that capacity on behalf of the village. The First Defendant is Rupert Myles, an individual who allegedly, on or about October 2014, committed trespass by wrongfully taking up residence on land belonging to Santa Cruz without the permission of the village. The Second Defendant, the Attorney General of Belize, is responsible for representing the State in any legal proceedings against the Government of Belize. The Second Defendant brought this Application seeking to strike out this claim as against the Government of Belize on several grounds, including, that the Court has no jurisdiction to entertain the Fixed Date Claim. The matter was heard on February 5th, 2018 and the court now delivers its decision.

Legal Submissions on behalf of the Applicant/Second Defendant

- 2) Mr. Hawke on behalf of the Second Defendant says in this Application that the Court has no jurisdiction to entertain the Fixed Date Claim for remedies for private law that is trespass against a private citizen, the First Defendant, and Constitutional Relief against the State in violation of Part 56 of the Civil Procedure Rules in one single claim. A claim for trespass cannot be maintained against the State but only against Mr. Myles as this is a private

law claim and should have been brought by way of an ordinary claim and not a fixed date claim. Mr. Myles is not an agent, department or instrumentality of the State in order for a constitutional claim to be brought against the Attorney General. Citing the State's Action Doctrine applied by Sykes J. in ***Maurice Tomlinson v Jamaica Television et. al.*** Claim 05676 of 2012 Mr. Hawke argues that the actions of a private individual cannot be attributed to the State unless he is an agent of the State. The constitutional ethos only recognizes actions for constitutional relief where organs of the State act in a way that violates the constitutional rights of citizens. The act of trespass by Mr. Myles, the First Defendant, cannot be an action of the State because he is not an Agent of the State.

- 3) Mr. Hawke also contends that as no leave has been obtained by the Claimant, the Court will have no jurisdiction to entertain this case; the Claimant is seeking mandamus relief without first obtaining leave of the Court. He cites ***Ivan O'Neal and SVG Green Party v The Supervisor of Elections of St. Vincent and the Grenadines et. al.*** Claim No. 349 of 2009 where it was held that the orders sought by the Claimant for Declarations and Orders amounted to Administrative Orders, and therefore it was necessary to first seek leave. Remy J held that the Claimants having not sought nor obtained leave, which

is a pre-requirement, the Court has no jurisdiction to entertain the proceedings, as there is nothing before the Court. Mr. Hawke contends that the Court must guard against the abuse of its jurisdiction and process, especially where a party such as the Claimant in this case has failed to comply with a mandatory provision of the Supreme Court. The Claimant has failed to obtain leave before pursuing administrative orders for judicial review, and have sought to introduce constitutional issues when the real issue in dispute is really in the realm of private law. Mr. Hawke cites Bernard CJ (as she then was) in ***Yaseen and Thomas v. The AG of Guyana*** (1999) 65 WIR 173 where Her Ladyship opined thus:

“Let me state at the outset that there is no doubt that a judge sitting in the High Court has unlimited jurisdiction in relation to matters which come before that court for determination. The statutes and legal authorities support this contention. More specifically the inherent jurisdiction extends to striking out, staying or dismissing an action.”

Learned Counsel submits that the Courts have continuously pronounced that the right of persons to apply to the courts for redress, which is provided for by section 20 of the Constitution where any of their fundamental rights have

been infringed must not be abused by the bringing of claims for constitutional redress that does not meet constitutional muster and scrutiny.

4. Mr. Hawke relies on ***Harikisoon v. The Attorney General of Trinidad and Tobago*** (1979) 31 WIR 348 for the proposition that not every failure by a public authority entails a contravention of a human right to justify a constitutional claim. Lord Diplock stated thus:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under s. 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under s 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself

*sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or **an abuse of process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.***

5. Mr. Hawke also cites Chief Justice De La Bastide (as he then was) in **AG v Luciano Vue Hotel Ltd** (2001) 61 WIR 406 where His Lordship considered the matter of abuse of constitutional motion and stated:

“It is time in my view that this abuse of using constitutional motions for the purpose of complaining of breaches of common law rights should be stopped. The only effective way of doing so is for the court at first instance to dismiss summarily any process which on its face seeks to force into the mold of a constitutional motion, a complaint of some tort or other unlawful act for which the normal remedy is an action at common law for damages or injunctive relief.”

6. In the Privy Council case of ***Thakur Persad Jaroo v The AG*** [2002] UKPC 5 a car was purchased by the Appellant and seized by the licensing authorities upon suspicion of being a stolen vehicle. The Appellant sought constitutional redress alleging deprivation of property. The Privy Council found that the Appellant's case for the return of his vehicle was capable of being dealt with in the ordinary courts in Trinidad and Tobago by means of processes which were available to him under the common law. The question whether it was appropriate for him to assert his constitutional rights was at the heart of the appeal. The Board found that the allegedly stolen vehicle was the property of the Appellant and therefore he could have had a claim for deprivation of property but given the nature of the claim and the significant dispute in facts, it was an abuse of process to proceed with a constitutional motion. The Privy Council held that:

".. Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the rights allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure whether under the common law or pursuant to statute might not more conveniently be invoked. If another

procedure is available, resort to the procedure by way of an originating motion would be inappropriate and it would be an abuse of process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances would also be an abuse...”

In conclusion, Mr. Hawke submits on behalf of the Applicant that based on the principles discussed in these cases, the Claim is wholly misconceived and is not consistent with proper principles of law. The Claim should therefore be dismissed.

Legal Submissions on behalf of the Respondent

7. In response to the Applicant’s submissions, Mrs. Magnusson Coc on behalf of the Respondent argues that the thrust of the Claimant’s Fixed Date Claim is not damages for trespass to land or damages for breach of a judicial order as alleged by the Applicant. The thrust of the Claim is damages and declaratory relief for the breach of a judicial order and the constitutional relief that breach repeats and perpetuates. Learned Counsel for the

Respondent submits that a fixed date claim is appropriate for claims involving the vindication of constitutional rights. In addition, the trespass claim is against the First Defendant, not against the State and this court has held in ***Guerra v. Oldham*** that a fixed date claim is appropriate for proceedings for possession of land. The failure of the Second Defendant to abide by the April 22nd, 2015 Consent Order of the Caribbean Court of Justice permitted the First Defendant's sustained trespass on Santa Cruz land. Therefore claims for private law remedies and constitutional relief are properly joined as they arise from the same set of facts.

8. Mrs. Magnusson Coc explains that the Claimants do not allege that Mr. Myles is an agent, department or instrumentality of the State, but instead that he is an independent third party acting with the tolerance and/or acquiescence of the Government. She submits that the Government has a specific legal duty to protect Maya lands against third party incursions onto Maya lands, pursuant to the judgment of the Supreme Court of Belize dated October 18th, 2007 and the CCJ order dated April 22, 2015. The Government's failure to comply with these judicial orders perpetuates the constitutional violations that these orders were imposed to remedy. The claim against the Government seeks to vindicate those Constitutional rights because the

essence of the claim relates to the Government's unconstitutional treatment of Maya land rights which leaves them at the mercy of behavior like that of Mr. Myles.

9. It is further submitted that the State Action Doctrine does not apply in this case and the argument made on behalf of the Government misconceives the Claim. The allegations against the Government are that when it was made aware of Mr. Myles' trespass, it failed to recognize and protect Maya land rights and in so doing perpetuated the violation of constitutional rights that the courts had sought to impose on it. It is *res judicata* that the Government's longstanding failure to recognize Maya customary land rights and to provide the Maya with official documentation is a violation of Santa Cruz's constitutional rights. In the absence of compliance with the court's remedial orders, the violations continue. This specific instance of violation caused specific losses and damage to Santa Cruz, therefore a claim for constitutional remedies is directly appropriate.

10. Mrs. Magnusson Coc contends that if the Claimants are wrong and if the court finds that this claim is more appropriately considered the proper subject of judicial review, then the Court has a wide discretion to allow the

claim to proceed as an application for judicial review, the court may give permission for the matter to proceed as if an application has been made under Rule 56.3. She also argues that even if the claim ought to have been framed as a request for judicial review, this claim is not an abuse of process. There is no bar to addressing private and public claims in the same proceeding if they arise from the same set of facts. On the contrary, it is submitted that dealing with all the claims arising out of the same facts in a single proceeding is the most expeditious way to resolve them, and dealing with matters expeditiously is a basic aspect of justice (CPR 1.1(2)(d)). It has the additional benefit to the administration of justice of negating any risk of contradictory findings if different judges hear separate proceedings arising from the same facts. The claim is not frivolous nor vexatious as the village of Santa Cruz has suffered real losses as a result of the wrongful behavior of the State and Mr. Myles. Learned Counsel refers to ***Toledo Alcalde Association and Mayan Leaders Association v Attorney General of Belize*** where the village of Golden Stream suffered a trespass from a third party, and brought a fixed date claim against the Government alone for failing to recognize and protect Maya customary property. The court required that the third party trespasser be added to the claim as a party. It is therefore argued that it

cannot be that it was improper to omit the individual third party trespasser in that case, and improper to include him in this case, when the basic facts, situations and claims are virtually identical.

11. Mrs. Magnusson Coc submits that while a Supreme Court judge has the discretion to strike out or to dismiss a claim on the basis of abuse of process, the court in *Yaseen & Thomas v The AG* (1999) 65 WIR 173 made it clear that this rule applies only in exceptional circumstances where no plausible argument in favor of the Claimant can be found. The Claimants agree with the arguments of the Defendant, that the right of persons to apply for the Supreme Court for redress where any of their fundamental rights have been infringed must not be abused by the bringing of claims for constitutional redress that do not meet constitutional muster. However the Claimants assert their claim for constitutional redress for the violation of their fundamental rights, as these rights have been provided with specific constitutional protection by the court. Mrs. Magnusson Coc goes on to distinguish *Harikisoon v. The AG* cited by the Applicant in his submissions. She points out that that case was one in which the rights of the appellant alleged to be violated were manifestly not included in the human rights and fundamental freedoms specified in Chapter 1 of the Constitution. In addition,

the Appellant's claim was squarely precluded for adjudication under the Constitution. There was a designated regulatory body with whom to bring such claims. Mrs. Magnuson Coc submits that these facts are not remotely similar to those of the case at bar. The fundamental freedoms of the Claimant are included as those warranting constitutional protection. Specifically the Claimants are asserting the constitutional rights against the Government : *"The right of the individual to life, liberty, security of the person and enjoyment of the property and the right not to be deprived thereof except by due process of law."* The Claimant's constitutional right to property is the key issue here and the Government's court ordered duty to protect this right is the basis of the claim. The Claimant's current claim is not tort, clothed in a constitutional argument.

12. Learned Counsel for the Claimants also distinguishes **Jaroo** as a situation where the nature of the right contravened was not clearly and primarily of a constitutional nature. In addition, there were other procedures available under the common law or pursuant to a statute that could have been conveniently invoked. The court held that where there is a parallel remedy, a claimant should not be given constitutional relief, unless the circumstances in which the complaint is made include some feature which justifies resort

to a claim for breach of a fundamental right. In the current case, the Claimant calls for governmental protection of constitutionally affirmed property rights to land. There are no parallel remedies in private law or statute that would adequately address breach of the Claimant's rights. Failure by the Government to honor the orders of the Supreme Court and the CCJ continues the violations the remedy was crafted to ameliorate. For these reasons, the Claim is properly before the Court. The Application to strike should be dismissed.

Ruling

13. Having considered all the arguments for and against this application, I must say that I agree with those of the Learned Solicitor General. The case against Mr. Myles for trespassing should have been brought separately from the case against the Government of Belize. Mr. Myles, as a private citizen, is not an agent of the State and he should therefore be held responsible for his actions in a private claim. With regard to the case against the Government of Belize and the declarations sought by the Claimant, as I understand it, the boundaries of these villages are yet to be officially demarcated by the Government of Belize acting in conjunction with the Mayan people to fulfill the terms of the Consent Order. It is beyond dispute that the Mayan people

are legally entitled to constitutional rights over certain lands in Belize. However, the process of demarcating these lands is a long and arduous one and is presently ongoing, and the **nature** and **extent** of these constitutional rights of the Mayan people and the manner in which these rights are to be exercised and enforced is still to be determined by a tribunal. Learned Counsel for the Respondent conceded in her oral arguments that the Government has yet to demarcate, identify and register the lands being claimed as belonging to the Mayan people. Until that occurs, this Court cannot grant the relief which is being sought as against the Government. I also bear in mind the cautionary words of the Learned Solicitor General in his oral arguments before me that while the rights of the Mayan people are fully recognized and upheld in the Consent Order, the CCJ has declared constitutional authority still vests in the Government of Belize. The Application to Strike Out the Claim as against the Government of Belize is granted.

Dated this Friday, 18th day of October, 2019

Michelle Arana
Supreme Court Judge