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Judgement Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL M215/1993

IN CHAMBERS

BETWEEN	NORRIS McLEAN	PLAINTIFF
AND	DET. SGT. HAMILTON	1ST DEFENDANT
AND	SUPT. WALKER	2ND DEFENDANT
AND	SGT. GOFFE WALKER	3RD DEFENDANT
AND	ATTORNEY-GENERAL	4TH DEFENDANT

Miss Y Emmanuel instructed by Haughton & Associates for plaintiff
Miss S Bennett instructed by Director of State Proceedings for defendants

REASONS FOR DECISION

Heard on April 9, 2002

JONES, J. (Ag)

1. This is an application by the defendants to strike out proceedings for want of prosecution and an application by the plaintiff to enlarge time. I will now set out the background facts from which this application arose.

2. The plaintiff Norris McLean filed a writ of summons together with a statement of claim on July 1, 1993, against the defendants claiming damages for false imprisonment. The Director of State Proceedings acting on behalf of the Attorney-General of Jamaica, hereinafter called "the fourth defendant", entered

appearance on August 26, 1993, and filed a defence on September 24, 1993. An order for trial to be set down within thirty days on a summons for directions was made on April 27, 1994, and the plaintiff filed a certificate of readiness on February 6, 1996. On December 15, 1997, the plaintiff filed an application to enlarge time. The record reads that the matter was adjourned as the plaintiff was absent and the summons was only served on the day of the hearing of the matter.

3. The fourth defendant contends that since the re-listed summons to enlarge time was served in January 29, 1997, the plaintiff has not taken any further action until February 2002 when the re-listed summons was again served on the fourth defendant. The fourth defendant brought a summons to dismiss the writ of summons filed by the plaintiff, for want of prosecution. He contends his defence has been prejudiced as Supt. Walker has resigned from the police force and Det. Sgt. Walker cannot be located. Although Det. Sgt. Hamilton is still available, the passage of time has eroded his memory. He submitted that the defendants are unable to have a fair trial given the long delay.

4. In a terse response, the attorney for the plaintiff maintained that the plaintiff and his attorneys were not at fault as the delay was due to the file being lost by the Supreme Court registry. Paragraphs 6 through 14 of the plaintiff's affidavit puts it this way:

> *"6...we in fact filed a summons for the enlargement of time on the 16th day of December 1997 to which we had no response, and our legal clerk made several attempts to ascertain the position, but the file could not be found. A letter was written to the Registrar of the Supreme Court on the 25th day of January 1999 requesting assistance."*

7. That no response was received to this letter and a follow up letter was sent on the 30th day of March 1999

8. That the Registrar responded on the 7th day of April 1999 giving permission for the file to be reconstructed

9. That this was done and submitted under cover of our letter dated 19th day of April 1999

10. That no response was received from the Supreme Court and we again wrote on the 10th day of March 2000 requesting an update on the matter.

11. That on the 25th day of October 2001 we again wrote to the Supreme Court outlining the problems experienced and seeking a resolution

12. That in response to this, the Registrar under cover of letter dated 13th November 2002 asked that we reconstruct this file again.

13. That in response, this was done under cover of our letter dated the 20th November 2001

14. That this demonstrates that we have not been dilatory in this matter and there is no want of prosecution and it will be a grave injustice for the Writ in this action to be struck out."

5. The first issue in this case is whether or not the delay on the part of the plaintiff and his advisors has been inordinate and inexcusable. Secondly, that being so, was there a real risk that the defendants would not have a fair trial, or would be prejudiced if the matter were to be tried.

6. The fourth defendant launched an assault on the plaintiff's position by submitting that this court has inherent jurisdiction to dismiss a case for want of prosecution. She referred to Lord Diplock's judgment in ***Bremer v. South Indian Shipping Corporation reported at [1981] 2 WLR 141*** where he said at pg 147:

"...such a power is inherent in its constitutional function as a court of justice... the power to dismiss a pending action for want of prosecution in cases

where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an "inherent power" the exercise of which is within the "inherent jurisdiction" of the High Court."

7. The fourth defendant further submitted that the guidelines for the exercise of this jurisdiction is set out in an oft quoted passage from the judgment of Lord Diplock in the leading case of ***Birkett v. James [1978] AC*** 297. His Lordship said:

> *"The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."*

8. She also relied on a section from the judgment of the trial judge in the case of ***Grovit v. Doctor and others*** [1997] 2 *AllER* 417 *:*

> *'Does that mean that the courts are powerless unless the defendant can show prejudice? It is said that the sword of Damocles argument only ought to be used or acceded to in exceptional cases. I do regard this as a case where the court is fully entitled to say that the very existence of an action which the plaintiff has no interest in pursuing is intolerable and there is no reason why defendants, some of whom are no longer in any way connected with the corporation and may (to their great relief) not have to be concerned with any of the other litigation, should still have this hanging over them.'*

9. And also:

> *"...I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion*

> *can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James."*

10. The fourth defendant then made reference to a case from the Jamaican Court of Appeal. In ***Vasti Wood v. H.G Liquors Limited and Crawford Parkins etc [1995] 48 WIR 240*** Wolfe JA (as he then was) said:

> *"...that the substantial risk that there cannot be a fair trial because of the inordinate delay and prejudice are two separate entities and that the proof of one or the other entitles a party to have the matter dismissed for want of prosecution. Once there is evidence that the nature of the delay exposes a party to the possibility of an unfair trial he is entitled to the favourable exercise of the court's discretion, prejudice apart. Inordinate delay, by itself, may make a fair trial impossible. Prejudice, in my view, includes not only actual prejudice but potential prejudice which in the instant case would be the possibility of not being able to obtain a fair trial because of the passage of time.*

11. In the present case, this court is satisfied that the delay was inordinate; but was it excusable? Is a delay caused in part by the act of a third party (in this case the Supreme Court registry in mislaying the court file in the case), sufficient to excuse the plaintiff's delay, and constitute grounds for the court to strike out the summons to dismiss for want of prosecution? No decision involving the same facts have been found, but I derived enormous assistance from two cases. First, in ***Roebuck vs. Mungovin*** *[1994] 2 AC 224* the facts involved blameworthy

conduct by the defendant himself. It was held that some types of conduct by a defendant in the pursuit of the action was not an absolute bar in law to his obtaining a striking-out order on the ground of the plaintiff's previous inordinate, inexcusable and prejudicial delay. It is however a relevant factor to be taken into account in the exercise of the judges discretion to strike out the claim. The facts were that the plaintiff was injured 1984 and issued a writ in 1986 against the defendant together with a statement of claim. In July 1986, the defendant in his defence admitted liability but raised the issue of damages and asked for further and better particulars of the statement of claim. In the period up to May 1990, the defendant sought to obtain information as to the quantum of the plaintiff's claim. On May 3, 1990, the defendant's solicitors wrote to the plaintiff's solicitors asking for the information and documents concerning quantum. On July 29, 1991, the defendant applied for the action to be struck out for want of prosecution. The plaintiff's solicitors replied that an accountant had been asked to prepare a schedule of special damages. The proper information was not sent to the plaintiff's solicitors until a year had passed.

12. Secondly, in ***Hunter vs. Skingley [1997] 1WLR 1466*** the defendant worked for the plaintiff in 1987. In November 1987, the plaintiff sued the defendant for damages for breach of contract, and obtained final judgment for damages to be assessed in June of 1988. The defendant disappeared for two years but reappeared in July 1990 and applied unsuccessfully for leave to appeal out of time. In November 1992, the parties agreed to have mutual discovery. On April

26, 1993, a preliminary issue was tried before the Master, but adjourned until May 11, 1994, through the plaintiff's fault. There were further adjournments until February 1996 as a result of the illness of the plaintiff's expert. On March 4, 1996, the defendant applied to strike out the plaintiff's action for want of prosecution. The first ground was that of inordinate and inexcusable delay which resulted in three of his expert witnesses being unavailable to testify. The second ground was that the delay had dimmed the memory of his remaining witnesses, thereby causing him prejudice. The judge found that there had been inordinate and inexcusable delays. He said that the defendant was responsible for the 5 years' delay from November 1987 to April 1993, and the plaintiff being responsible for the delays from April 1993 to May 1994 and from September 1994 to February 1996. The judge held that it would be artificial to allocate prejudice between the parties in relation to the periods of delay for which each was responsible, but that the plaintiff's delays were inordinate and inexcusable and had substantially dimmed the parties' own recollections, so as to make a fair trial impossible. He struck out the plaintiff's action.

13. On appeal by the plaintiff it was held that on an application to strike out an action for want of prosecution where both the defendant and the plaintiff were responsible for delays which might prejudice a fair trial, it was proper and necessary to consider the various periods of delay and items of alleged prejudice, and to decide, where possible, to whose fault they were attributable. As the evidence could be seen on the premises, was documented or covered by the

experts' reports, it was still possible to have a fair trial. It was therefore ordered that the action should not be struck out

14. The unchallenged evidence in this case is that the defendants cannot be blamed for the delay. The delay, however, can be apportioned between the plaintiff and the Supreme Court registry. Although the decisions in ***Mungovin*** and ***Skingely*** (supra) were made in the context of a partially blameworthy defendant, in my view, the same reasoning is applicable where a third-party shares the blame for the delay with the plaintiff. The question therefore arises in the context of the overall delay, whether or not the contribution to the delay by the plaintiff was significant.

15. Let us now examine the timeline. The plaintiff's affidavit of readiness was dated February 6, 1996. After the first reconstructed file was misplaced, the plaintiff was able to send a second reconstructed file to the registry on November 20, 2001. That entire period of delay was 2114 days or approximately five and three quarter years.

16. The registry's contribution can be assessed in this way. The letter to the registry requesting assistance with the lost file and requesting the first reconstruction of the file was dated January 29, 1999. The second reconstructed file was finally sent to the registry on November 20, 2001. It can be inferred that for the period January 29, 1999, to November 20, 2001 the Supreme Court registry was liable for the delay. The registry's involvement in the delay was some 1030 days or approximately two and three quarter years. In other words,

the contribution of the registry to the overall delay can be assessed at just below half.

17. The court finds that the defendants were prejudiced by the long delay and are unable to get its witnesses to have the matter tried fairly. That fact taken together with the significant contribution to the delay by the plaintiff himself or his attorneys, leads me to conclude on balance that in the interest of justice the Writ of Summons should be struck out against the First, Second, Third and Fourth Defendants, and the action against them should be dismissed for want of prosecution. Accordingly, it is ordered that the summons to enlarge time is denied, and the summons to strike out proceedings for want of prosecution is granted.