IN THE SUPREME COURT OF BELIZE A.D. 2017

CLAIM No. 283 OF 2017

IN THE MATTER of the Estate of Herbert Edmond Llewelyn McKenzie

AND

IN THE MATTER of the Administration of the Estate of Herbert Edmond Llewelyn McKenzie

BETWEEN	**(MAUREEN HORTENCE McKENZIE**	**CLAIMANTS**
	(JAMES NATHANIEL McKENZIE	
	(	
	(AND	
	(	
	(DENNIS McKENZIE	**DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE LISA SHOMAN

HEARING: February 24, 2022

WRITTEN SUBMISSIONS:

Claimants: January 24, 2022 & January 31, 2022

Defendant: January 27, 2022

APPEARANCES:

David McKoy for the Claimants

William Lindo for the Defendant

RULING ON STRIKE OUT APPLICATION AND APPLICATION FOR SUMMARY HEARING

BACKGROUND

1. These are contentious probate proceedings, and the Parties are three siblings, of the eleven children of the late of Herbert Edmond Llewelyn McKenzie. By Fixed Date Claim Form and Statement of Claim both dated the 15th day of May, 2017, the Claimants in this claim are seeking the following reliefs:

   a. *An Order that the Petition No. 208/2003 for Grant of Probate filed by Dennis McKenzie with the Supreme Court (Probate Side) be withdrawn and declared null and void.*

   b. *A declaration that the true and valid will of the Testator, Herbert Edmond Llewelyn McKenzie is the one dated 22nd February, 2001 and not the one probated by the Defendant.*

   c. *An Order for an injunction restraining the defendant whether by himself, his servants or agents from further dealing with the properties described as:*

   a) *Lots 30 St. Vincent Street, Dangriga Town Stann Creek District;*

   b) *Lot #32 St. Vincent Street, Dangriga Town, Stann Creek District;*

   c) *Lot #364 Magoon Street, Dangriga Town, Stann Creek District;*

   d) *20 acres of farm land situated at mile 2 Melinda Road, Stann Creek District;*

   e) *100 acres of land situated on the Mullins River/Stann Creek Coastal Road, Stann Creek District*

   f) *Belize Bank account, Dangriga Branch*

   g) *Bank of Nova Scotia account, Dangriga Branch*

   d. *An Order that the Defendant, provide an inventory of all proceeds and property held under the Estate of Herbert Edmond Llewelyn McKenzie as from the time of obtaining grant of administration;*

   e. *An Order that whomever or whosoever is presently paying rents leases or any form of fee in relation any of the properties of the estate of Herbert Edmond Llewelyn McKenzie make such payments to an escrow account held by the Claimants until the conclusion of this matter.*

f. *An Order that the Defendant, provide accounts of all monies collected for rent, leases, sales or dealings with any of the properties under the estate and accounts for what has been done with the same;*

g. *Further or other relief this Honorable Court deems fit*

h. *Costs*

2. The matters before this Court for resolution at this stage are 2 applications, one is contested, and the other is not. The Application filed by the Defendant via Notice of Application to Strike Out is dated 15 November, 2021 for an order that the Claimant's claim be struck out. The Claimants vigorously oppose this application.

3. The Claimants' Application dated 26 April, 2021 is for an Order that the claim be dealt with summarily. The Defendant does not seek to oppose the application of the Claimants. In the premises, I will deal with the Strike Application first.

4. I thank both Counsel, neither of whom commenced these proceedings or drafted the pleadings in this matter, and both of whom were engaged late in the process, for their vigorous representation of their respective clients and for their helpful written submissions.

The Strike out Application

5. The Defendant filed an Application Notice pursuant to Rule 26.3(1)(b) and (c) and Rule 1.1 of the ***Supreme Court (Civil Procedure) Rules, 2005*** (CPR) and the inherent jurisdiction of the Court that the Claimant's claim be struck out and that judgment be entered in favor of the Applicant and costs. The grounds are that the claim amounts to an abuse of the process of the Court; and that the claim discloses no reasonable grounds for bringing the claim as follows:

a. The Claim is barred by limitation, the cause of action having arisen on

November 2, 2002 at the earliest, or alternatively in 2007 being the date of discovery;

b. Alternatively, the Claimants are barred by the equitable doctrine of laches from bringing or maintaining any claim against the Defendant;

c. The Claimants lack ***locus*** and have no standing to bring the Claim;

d. There is no claim of mismanagement of the Estate by the Claimants;

e. There is no plea of fraud against the Defendant;

f. There is no plea of duress/undue influence against the Defendant.

6. The power of the court to strike out a Statement of Claim is provided for by Rule 26.3 (1) (a) (b) & (c) of the Civil Procedure Rules which provides as follows; ***"26.3 (1) In addition to any other powers under these Rules, the court may strike out a Statement of Claim or part of a Statement of Claim if it appears to the court –***

(a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the Statement of Claim or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

***(c) that the Statement of Claim or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;*"**

7. The power given to the Court under this Rule is considered to be a "nuclear option" and ought not to be used except in the clearest of cases where a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. Where an arguable case is presented by a Claimant(s) or the case raises complex issues of fact or law, its use is inappropriate. The Defendant must satisfy the Court either that a party is barred or unable to prove allegations made against the other party; or that the Statement of Claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.

8. The proper attitude of the Court in respect of a Strike Application is that articulated in the UK decision in ***<u>Kent v Griffiths1</u>*** per Woolf LJ as follows:

"In so far as Osman's case underlined the dangers of a blanket approach so much the better. However, it would be wrong for the Osman decision to be taken as a signal that, even when the legal position is clear and an investigation of the facts would provide no assistance, the courts should be reluctant to dismiss cases which have no real prospect of success. Courts are now encouraged, where an issue or issues can be identified which will resolve or help to resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. There is no question of any contravention of art 6 of the ECHR in so doing. Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although a strike-out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law."

9. The Eastern Caribbean High Court case of ***<u>Shane Avril v. The Attorney General of St. Lucia</u>***[2] is persuasive and applied the reasoning of Woolf LJ in ***<u>Kent v. Griffiths</u>*** (above). Per Master Sandcroft[3] : ***"Lord Woolf pointed out in Kent v Griffith [2001] 1 QB 36 that it is not accurate to say that a court should be reticent about striking out a statement case (or defence in this case) that has no real prospect of success when the legal position is clear and the investigation of the facts would be of no assistance. Indeed, his Lordship said that the courts are now being encouraged to take issues that have been or can be identified at an early stage and deal with them so that time and expense can be saved. Active case management is an ongoing process. It does not stop because this or that application is being made. It may be that during the application the issues become more sharply defined. The applicable law becomes evident. If that is the case, it makes no sense to say that because there is this particular application then that application alone is an end in itself and the court should not take all opportunity to resolve other issues. Once***

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[1] [2002] 2 All ER 474 at Paragraph 38
[2] Claim No. SLUHCV2019/0509
[3] Ibid at Paragraphs 98 to 102

the parties have the opportunity to make their case then there can be nothing wrong with using case management powers to deal with the case justly and save expense regardless of the application being made."

10. Master Sandcroft further states as follows: ***"Rule 25 of the CPR urges the court to identify issues at an early stage[4]. Resolve those that can be resolved at the time the case is before the court. The issues can be identified through pleadings; they can be identified with greater precision during various applications. This court has had experience where during applications the parties see both their case and other side's with greater clarity and that has led to settlements and in some cases discontinuance of the claim. If this happens then the objectives of the new rules are being met. The trial-at-all-cost mentality is behind us. It cannot be that because a particular application is being made the court must sit like an entombed mummy or like Aladdin's genie popping up to do the bidding of he or she who rubs the lamp, ignore the possibility of clarifying the matters so that a settlement on some or even all issues can be arrived at. Why this can happen is that the litigants are under the specific obligation of assisting the court to further the overriding objective. One way of doing this is admitting facts when the party so doing knows that what is being said is true. We are long past the days of mechanical judicial responses to applications and blinkered vision. The new rules empower the courts to seek to resolve as many issues as possible on each occasion the case comes before the court. This is what active case management looks like."***

LIMITATION

11. The Defendant says that the Claimants' cause of action would have accrued on the July 23, 2002 when the last will and testament of Herbert McKenzie, was (according to them) fraudulently made. This Will was attached as Annex 2 to the Claimants' Statement of Claim. Furthermore, Grant of Probate No. 208/2003 was issued to the Defendant on

[4] Rule 25.1(a) of the Belize Supreme Court Civil Procedure Rules

December 10, 2003. The Claimants' claim that the Defendant obtained the Grant of Probate by fraud.[5]

12. The Limitation Act, Chapter 170 of the Laws of Belize provides at section 4:

> ***"4. The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued,***
>
> **(a)** ***Actions founded on simple contract or on tort;"***

13. Section 32 of the Limitation Act provides for the postponement of the running of time as follows:

> ***"32. Where, in the case of any action for which a period of limitation is prescribed by this Act, either,***
>
> ***(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;***
>
> ***(b) the right of action is concealed by the fraud of any such person as aforesaid; or***
>
> ***(c) the action is for relief from the consequences of a mistake,***
>
> ***the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it,"***

14. The Submissions for the Defendant posit that a strict application of Section 4 of the Limitation Act would mean that the Claimants' would have been statute barred from pursuing their claim as from July 23, 2008. Alternatively, Mr. Lindo says that even if the Claimants are afforded the benefit of the doubt, by their own admission[6], they knew of the Defendant's Grant by 2007 by the statement: ***"Thus, the Claimant was shocked in 2007 when she first heard about the defendant having obtained probate of a Will and that he had done the probate since 2003."***

[5] Statement of Claim, Paragraph 39 and 41

[6] Ibid, Paragraph 21

15. By the Claimants' own admission, the date of discovery of the supposed fraud would have been sometime in 2007. The Defendant invites the Court to find that the Claimants' cause of action became barred by operation of section 4 and 32 of the Limitation Act, at the latest in December of 2010 and therefore amounts to an abuse of the process of the Court by instituting the claim, seven years after the limitation period.

16. The submissions made on behalf of the Claimants in respect of limitation are that the Defendant did not plead the limitation defense in his response to the Fixed Date Claim. Counsel for the Claimant refers to the decision in ***Marva Roches v Clifford Williams*****,**[7] in which Justice Sonya Young says at paragraphs 17:

"Limitation, once pleaded, is a complete defence but it must be specifically pleaded. The Claimant is under no duty to prove that his claim is not statute barred. This is because he maintains an action notwithstanding the limitation has expired. The court will not take this defence of its own motion. It is for the defence to raise it appropriately in its defence."

17. Counsel says that the Defendant's Application to file a Defence and to obtain relief from sanctions was refused by Arana J (as she then was) in 2019; and that the limitation defense has not been pleaded and raised appropriately before the Court. Counsel argues that this ground is without merit and should be dismissed.

18. Counsel for the Claimants also valiantly tried to extend the limits of the limitation period by arguing that the First-named Claimant asserted in her statement of claim that in or about 2012, she found the Will dated February 22, 2001, which has herself as executor and one of the beneficiaries and that consequently, the Claimants commenced proceedings in the year 2017, within 12 years as required by Section 26 of the Limitations Act,[8]:

> ***" Subject to section 25 (1) of this section, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a Will or on intestacy, shall be brought after the expiration of***

[7] Belize Supreme Court Claim No. 179 of 2015

[8] Chapter 170

twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due."

19. Unfortunately, the First-named Claimant never saw fit to exhibit this purported will which she says she found in 2012, and the Court has no such will to consider, as a result.

20. I find as a matter of fact in this claim that the Claimants did admit that in 2007, they found out that a grant of probate was issued to the Defendant. For one reason or another, no claim was filed until 2017. On May 15, 2017 when the Claim Form and Statement of Claim was filed, ten years had elapsed. This Claim was filed outside the limitation period.

NO REASONABLE GROUNDS
LOCUS STANDI

21. The Defendant refers to Rule 67.2(2) of the Supreme Court (Civil Procedure) Rules: ***"The Claim Form must state the nature of the interest of the claimant and of the defendant in the estate of the dead person to which the action relates."***

22. The contention that the Claimants exhibit no birth certificates to the Statement of Claim to support the assertion that they are children of the deceased, is easily countered by the fact that the Defendant does not deny that they are.

23. The Defendant does assert, however, that the Claimants do not establish the nature of their interest in the estate of Herbert Mckenzie, nor in what capacity they are entitled to claim. Under the terms of Grant of Probate No 208/2003 issued to Dennis McKenzie, the Claimants do not appear to have any interest as beneficiaries or trustees.

24. Counsel for the Claimants rests the matter of the standing of Maureen McKenzie and James McKenzie to bring this claim on the assertion of the existence of a Will made in 2001,

which Ms. McKenzie alleges was found by her in an envelope with her land documents, and therefore the Claimants have a recognizable legal interest in issue. Counsel argues that this alleged February 22, 2001 Will names Maureen McKenzie as one of the beneficiaries and the Executrix of the Estate of Herbert McKenzie. He says that if the Claimant is successful in this case, she will be entitled to function as the Executrix and one of the beneficiaries in the Estate and that it is on that basis that the Claimant has reasonable grounds to bring the claim.

25. The Claimants did not provide any copy nor attach this alleged Will of Herbert McKenzie to the Statement of Claim, nor to any another document filed on their behalf. In consequence, the Defendant/Applicant and court are left, as Mr. Lindo submits, "in a vacuum to wonder in which capacity they would be entitled to claim. As executors of the deceased's estate or as beneficiaries?"

26. The Claimants do not state that they are claiming as either executors or beneficiaries of Herbert McKenzie. Neither position is stated either in the Fixed Date Claim Form or the Statement of Claim, nor to the Witness Statement of Maureen Hortence McKenzie dated December 27, 2017.

27. The pleadings in the instant claim do not provide - as required by Rule 67.2(2) - the nature of the interest nor the basis on which the Claimants have instituted this claim in respect of the Estate of Herbert McKenzie. Neither does the Witness Statement filed on behalf by the Claimants provide the basis for the standing of the Claimants.

MISMANAGEMENT

28. The Application for the Defendant says that in order to maintain a claim in respect of mismanagement of an estate, there must be pleaded particulars of the alleged mismanagement; and that there is no plea of mismanagement of the Estate of Herbert McKenzie in the Statement of Claim. In consequence, since there is no pleading of mismanagement by the Defendant, there is no cause of action disclosed and the Claimants

have no standing to ask for an Order on the basis that the Defendant has mismanaged the Estate. I agree with the Defendant's submission. The Claimants have not pleaded mismanagement and consequently, at this stage they cannot ask for any order which hinges on any such allegation.

FRAUD

29. The Claimants says that they have pleaded fraud on the part of the Defendant. According to submissions made on behalf of the Claimants[9], they assert ***"that in 2016, the Defendant admitted to her that he made the Will himself and that he should have given the Claimant benefits under the Will instead of his sister Elaine McKenzie – a clear indication of fraud."*** The Claimants also say in the submissions made on their behalf that **"the Defendant acted fraudulently by forging his father's Will."**

30. The Defendant contends, on the other hand that the issue here is that fraud is not pleaded by the Claimants' statement of case at all.

31. A review of the Fixed Date Claim Form shows that the Claimants make no claim against the Defendant for fraud, on the face thereof. The first Order claimed is for ***"An Order that the Petition No. 208/2003 for Grant of Probate filed by Denis McKenzie with the Supreme Court (Probate Side) be withdrawn and declared null and void."*** The second relief claimed is for ***"A declaration that the true and valid will of the Testator, Herbert Edmond Llewelyn McKenzie is the one dated 22nd February 2001 and not the one probated by the Defendant"***. Fraud is never mentioned.

32. In fact, the only mention of anything raising the issue of fraud appears in the penultimate paragraph of the Claimants' Statement of Claim[10] which states only that: ***"I verily believed that the will dated July 23rd, 2002 is a forgery and invalid."***

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[9] Submission in Response to Defendant's Application for Strike Out at Paragraph 4
[10] Statement of Claim, Paragraph 41

33. That assertion is repeated at Paragraph 52 of the Witness Statement of Maureen Hortense McKenzie but without any reason for the belief thereof and without any particularization as to any involvement by the Defendant.

34. The Defendant submits, rather succinctly, that ***"It cannot be said that the Applicant's supposed fraud is woefully pleaded. It is not pleaded at all."***

35. There is no doubt that the burden of proof of establishing fraud is on the Claimants. Since allegations of fraud involve substantial factual dispute, they require proper pleading and particularization. This is indeed, trite law.

36. In the Caribbean Court of Justice case of Subhas Ramdeo v Heralall[11] case, the Court described this rule as "elementary". In his decision, Mr. Justice David Hayton put the matter thus:

> ***"Unfortunately, the Appellant's then attorney in his pleadings overlooked the elementary need to provide clear particulars of fraud involving the Respondent: High Court Rules, Order 17 r. 6; Bullen & Leake & Jacob's Precedents of Pleadings 15th Edition 2004, para 48-02. An allegation of fraud is a very serious allegation, requiring that the person against whom fraud is alleged be made as aware as possible of what is alleged to be his fraudulent behaviour. This is a requirement that enables the defendant to be well-positioned to try to counteract such allegation and that also places the judge in a good position to make definitive findings in support of, or in rebuttal of, such allegation."***

37. I agree with the contention that aside from the bare assertion by the Claimants in the Statement of Claim of a belief "***that the will dated July 23rd, 2002 is a forgery and invalid."*** there are no particulars of fraud pleaded and none are pleaded against the Defendant in the Statement of Case. The submissions by Counsel made at Paragraph 4 (as cited above) cannot and do not replace the actual pleadings. I am constrained to point out here that

[11] [2009] CCJ page 1 at Paragraph 3

Counsel should be exceedingly careful not to venture to state a client's case as if the same were pleaded, unless the case was in fact so pleaded.

38. The Belizean Supreme Court case of Daisy Watson v Alexander Watson[12] is of assistance and Sir John Muria, held (in reliance on another Belizean Court of Appeal case) as follows:

> ***"As to fraud, there is not a scintilla of evidence before the court that points to any suggestion of fraud on the part of the Claimant or anybody in the making of the Will. The Will was signed by the deceased and witnessed by Josephine Cadle and Luis Torres. The court rejects the assertion of fraud in this case. See Belize Airports Authority v UETA Ltd of Belize (21 June 2001) Court of Appeal of Belize, Civil Appeal No. 17 of 2000 where the Court reiterated that allegations of fraud should not be pleaded unless there is clear and sufficient evidence to support it."***

39. The Authorities are clear. Allegations of fraud require clear particulars of the fraud, and should not be pleaded unless there is clear and sufficient evidence to support the same. In this case, particulars of fraud were not pleaded by the Claimants and cannot be sustained.

DECISION

40. This claim was filed outside the limitation period, although Limitation was not pleaded as a Defence.

41. The pleadings in this claim do not provide, as required by Rule 67.2(2), the nature of the interest nor the basis on which the Claimants have instituted this claim in respect of the Estate of Herbert McKenzie.

42. The Claimants have not pleaded mismanagement and therefore cannot ask for any order which hinges on any such allegation.

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[12] Action No. 647 of 2004, page 9

43. Neither the Fixed Date Claim, nor the Statement of Claim of the Claimants disclose any reasonable grounds for bringing or maintaining this claim against the Defendant on the basis of fraud.

44. In the premises, I find that the statement of case in the instant claim against the 3rd and 4th Defendant is an abuse of the process of the Court and therefore should be struck out under Rule 26. 3 (1)(b) of the Supreme Court (Civil Procedure) Rules.

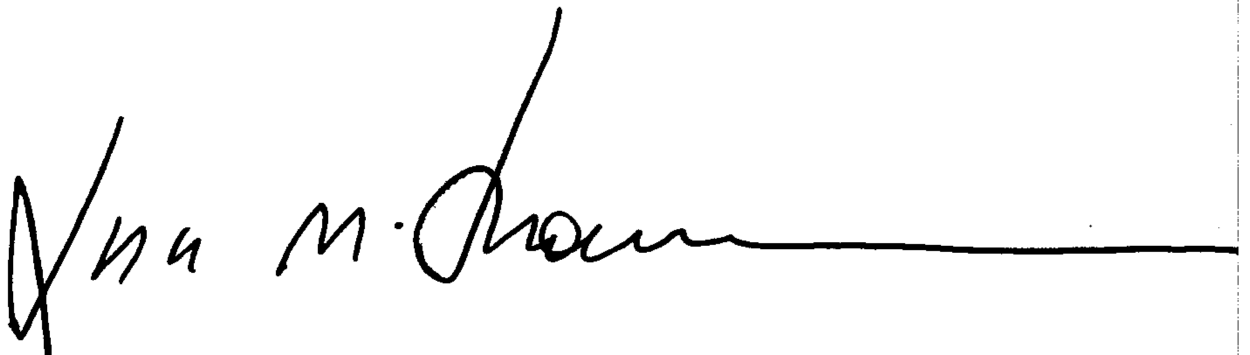
45. Since the Claim is to be struck out, there is no need to consider the Claimants' Application for Summary Trial.

46. The following Orders are made:

   a. That the Claimants' Claim Form and Statement of Claim filed herein is struck out and the Claim is dismissed as being an abuse of process of the Court; and

   b. That the Claimants shall pay the Defendant's costs of this application and of the claim to be agreed or taxed.

Dated March 16, 2022



Lisa M Shoman

Justice of the Supreme Court