

11/11/09

## JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 04623

BETWEEN	DONOVAN EARL HAMILTON	CLAIMANT
AND	IAN HAYLES	RESPONDENT

Ms Nesta Smith for Claimant instructed by Ernest Smith and is with claimant.

Messrs Earnest Smith and Ransford Braham who appears with Ms. Smith are unavoidable absent.

Mr. Abe Dabdoub for Applicant Respondent instructed by Mr. Gayle Nelson and Company with Mr. Gayle Nelson and Respondent.

Mr. K. Kalill Dabdoub who appears with Mr. Abe Dabdoub also unavoidable absent

**HEARD; 17<sup>TH</sup> November, 2009 CAV 4<sup>th</sup> December, 2009**

**IN CHAMBERS**

**Coram D. MCINTOSH, J.**

Before the Court is an application to strike out Fixed Date Claim Form filed by the claimant on the 12<sup>th</sup> October, 2009.

The claimant is seeking Declarations pursuant to Section 44 of the Jamaica Constitution .

The applicant in paragraph 14 of his affidavit avers that on the 9<sup>th</sup> day of October, 2009 his attorneys obtained photo copies of documents filed in the Registry of the Supreme Court for which no date had been fixed and immediately set about filing this application to have the matter struck out.

It seems that applicant by his preemptive strike was seeking to attack as the best form of Defence and to induce the Court to “Rush to Judgment”.

He contends that the claim should be struck out for the following reasons:

- a). That the Supreme Court of Jamaica lacks jurisdiction to hear the claim;
- b). That the claim discloses no cause of action;
- c). That the claim is an abuse of the process of the Court; and
- d). That the Claim, being substantially a claim which questions the election of a member of the House of Representatives, is not brought in accordance with the provisions of Section 44 of the Constitution of Jamaica and in accordance with Election Petitions Act.

The inherent Power of the Court at first instance to strike out cases is one which should be exercised with great care and due diligence. It should only be done in the simplest cases and those which are clearcut cases of abuse of process.

The exercise of this power is prima facie not encouraged by the constitution; not in keeping with the main objectives of the Civil Procedure Rules and does not meet readily with the approval of Courts of Appellate Jurisdiction.

It seems to this Court that the power to strike out cannot be exercised when there are vexed, diverse or serious issues of facts and or Law to be decided.

This court takes the common sense approach that when the matter engages the Court for a day, with Counsel making lengthy submissions and praying in aid volumes of authorities, the matter speaks for itself and begs for a hearing. If it is that this view is regarded as simplistic, one only has to look at the grounds of applicant and his reasons for seeking the orders in this application, which reads:

***“The claimant is aware or ought to have reasonably been aware that the Defence of the Claim would involve complex legal issues and that any Application to strike out the Claim would of itself involve complex legal issues”.***

If that were not sufficient it is made even more explicit in paragraph 2 of that application just how controversial the applicant regards the issues.

The Real Mischief in this application is the attempt to oust the jurisdiction of the Court by an implied suggestion that Statutory Law supersedes the Constitution and is paramount law.

This may well be a misguided idea driven by zeal. It must be clearly understood that the Constitution is the primary law of the land.

It cannot be thought that a statute so obliterates the rights of the citizen to petition the Court that that citizen cannot even bring his application to the Court.

The Constitution gives the citizen the right to bring a petition before the court in any Constitutional matter. It is for the Court to decide whether that citizen should be allowed to go to the Constitutional Court. This right of the citizen to petition the Court for Constitutional Redress has not been summarily aborted or abrogated by any statute.

This court will dismiss the respondent's application with costs to the claimant to be taxed if not agreed.

Leave to appeal granted to applicant.