



[2019]JMSC Civ.262

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO.SU2019CV01796

**IN THE MATTER of an application by
DEANROY BERNARD for leave for
Judicial Review.**

AND

**IN THE MATTER of Section 126(1) of
the Constitution of Jamaica, 1962.**

AND

**IN THE MATTER of Section 126(3) of
the Constitution of Jamaica, 1962.**

AND

**IN THE MATTER of Section 93(1) of
the Constitution of Jamaica, 1962.**

BETWEEN DEANROY RALSTON BERNARD RESPONDENT/CLAIMANT

AND THE PUBLIC SERVICE COMMISSION APPLICANT/1ST DEFENDANT

AND THE ATTORNEY GENERAL OF JAMAICA APPLICANT/2ND DEFENDANT

Mrs. Susan Reid-Jones, Mr. Carson Hamilton and Mr. Louis Jean Hacker instructed by
Director of State Proceedings for the Applicants /1st and 2nd Defendants.

Mr. Mark Williams and Miss Justine Wilson instructed by Williams, McKoy and Palmer for Respondent /Claimant

IN CHAMBERS

Date Heard: May 15, & May 24, 2019

Application for Leave for Judicial Review – Application to strike out –Application by way of fixed date claim form – Whether fatal – Civil Procedure Rule, rules 26.3(1)(a), 56.3(1), 26.9(1), 26.9(3)

HENRY-MCKENZIE, J (Ag)

ORAL JUDGMENT

- [1]** This matter is before the court by way of a Notice of Application to Strike Out Claim filed on May 7, 2019 by the Attorney General of Jamaica (Applicant) who appears on record for the Applicants(1st and 2nd Defendants).
- [2]** The Application to Strike Out Claim is centred around a Fixed Date Claim Form filed by Mr. Deanroy Ralston Bernard (the Respondent), seeking amongst other orders, an order granting leave for judicial review into the circumstances under which the Office of the Services Commission issued a letter dated March 1, 2019, reassigning the Respondent Mr. Deanroy Ralston Bernard, Attorney-at-Law and Permanent Secretary, to the Ministry of Finance and the Public Service as Director General Designate.
- [3]** The Notice of Application to Strike Out Claim seeks to have the Fixed Date Claim Form filed by the Respondent on April 26, 2019, struck out. Further, that time be abridged for the service of the Notice of Application and cost in favour of the Applicants. I granted the application for time to be abridged and hence the main

issue for my consideration is whether or not I should grant the Application to Strike Out the Fixed Date Claim Form.

- [4] The grounds upon which the Applicants seek these orders are: Firstly, that rule 26.3(1)(a) of the Civil Procedure Rules (CPR) allows the court to strike out a statement of case where there has been a failure to comply with a rule or practice direction.
- [5] Secondly, that the Fixed Date Claim Form filed on April 26, 2019, seeks judicial review of the decision of the Public Service Commission by way of certiorari, however, the Respondent has not complied with rule 56.3(1) of the CPR which requires that he must first obtain the leave of the court to do so.
- [6] Further, that an application for leave to apply for judicial review must be made by way of a Notice of Application for Court Orders, pursuant to rule 56.3 of the CPR and not by a Fixed Date Claim Form.
- [7] Lastly, that the Fixed Date Claim Form is a nullity, no leave having been granted to the Respondent to file a claim for judicial review and further,
- [8] that judicial review proceedings can only be filed after leave is granted.

APPLICANTS' SUBMISSIONS

- [9] In making submissions, counsel for the Applicants relied on the cases of **Orett Bruce Golding vs. Portia Simpson Miller**, (Unreported) Supreme Court, Jamaica, Civil Appeal No. 3 of 2008, **Chester Hamilton vs. Commissioner of Police** [2013] JMCA Civ.35, **Lafette Edgehill et al vs. Greg Christie** [2012] JMCACiv.16
- [10] In summary, counsel argued that an application for judicial review is a two stage process. There must first be an application for leave to apply for judicial review. If leave is granted, then this is followed by the filing of a Fixed Date Claim Form

supported by affidavit for judicial review. Further, that there can be no cure if the process is commenced by a Fixed Date Claim Form. A Fixed Date Claim Form is only applicable after leave has been granted. Rule 56.3(1) therefore has not been complied with. Further, they argued, CPR Part 26 and in particular rule 26.9(3) is not applicable at the leave stage. They submitted that on this basis, the claim should be struck out.

RESPONDENT'S SUBMISSIONS

- [11] Counsel for the Respondent on the other hand, argued that rule 56.3 does not specify that an application for leave to apply for judicial review must be commenced by way of a Notice of Application for Court Orders, neither is this stated in any Practice Direction or case law.
- [12] In any event he contended, the Fixed Date Claim Form indicated in the first paragraph that what is being sought is leave to apply for judicial review. Further, that this is a matter of form rather than substance, as the substance of the application remains the same. The use of the Fixed Date Claim Form has no impact on the fairness to the Applicants, neither has it caused any prejudice to them.
- [13] He contended further, that the court should exercise its discretion having regard to the overriding objective of the CPR. In addition, the court has the power pursuant to rule 26.9(3) to put matters right and therefore can treat the Fixed Date Claim Form as the Application for Leave for Judicial Review.
- [14] He indicated further, that striking out should be a last resort if the wrong can be addressed otherwise. He prayed in aid the following cases: **Eldemire vs. Eldemire** (1990) 38 WIR 234, **Charles McLaughlin vs. Sherrie Grant & Collin Smith** [2018] JMCC COMM.20
- [15] He also referred to the United Kingdom (UK) rules in relation to an application to apply for permission for judicial review and made reference the fact that in

England and Wales leave for judicial review starts by way of a Fixed Date Claim Form.

REASONING AND ANALYSIS

[16] CPR Part 56 deals specifically with Administrative Orders which includes Judicial Review proceedings. Rule 56.3(1) states that a person wishing to apply for judicial review must first obtain leave. However, Part 56 is silent as to how the application for leave is to be made. Recourse will have to be had therefore, to the general rules having to do with Application for Court Orders enunciated in CPR Part 11.

[17] In this case, the application seeking leave for judicial review was made by way of a Fixed Date Claim Form. This is an irregularity in the procedure for making an application for leave for judicial review, in that, a Fixed Date Claim Form becomes applicable only upon leave being granted for a claim to be made for judicial review. Notably however, it has been detailed at paragraph one (1) of the Fixed Date Claim Form, that what the Respondent seeks is leave to apply for judicial review. The question is whether this irregularity is fatal or whether it can be cured.

[18] Counsel for the Respondent has argued that the provisions at rule 26.9(3) can operate as a cure for this procedural irregularity, and that this is a matter of form rather than substance, as the substance of the application remains the same.

[19] Rule 26.9(3) has to do with the general powers of the court to rectify matters where there has been a procedural error. Rule 26.9(3) states:

“Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right”

[20] Rule 26.9(1) is also applicable. It states:

“This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order”.

- [21] Rule 26.9(3) therefore vests in the court a discretion where there has been any error in procedure, any failure to comply with a rule, practice direction, court order or direction to make an order to put things right. There is a condition precedent to the application of this rule however, as it only applies where the consequence of failure to comply has not been specified by any rule, practice direction or court order.
- [22] Counsel for the Respondent has argued that the consequence of failure to comply in this case, has not been stated in any rule, practice direction or court order and therefore rule 26.9(3) is applicable.
- [23] On the other hand, counsel for the Applicant submitted that rule 26.9(3) is not applicable at the leave stage, given that rule 56.1(3) states that parts 25 to 27 apply at the first hearing. Counsel for the Applicants in support of this contention have prayed in aid the case of **Orrett Bruce Golding** (supra).
- [24] The applicant also relied on the dictum of Phillips JA in **Chester Hamilton’s** case [supra] at paragraph 39, to reinforce the point that the Fixed Date Claim Form is invalid and cannot be cured. Phillips JA stated in that case in reference to **Edgehill et al vs. Greg Christie** (supra).

“In my judgment on appeal, I said that I had some sympathy for the applicants as their Fixed Date Claim Form had been filed, however, as their Fixed Date Claim Form had been filed without leave, because they had not been filed subsequent to leave having been obtained, they were invalid and could not be cured”

- [25] The circumstances in the case of **Edgehill et.al vs. Greg Christie** differ however, from the circumstances of this case. In **Edgehill’s** case the Fixed Date Claim Forms had been filed without leave because they had not been filed subsequent to leave having been obtained, hence the court found that they were invalid and could not be cured. In this case, leave to apply for judicial review is

being sought, but there is an error in the procedure. It is clear that in the Fixed Date Claim Form what is being sought is leave to apply for judicial review. The circumstances of both cases therefore are distinguishable. The question remains whether this error in the instant case can be cured.

[26] The case of **Orrett Bruce Golding** can also be distinguished on the facts from this case. In that case, the applicant failed to make a claim for judicial review within the prescribed fourteen (14) day period of the order granting leave. An extension of time was granted by the court so to do. On appeal, the main question the court had to grapple with was whether the lower court had the power to vary the condition by enlarging the time prescribed by rule 56.4(12). Counsel for the appellant before the Court of Appeal, relied on the provision of CPR rules 26.1(2)(c) and 26.9(3) in support of the argument that the court had the power to enlarge time.

[27] Smith JA in the Court of Appeal indicated that rule 56.13 does not support the contention that the court may invoke the provisions of rule 26 at the leave stage and that rule 56.13 speaks only to the powers of the court at the first hearing stage (page 19 of judgment). Having reached this position, he went on to examine whether the court had the power to grant the extension under rules 26.1(2)(c) and 26.9(3). He thus indicated:

The critical questions now are:

1 whether or not the court in the exercise of its general powers under rule 26.1(2)(c) may enlarge the time for the filing of the claim form notwithstanding the provisions of rule 56.13; and

2 whether or not the court has the power to grant the extension under rule 26.9(3) which addresses the general power of the court to rectify matters, where there has been a procedural error.

[28] He posited that rule 26.9(1) clearly states that rule 26.9 only applies where the consequence of non-compliance has not been specified. He opined that in rule 56.4(12) provides a consequence for failure to comply, so accordingly, rule 26.9(3) was not applicable to that case.

- [29]** The question I have to resolve in this case, is whether the court's general powers under rule 26.9(3) can be invoked in the circumstances of this case, where there is no stated consequence for failure to comply.
- [30]** Having considered the matter, I agree with counsel for the Respondent, that rule 26.9(3) is applicable in the circumstances of this case, as the consequence of non-compliance has not been specified. The court can therefore invoke its general powers under rule 26.9(3) to rectify the procedural error.
- [31]** It is evident that it is the intention of the Respondent to make an application for leave for judicial review as seen in paragraph 1 of the Fixed Date Claim Form. In the circumstances, the court can exercise its discretion to make things right and to give effect to the application by treating the Fixed Date Claim Form as the Application for Leave to Apply for Judicial Review. I do not believe that this error in the procedure is fatal.
- [32]** I am of the view that this posture will not occasion any unfairness to the Applicants, nor cause any undue prejudice to them. In fact, as far as I am concerned, grave prejudice and injustice would be caused to the Respondent, were I to strike out the application, as this could mean that he may incur significant costs in starting over and may not be able to meet the deadline fixed by the rules in bringing his application.
- [33]** Striking out should be a last resort exercised by the courts and the cases are replete with this position. This is not a case that warrants striking out.
- [34]** I come to this decision also, bearing in mind and having regard to the overriding objective as stated at CPR rules 1.1 and 1.2, which is to deal with cases justly, fairly and expeditiously.
- [35]** The primary aim of the CPR is to move away from unnecessary technicalities and formalities which will be a bar to the fair and expeditious hearing of matters. The rules are to be applied in such a way as to promote the overriding objective. This is not to say that the rules are to be flaunted and treated with scant regard,

but where there is an error in procedure which goes to form rather than substance, which can be rectified, as in this case, then the rules are to be applied so as to rectify the error.

[36] In the premises, I make the following orders:

ORDER

1. Time is abridged for the service of the Notice of Application for Court Orders filed on May 7, 2019.
2. The Notice of Application to Strike Out Claim filed on May 7, 2019 is refused.
3. The Fixed Date Claim Form filed on April 26, 2019, is to be treated as the Application for Leave to Apply for Judicial Review.
4. The hearing of the Application for Leave to Apply for Judicial Review is adjourned to July 18, 2019 at 12 noon for one (1) hour.
5. Leave to Appeal is granted.
6. No order as to costs
7. Applicant's Attorney-at-Law is to prepare file and serve orders herein

.....
Hon. G. Henry-McKenzie, J (Ag)