NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
SUIT NO. M 75 OF 1995

IN THE MATTER OF the Status of the Children Act Under section 7 (1) (b) and section 10

AND

IN THE MATTER OF the paternity of Duke Mahadeo Campbell (Infant)

AND

IN THE MATTER OF the Registration (Births and Death) Act section 19b (2) (bb) (cc)

AND

IN THE MATTER of the Estate of William Knighten Campbell, deceased

BETWEEN	MICHAEL ANTHONY CAMPBELL	PLAINTIFF
AND	DUKE MAHADEO CAMPBELL (By Susan McGann, Guardian and Next Friend)	DEFENDANT

IN CHAMBERS
Pamella Gayle, Joan Paris Woodstock and Gloria Langrin for the claimant
Defendant absent on hearing dates

June 18, July 2 and September 18, 2008

SUMMARY JUDGMENT - NO REAL PROSPECT OF SUCCESS - RULES 10.5, 15.2 (a) and (b), 25.1, 26.3 (1) (c) OF THE CIVIL PROCEDURE RULES

SYKES J.

1. It is a common occurrence in Jamaica that the death of a person of material wealth has a tendency to spawn claimants to the estate. This case proved to be no different. Mr. William Knighten Madden (William), a self made man and a man of means, died on November 27, 1994. Master Duke Mahadeo Campbell (Duke) is alleged to be the son of William. This was rebuffed by Mr. Michael Campbell (Michael) who claims to be the child of William by one Mrs. Kathleen Daniels (nee Mowatt). This dispute led to the current claim before the court. Summary judgment was granted to the claimant in an oral judgment delivered on July 2, 2008. These are the reasons for that decision.

2. This matter came on for trial on October 3, 2007. At that time, the defendant was unrepresented and the court granted an opportunity to retain counsel. The matter was adjourned to October 4, then to October 5 on which date Mr. Michael Williams, attorney at law, attended and indicated he would represent the defendant.

3. On October 5, the court made a number of orders regarding the taking of samples for DNA analysis. These orders were made because the submission of Mrs. Gayle was to the effect that based on the available evidence and the time that the matter was before the court (twelve years), the matter ought to be concluded as quickly as possible. It was her view that the defendant was unlikely to be successful in defending the claim and it was extremely doubtful whether a trial was required having regard to the hopelessness of the defendant's case. Without putting it in so many words, Mrs. Gayle was asking for summary judgment. Having heard from Mrs. Gayle, Mr. Williams and Miss Susan McGann (the next friend of the defendant) I decided that in the time that has elapsed since 1995 when the claim was first filed, DNA analysis was available in Jamaica and if possible, that evidence should be had. I made this decision because the issue in the claim was whether the defendant was William's. Orders were then made in respect of having DNA evidence placed before the court.

4. The matter was adjourned for a case management conference in chambers. The purpose was to consider the result of the DNA analysis. On December 18,

2007, Mrs. Marvalyn Taylor-Wright, attorney at law, came to chambers and told the court that she was recently attended upon by Miss McGann who wished to retain her as counsel. Apparently, Mr. Williams' services were terminated. The matter was adjourned to allow Miss McGann to retain counsel. Also, additional orders for DNA sampling and analysis were made on December 18, 2007. Miss McGann was present on this date.

5. The matter was next set for a case management conference on March 28, 2008. I should point out that at all times it was explained to Miss McGann that the purpose of securing this evidence was to assist in deciding whether the claim could be resisted and whether a trial was necessary. She was a willing participant in this evidence gathering exercise. On March 28, 2008, Miss McGann attended the hearing and informed the court that she had not retained Mrs. Taylor-Wright. The matter was adjourned to Tuesday, April 1, 2008. On this dated, Miss McGann arrived quite late but while the matter was being dealt with. The claim was adjourned to May 20 but on that date Miss McGann did not attend. The claim was further adjourned to June 18, 2008. Miss McGann was absent on this date. The hearing proceeded and an oral judgment was delivered on July 2, 2008. The additional evidence was gathered and an assessment was made on whether the defendant had a real prospect of successfully defending the claim. So much for the litigation history of the matter. I now set out the allegations so that the decision to grant summary judgment to the claimant can be appreciated.

6. It is fair to say that the examination of the defendant's case even without the DNA results revealed that the case was quite weak. The DNA evidence created further hurdles for the defendant which led ultimately to the conclusion that the defendant had no real prospect of successfully defending the claim. The evidence against the defendant on October 3 comprised the handwriting evidence of Senior Superintendent Carl Major and the statement given to the police by one Mr. Thomas Beckford, a Justice of the Peace. This evidence pointed strongly against the defendant's contention that Duke was the child of William.

7. Miss McGann, the acknowledged mother of Duke, is claiming that she had a sexual relationship with William that spanned a number of years beginning in 1987 when she was seventeen years old. According to her, she first met William at Mount Charles in the parish of St. Andrew. After the initial meeting, William came by her house the very next morning and the evening, and such were his persuasive skills that she moved from the hills of Mount Charles to William's house located at 4 Long Lane, St. Andrew, on the rolling plains of Liguanea.

8. She further stated that the relationship between them was tempestuous. This led to her leaving him on a number of occasions. During one interregnum she met Mr. Mahadeo and was impregnated by him and she bore a child. Despite the fact that William was not the father of this child he (William) expressed the desire that Miss McGann continue to live with him. According to her, she had a second child for Mr. Mahadeo. William did not protest. She alleges that by 1992, after the birth of her two children sired by Mr. Mahadeo, she had a third child which she alleges was fathered by William. This is Duke Mahadeo Campbell. The irony of the middle name.

9. In her assertions she has the support of the late Mr. Seymour Aston Stewart, attorney at law, who claims he was William's legal adviser and friend. He says that he knew William since 1958. He states that he knew that William fathered Duke. He acquired this knowledge from his visits to 4 Long Lane. According to learned counsel, he began seeing Miss McGann at 4 Long Lane from 1987 and she was introduced to him as William's mistress. Mr. Stewart also stated that William always acknowledged that Duke was his child.

10. In light of what was said so far, one would have thought that having William registered as the father of the child when he was born would not have presented a great problem. It turned out that William was not registered as the child's father. It is not entirely clear how this omission came about, but suffice it to say Miss McGann set about rectifying this omission.

11. On July 4, 1990, Miss McGann took a man who purported to be William to Mr. Thomas Beckford so that a declaration of paternity under the Status of the Children's Act could be signed. According to Mr. Beckford, Miss McGann brought a man there and introduced him as Mr. William Knighten Madden, the father of Duke. Mr. Beckford states that the man produced identification. The Justice of the Peace stated in his statement to the police that he asked the man if he appreciated what he was about to do and having received an affirmative answer, the man signed the document acknowledging that he was Duke's father. Mr. Beckford then signed and placed his stamp on the document, witnessing and representing that he Mr. Beckford had complied with the necessary formalities. This act by Mr. Beckford led to the alteration of the records at the Registrar of Births and Deaths. William was now recorded as the father of Duke.

12. By an originating summons dated September 18, 1995, Michael, sought a declaration that two other children were not children of William. This has now been withdrawn by Michael. However the summons claimed two other reliefs that are the relevant ones for the purposes of this case. They are:

a. an order that the Certificate of Registration of Paternity in respect of Duke Campbell be cancelled in accordance with Registration (Births & Deaths) 19B (2) (bb) (cc) (sic);

b. a declaration that the relationship of father and child does not exist between William Knighten Campbell, deceased, and Duke Knighten Mahadeo Campbell, born on 31st May 1993, pursuant to section 10 (1) (c) of the Status of Children Act.

13. Paragraph (b) was added by way of amendment on February 13, 1996, on the application of Michael. Also on February 13, McCalla J (Ag) (as she was at the time) ordered that the originating summon be treated as if it were a writ of summons and that the affidavits filed stand as pleadings.

14. In support of his claim, William deployed what is described below. Senior Superintendent of Police, Mr. Carl Major, a handwriting analyst at the Forensic Laboratory of the Jamaica Constabulary Force, examined the signature on the declaration of paternity which purported to be that of William. The Superintendent compared this signature, with sixty known and acknowledged signatures of William. The known signatures included, signatures on (i) his passport, (ii) a power of attorney; (iii) twenty seven cheques; and (iv) two driver's licence. He concluded that signature on the declaration purporting to be signed by William was not signed by him. This was indeed a heavy blow against the defendant's case.

15. As the investigation in what was now a case of forgery progressed, Mr. Beckford, the Justice of the Peace, it will be recalled witnessed the purported signature of William, was shown a number of photographs by the police, including a genuine photograph of William, and asked to identify him. This he failed to do and when the picture of William was pointed out to him, he stated that that was not the man that Miss McGann brought to him. He went further to explain that the reason he signed the declaration was that he knew Miss McGann for a long time and took her at her word. This was another blow against the defendant's case.

16. The third bit of evidence that weighed heavily against the defendant was Miss McGann's sworn affidavits. She apparently forgot some of the assertions she made in the affidavit; assertions, which in light of the DNA analysis, made the case virtually impossible to sustain. It will be recalled that she stated that Mr. Mahadeo fathered two children and William fathered the third child. Pursuant to orders of the court, DNA samples were taken from Michael

Campbell, Duke Mahadeo Campbell, Daniel Mahadeo and David Silvera. Duke Campbell, Daniel Mahadeo and David Silvera, according to Miss McGann were her three children. The DNA result showed that Michael Campbell was not the biological sibling of the three other males using the paternal line. The analysis went on to say that the results were consistent with the three male children being of the same paternal line. At first glance it may seem that this supported the defence in that the DNA showed that Michael and Duke were fathered by different men which would be consistent with the defence case that William was Duke's father and not Michael's. However, the DNA is suggesting that the three boys were fathered by one and the same person and since Miss McGann is adamant that Mr. Mahadeo father two of the three boys then it necessarily follows, based on her logic, in light of the DNA evidence, that Mr. Mahadeo also fathered Duke. If this is so, this would explain why Michael is from a different paternal line from the other three males. This is consistent with William being the father of Michael and not the father of Duke. In short, the DNA suggests that the father of Duke, is more probable to be the father of Daniel and David. Mr. Mahadeo, the reputed father of two of the children, was not taken to the DNA analyst by Miss McGann as ordered by the court for his DNA to be taken for analysis. This state of the evidence did not augur well for the defence. I now to the applicable law.

17. The principles of law applicable here are not in doubt. Under part 15 of the Civil Procedure Rules (CPR), there is a new power. It is the power to give summary judgment for either claimant or defendant when there is no real prospect of successfully prosecuting or defending the claim (see rule 15.2). Under the CPR, the court is authorised, indeed commanded, to manage cases actively and make such orders as will further the overriding objective of disposing of cases quickly, fairly and allocating to it a fair share of the court's resources. The ability to grant summary judgment in appropriate cases for either defendant or claimant is a salutary development and if used judiciously will generate great savings in time, money and effort. I now turn to judicial exposition of the applicable principles.

18. What is the judge to do on a summary judgment application? and what is the purpose of the new power? The answer to the second question is to be found in this rather long passage from Lord Hobhouse (dissenting on the outcome but not the law) in ***Three Rivers District Council v Governor and Company of the Bank of England (No. 3)*** [2003] 2 AC 1, paras. 158 - 161:

> ***This leads me back to the CPR. ... It is Part 24. It authorises the court to decide a claim (or a particular issue) without a trial.*** *Unlike Order 14, it applies to both plaintiffs (claimants) and*

the defendants. It therefore can be used in cases such as the present where the application for judgment without trial is being made by the defendant. The court may exercise the power where it considers that the "claimant has no real prospect of succeeding on the claim" and "there is no other reason why the case or issue should be disposed of at a trial". ... The important words are "no real prospect of succeeding". ***It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment.*** *It is a "discretionary" power, i e one where the choice whether to exercise the power lies within the jurisdiction of the judge.* ***Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party.*** *If he concludes that there is "no real prospect", he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made "findings" of fact. He did not do so. Under RSC Ord 14 as under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the "bottom line" is what ultimately matters.*

...

The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality. *The majority in the Court of Appeal used the phrases "no realistic possibility" and distinguished between a practical possibility and "what is fanciful or inconceivable" (ante, p 83h). Although used in a slightly different context these phrases appropriately express the same idea. Part 3 of the CPR contains similar provisions in relation to the court's case management powers. These include explicit powers to strike out claims and defences on the ground, among others, that the statement of case discloses no reasonable ground for bringing or defending the claim.*

159 *Before your Lordships it was accepted by counsel that this part of the appeal should be decided under CPR Part 24 applying the criterion "no real prospect of success". An exchange of correspondence has confirmed this. (A similar criterion is also appropriate where there is an application for leave to amend to add a new case.) Recent statements in the Court of Appeal concerning Part 24 bear repetition:*

"The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for

themselves. The word 'real' distinguishes fanciful prospects of success or, as [counsel] submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a ' fanciful' prospect of success."

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. " (Swain v Hillman [2000] 1 All ER 91, 92, 94, per Lord Woolf MR)

"The CPR are a procedural code with the overriding objective of enabling the court to deal with cases justly including saving expense and ensuring that it is dealt with expeditiously and fairly. The court must seek to give effect to the overriding objective when it exercises any power given to it or interprets any rule. I take this into account when considering the application under Part 24.2 ... [The language of Part 3.4] is very akin to that in the now extinct RSC Ord 18 and 19 and under which this application was commenced (and as good as succeeded) at the first hearing. This Part includes 'a claim which raises an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides'." (Sinclair v Chief Constable of West Yorkshire Transcript No L189 of 2000, per Otton LJ. See also Harris v Bolt Burdon [2000] CPLR 9)

There is no point in allowing claims to proceed which have no real prospect of success, certainly not in proceeding beyond the stage where their hopelessness has clearly become apparent.

160 *The difficulty in the application of the criterion used by Part 24 is that it requires an assessment to be made in advance of a full trial as to what the outcome of such a trial would be. The pre-trial procedures give the claimant an opportunity to obtain additional evidence to support his case. The most obvious of these is discovery of documents but there is also the weapon of requesting particulars or interrogatories and the exchange of witness statements may provide a party with additional important material.*

161 *The judge's assessment has to start with the relevant party's pleaded case but the enquiry does not end there. The*

allegations may be legally adequate but may have no realistic chance of being proved. On the other hand, the limitations in the allegations pleaded and any lack of particularisation may show that the party's case is hopeless. (my emphasis)

19. Thus summary judgment applications are designed for those cases which do not need any investigation of the facts at a trial. It enables the court to dispose of hopeless cases early and avoids wasting of resources; the court's and the litigants'. The summary judgment power is not confined to obviously hopeless cases. While it is true that a case that has no hope of success must necessarily also be a case that has no real prospect of success, there are also cases that are arguable but have no realistic prospect of being established (see Lord Hoffman at para. 41 in ***Sutradhar v Natural Environment Research Council*** [2006] 4 All ER 490). The test is not whether the case is arguable but whether there is a real prospect of success. Therefore, it is no longer adequate to rely simply on pleading a case that is "legally adequate" in response to a summary judgment application or an application under rule 26.3 (1) (c). That is merely the starting point. Close examination may reveal that the legally adequately pleaded case has "no realistic chance of being proved" (see Lord Hobhouse at para. 161 in ***Three Rivers District Council (No. 3)*** above).

20. An example of the hurdle of proof being so great that there was no realistic prospect of success can be found in the analysis of the allegations by Lord Hoffman in the case of ***Sutradhar v Natural Environment Research Council*** [2006] 4 All ER 490, at paragraph 41. I appreciate, of course, that the claimant in ***Sutradhar*** would have failed because the House held that the proximity was not established to make the defendant liable in tort but that should not detract from Lord Hoffman's extensive examination of the evidential hurdles in front of the claimant, each difficult to negotiate individually with the result that the cumulative effect was to make success not real. It is clear that the power is an extraordinary one which should be exercised cautiously because it has the effect of depriving a person from presenting his evidence before a court. This should also put an end to the proposition, common heard in these courts, that on an application under these provisions the court is restricted to an examination of pleadings alone and cannot examine the proposed evidence.

21. In answer to the question, what does the judge do on a summary judgment application I refer to Lord Hope in ***Three Rivers District Council (No. 3)***, who said at paragraphs 94 and 95:

For the reasons which I have just given, I think that the question is whether the claim has no real prospect of

succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is--what is to be the scope of that inquiry?

95 *I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.*

22. The judge is required to examine the pleadings as well as the proposed evidence and is to make an informed assessment of the likely outcome of a future trial.

23. The Court of Appeal of England and Wales in the case of ***Keesoondoyal v. BP Oil UK Ltd*** [2004] C.P. Rep. 40 provides a very robust example of the application of the principles identified by Lord Hope and Lord Hobhouse. In that case, there was an allegation of fraud made against a defendant. The claimant outlined a formidable case and all that came from the defendant were

bare denials. This case explodes the idea that is prevalent in Jamaica, that bare denials in the face of a formidable claim, is sufficient to slip through the rigours of case management and slither into court. This case has firmly and rightly shut the door to that kind of approach. The trial judge granted summary judgment. Let me set out the submissions made by counsel for the fraudulent defendant so that the full impact of what the Court of Appeal did can be appreciated. In paragraph 10, the court summarised counsel's submissions as follows:

> *10. In his written submissions in support of the application for permission to appeal, Mr Davies submitted that the cumulative effect of the first defendant's good character, the absence of any evidence that he benefited from the fraud, the fact that he had not absconded, unlike his brother-in-law (he is on bail in the criminal proceedings), his co-operation with the claimants, the ease with which other employees of the claimants might have defrauded them, the discovery that other persons could have access to the relevant area on the server, and the possibility that some other person employed by the claimants could have engaged with the second defendant in the deceit and set out to frame the first defendant, raise a sufficient prospect that the first defendant's bare denial defence might succeed to justify permission to appeal against the judge's order.*

24. All these matters were relied on by counsel to say that there was a real prospect of success. Counsel, on the facts of that case, had a formidable task. He could not succeed by merely establishing that the case was arguable. He could not succeed by showing that there was some prospect of success. He had to meet the adjective 'real'. He had to show that the prospect of success was 'real' and not just merely possible. May L.J. upheld the trial judge's decision that there was no real prospect of success because the evidence put forward by the claimant was not answered by the defendant in such a manner as to give rise to triable issues. May L.J. accepted the submission by the claimant that the defence proffered did not have any factual basis. It was fanciful and without substance. Paragraph 13 sets out May L.J.'s summary dismissal of the submissions made on behalf of the appellant. His Lordship observed:

> *The written submission on behalf of the claimants before the judge was that it was plain and obvious that this was a simple fraud by which the first defendant colluded with his brother-in-law and sister to steal money from the claimants*

by arranging for the presentation and passing of fraudulent invoices. The defence which the first defendant had put forward was, it was submitted, fanciful and demonstrably untrue. It was a case in which it was "possible to say with confidence before trial that the factual basis for the [defence] is fanciful because it is entirely without substance". That was a quotation from the opinion of Lord Hope of Craighead at paragraph 95 of his judgment in Three Rivers District Council v The Bank of England (No 3) [2001] 2 All ER 513.

25. Of note too, is the approval by the Court of Appeal of the judge's analysis of the proposed evidence. In other words, there is nothing wrong with a first instance judge, where the material before the court permits that to be done, examining the intended case for either party and granting summary judgment accordingly. It is not a fact finding process. It is an assessment of a real prospect of success. This is exactly what I have done here.

26. I am also mindful of the warning given by Mummery L.J. in ***Doncaster Pharmaceutical Group v The Bolton Pharmaceutical Ltd*** [2007] F.S.R. 3, who indicated at paras. 5 and 6:

> **5** *Although the test can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.*
>
> ***6*** *The outcome of a summary judgment application is more unpredictable than a trial. The result of the application can be influenced more than that of the trial by the degree of professional skill with which it is presented to the court and by the instinctive reaction of the tribunal to the pressured circumstances in which such applications are often made.*

27. In the case before me, the DNA shows up severe inconsistencies in the defence. The defence admits that Miss McGann's first two sons were by the same father but the third by William, but the DNA shows that this is extremely unlikely to be the case. The DNA demonstrates that the father of the three boys is more probable than not the same person. Mr. Major's evidence is indicative of a forgery. Mr. Stewart's evidence that William said the child of his cannot overcome the DNA and the forgery. All that Mr. Stewart's affidavit shows is that William had a sincere belief that he was the father of Duke. Finally, Mr. Beckford did not identify the picture of William, when it was placed before him by the police, as the person who came with Susan to sign the declaration of paternity. To use Lord Hoffman's approach in ***Sutradhar***, if the defendant will find it extremely difficult to overcome any one of the hurdles in her way, it is extremely unlikely that she will overcome all three. In light of these three major strikes against the defence's case, can it really be said that there is a reasonable prospect of successfully defending this action?

Conclusion

28. It is my view that there is no real prospect of successfully defending the claim. Summary judgment is given for the claimant with costs to be agreed or taxed. Counsel for the claimant to prepare a draft order to give effect to this judgment. The draft order should contain consequential orders as well.