**EASTERN CARIBBEAN SUPREME COURT**
**SAINT CHRISTOPHER AND NEVIS**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. SKBHCV2016/0074**

**IN THE MATTER of Sections 5 (1), 5 (1) (e), 5 (3) (a) & (6), 5 (4), 5 (5) and 6 of the Constitution of St. Christopher and Nevis**

**And**

**IN THE MATTER of an Application on for Declatory and Compensatory relief by JERMAINE BROWNE pursuant to Section 18 (1) & (2) of the Constitution of St. Christopher & Nevis**

**BETWEEN:**

**JERMAINE BROWNE**

**Respondent/Claimant**

**and**

**THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS**

**1st Defendant**

**and**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**2nd Defendant**

**Appearances:-**

Mr. O'Grenville Browne of Counsel for the Claimant
Mrs. Rivi Lake of Counsel for the Defendants

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2017: November 13th

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**JUDGMENT**

[1] On 27th February, 2012, the respondent/claimant was arrested and remanded into police custody. On 2nd March, 2012 he was issued three separate charges of house breaking with intent to commit a felony.

[2] On 13th February, 2013 the preliminary inquiry into one of those charges commenced. At the conclusion of the preliminary inquiry on 11th October, 2012, the respondent/claimant was committed to stand trial at the January 2014 Criminal Assizes.

[3] He was arraigned on 14th January, 2014 and pleaded not guilty. His trial commenced on 24th February, 2014. On 25th February a directed verdict of acquittal was entered. However, the respondent was remanded in custody to await trial on the other two charges.

[4] On 4th June, 2015, the Director of Public Prosecutions entered a *Nolle Prosequi* in respect of these two charges. The respondent was eventually released from custody on 23rd June 2015, having spent a total of some three years and three months in custody.

[5] On 3rd March, 2016 the respondent/claimant commenced an action against the Attorney General and the Director of Public Prosecutions by filing a Fixed Date Claim Form, a Statement of Claim and an Affidavit in Support of Originating Motion seeking several declarations and compensatory relief. The Fixed Date Claim Form sought declarations that his arrest and detention for a period of three years and three months without trial was unreasonable, violated his constitutional right to personal liberty, and contravened section 5 (5) of the Constitution of St. Christopher and Nevis and further sought an order that he is entitled to compensatory relief and damages for the unconstitutional deprivation of his liberty.

[6] The applicants/defendants apply to have the case struck out pursuant to Civil Procedure Rules 2000, "CPR" Part 26.3(1) (a) and (c) and the court's inherent

jurisdiction. Specifically, the applicants/defendants seek to have the statement of claim and affidavit struck out for failure to comply with CPR 8.1 (1); 56.7(1), 56.7(3) and 56.7(4**)**; and an order that the statement of claim be struck out as an abuse of process.

[7] The applicant/defendants contend that this being an application for an administrative order, Part 56 mandates that the application be made by fixed date claim supported by evidence on affidavit; not a statement of claim; for which the rules make no provision in an action of this nature. It is said that the filing of a statement of claim is procedurally improper, otiose and seeks reliefs that are inconsistent with those sought in the Fixed Date Claim Form.

[8] The applicants further submit that Part 56.7(4) (a) – (e) prescribes, in mandatory terms, the contents of the supporting affidavit. The applicants/defendants contend that the respondent's affidavit does not conform to these mandatory requirements. In particular, it is said that the affidavit does not disclose one provision of the Constitution that is said to have been breached. The applicants/defendants submit that these defects are fatal to the claim. **Homer Richardson v The Attorney General of Anguilla**[1] is cited as authority for this proposition.

[9] The applicants/defendants also submit that the respondent has failed to plead the ingredients sufficient to establish a constitutional case and is incurably deficient.

[10] Counsel further posited an additional basis for saying that the respondent's/claimant's case should be struck out as an abuse of process. Counsel submitted that alternative remedies, namely, judicial review or a common law action for damages are available and further, a constitutional motion is ill-suited to cases where there is a substantial dispute as to the facts.

[11] It was further submitted by the applicants/defendants that the 2nd defendant is not a proper party to these proceedings.

[1] AXAHCV2005/0031

[12] In reply, learned counsel for the respondent, Mr. O' Grenville Browne submitted that the court should only strike out a statement of case where pleadings disclose no cause of action or the defences are frivolous and vexatious. He submitted that the discretion to strike out should be exercised sparingly. The court could exercise the discretion to rectify any procedural errors pursuant to its powers under CPR 26.9.

[13] In response to the applicant's criticisms of the content of the affidavit, Mr. Brown submitted that even if found to be non-compliant with CPR 56.7 (4) the court need not resort to the draconian sanction of striking out. He submitted that in the proper exercise of its discretion the court could order a supplemental affidavit to be filed. Counsel relied on the case of **Attorney General v Giselle Isaac**[2] as authority for this proposition.

[14] Learned counsel for the respondent/claimant submitted that there is a serious allegation of constitutional infractions and the respondent/claimant should not be barred from seeking constitutional redress on account of procedural missteps.

[15] As it relates to the issue of an alternative remedy, learned counsel for the respondent/claimant submitted that redress is not sought for tortious claims of assault and battery, false imprisonment or malicious prosecution. What the respondent/claimant seeks is redress for breach of his constitutional rights to a hearing within a reasonable time and his right to personal liberty.

**Issues**

[16] The issues that arise for resolution in this case are:

(i) Whether the respondents' case should be struck out for non-compliance with CPR 8.1 and 56.7;

(ii) Whether an alternative remedy is available to the

[2] ANUHCVAP2015/0014

respondent/claimant so as to preclude access to the court via originating motion;

(iii) Whether the 2nd defendant is a proper party to the proceedings.

**Discussion**

[17] CPR 26. 3(1)(a) and (3) empower the court to strike out a statement of case or any part of it if there has been a failure to comply with a rule, practice direction or order or if the statement of case or the part to be struck out is an abuse of the process of the court.

[18] The procedure by which applications for an administrative order must be commenced is derived from a combined reading of CPR 8.1 (1) and 56.7. So far as relevant, they are in the following terms:

> "8.1(1) A claimant starts proceedings by filing in the court office the original and one copy (for sealing) of –
> (a) the claim form; and (subject to rule 8.2)
> (b) the statement of claim; or
> (c) if any rule or practice direction so requires – an affidavit or other document."

> "56.7 (1) An application for an administrative order must be made by a fixed date claim in Form 2 identifying whether the application is for
> (a) a declaration;
> (b) judicial review;
> (c) relief under the relevant Constitution; or
> (d) for some other administrative order (naming it); and must identify the nature of any relief sought.
> (2)The claim form in an application under a relevant Constitution requiring an application to be made by originating motion should be headed 'Originating Motion'.
> (3) The claimant must file with the claim form evidence on affidavit.
> (4)The affidavit must state –
> (a) the name, address and description of the claimant and the defendant;
> (b) the nature of the relief sought identifying –
> (i) any interim relief sought; and
> (ii) whether the claimant seeks damages, restitution, recovery of any sum due or alleged to be due or an order for the return of property, setting out the facts on which such claim is based and, where practicable, specifying the amount of any money claimed;
> (c) in the case of a claim under the relevant Constitution – the provision of

the Constitution which the claimant alleges has been, is being or is likely to be breached;
(d) the grounds on which such relief is sought;
(e) the facts on which the claim is based;
(f) the claimant's address for service; and
(g) the names and addresses of all defendants to the claim."

[19] The effect of these provisions read together is that an application for an administrative order is commenced by claim form with supporting affidavit headed "Originating Motion"; not a statement of claim. I am therefore in agreement with the submissions of learned counsel for the applicants/defendants that the procedure employed by the respondent/claimant violates CPR 8.1.and 56.7 to the extent that a statement of claim was also filed.

[20] Accordingly, the statement of claim must be struck out for failure to comply with these rules.

[21] The question is whether this necessarily leads to the entire case being struck out. I am of the opinion that it does not. The respondent did file contemporaneously with the fixed date claim form an affidavit in support of his application as required by CPR 56.7. The task is to determine whether this affidavit is itself compliant with the rules or should be struck out.

[22] The power to strike out is one that must be used sparingly. The rationale for this cautious approach was explained by Mitchell, J.A. in ***Tawney Assets Limited v East Pine Management***[3]:

> "The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case 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."

[3] Civil Appeal No. 7 of 2012 (Unreported)

[23] CPR 56.7 (4) provides that where an administrative order is sought in the case of a claim under the constitution, the supporting affidavit must state, *inter alia*, the nature of the relief sought, identifying, *inter alia,* whether the claimant seeks damages and setting out the facts on which such claim is based, and where practicable, specifying the amount of any money claimed; the provision of the constitution which the claimant alleges has been or is likely to be breached; the grounds on which such relief is sought; and the facts on which the claim is based.

[24] The applicants/defendants rely on the construction placed on this rule in **Homer Richardson v the Attorney General[4].** In that case Bruce-Lyle, J held that these requirements of Rule 56.7(4) are mandatory. He stated:

> "Secondly, the mandatory nature of Part 56.7(4) leaves me with no doubt that its provisions should or must be complied with strictly before a Claimant can raise the Court's jurisdiction. The overriding objectives in my view should not be used as an excuse to come before the constitutional court in a cavalier manner, where strict provisions laid down are a requisite."

[25] This issue was further considered in **Attorney General v Franklyn Dorset and Bernard Richards[5].** Thomas, J held that the provisions of CPR 56.7(4) were conjunctive and as such there must be total compliance. In that case he held that there was non-compliance with sub-paragraphs (b) and (c) of CPR 56.7(4) and held this to be fatal.

[26] However, the Court of Appeal's decision in ***Attorney General v Giselle Isaac[6]*** makes it plain that non-compliance with CPR 56.7(4) is not necessarily fatal. In considering an argument that the judge below had erred in striking out the claim for non-compliance with CPR 56**,** Blenman, J.A. squarely addressed the issue of the effect of non-compliance with CPR 56.7(4) and had this to say:

> "For the sake of completeness, it is worthy to mention that the learned

[4] Claim No. AXAHCV/2005/0031
[5] SKBHCV2012/0399
[6] ANUHCVAP2015/0014

> judge was quite correct in holding that any omissions in the supporting affidavit did not make the proceedings a nullity. Even though the affidavit failed to comply with CPR 56.7(4), the omission could have been remedied by the filing of a supplemental affidavit. Indeed, to accede to the Attorney General and Minister's request on this basis would have been draconian as opined by the judge."

[27] To similar effect is the decision in **Savita Indira Salisbury v The Director of the Office National Drug and Money Laundering Control Policy (ONDCP)**[7]**.** The appellant instituted a claim against the respondent in the form of a fixed date claim and, instead of filing with the fixed date claim form evidence on affidavit as stipulated by CPR 56.7(3), filed a statement of claim. The respondent filed a defence to the claim. At the hearing of the matter the respondent objected to the appellant's claim on the basis of non-compliance with CPR 56.7(3) and made an oral application to strike out the matter. The learned trial judge struck out the claim on the basis that the appellant had failed to file an affidavit in support of the claim or to apply for relief from sanctions. The appellant appealed alleging that the learned trial judge erred in striking out the claim on the basis of the alleged breach of the rules since in the circumstances of the case CPR 26.9 was applicable.

[28] The Court of Appeal held that in circumstances where the rule or order of court does not provide for sanctions where there is a default in procedure, it is not open to the court to read any sanction into the rule. The CPR provides no sanction for non-compliance with CPR 56.7(3). Therefore, the appellant's non-compliance with that rule did not require the appellant to file relief from sanctions. It was further held that CPR 26.9(3) confers jurisdiction on a judge to make an order to put matters right if there has been an error of procedure or a failure to comply with a rule, practice direction, court order or direction. This the court may do on o*r* without an application by a party. The failure of the appellant to file affidavit evidence in support with the fixed date claim was a procedural error. Hence, the learned trial judge would have been clothed with jurisdiction to give an appropriate direction to put matters right. Considering that the respondent would not have been prejudiced

[7] ANUHCVAP2012/0044

by an order to put matters right and that doing so would only further the overriding objective of the CPR, the learned trial judge did err in his refusal to do so.

[29] In light of the foregoing, I respectfully decline to follow ***Homer Richardson*** in so far as it states that any defect in the affidavit is necessarily fatal. I am obliged to consider the contents of the respondent's/claimant's affidavit and to determine whether such defects, as there may be, are fatal or may be remedied by a supplemental affidavit.

[30] Accordingly, I turn now to a consideration of the respondent's/claimant's affidavit in order to assess whether it is compliant with the requirements of these rules.

[31] The affidavit identifies the claimant and defendants, although it omits to state their respective addresses. It identifies the nature of the relief sought at paragraph's 33-37. The grounds on which the reliefs are sought and the facts constituting the section 5(5) infringement are plainly discernible on a reading of the affidavit which traces the history of the respondent's/claimant's arrest, detention, court appearances, trial disposition and release from custody over the period 27th February, 2017 to 23rd June, 2015.

[32] True it is that the affidavit does not state the provision of the constitution said to have been breached as required by CPR 56.7(4)(c); it merely asserts that the respondent's/claimant's constitutional rights were violated. But this can hardly warrant the applicants'/defendants' submission that *"there is a complete violation of the mandatory rules found in r 56.7(4).*"

[33] I consider that such defects as are present in the respondent's/claimant's affidavit are curable by filing a supplemental affidavit and are not fatal to the respondents' case. I am fortified in this view when I call to mind the learning that the discretion to strike out a case should be exercised sparingly and the overriding objective.

[34] Accordingly, I hold that it would be draconian to strike out the respondents' case

owing to these defects in the affidavit and I decline so to do. I am satisfied that CPR 26.9 empowers the court in circumstances such as these to put right any procedural misstep.

[35] I would also reject the applicants'/defendants' submission that the affidavit does not disclose a cause of action and consider it pointless to dwell on any defects in the statement of claim since I have already struck this out and it is therefore irrelevant.

**Alternative Remedy**

[36] The only remaining issue is whether an alternative remedy is available to the respondents such that they should not be permitted to access the court by the constitutional motion route.

[37] It is well settled that an application for constitutional relief should not be used as a general substitute for the normal procedures for invoking judicial control of administrative action and where there is a parallel remedy unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course: ***Attorney General of Trinidad and Tobago v Ramanoop***[8]

[38] It is also true that it is ill suited to decide substantial factual disputes. Nonetheless, where on the information available to an applicant for constitutional relief a constitutional motion is properly launched, it is recognized that the subsequent emergence of substantial factual disputes does not render the proceedings an abuse where the alleged facts, if proved, would call for constitutional relief: **Ramanoop.**

[8] [2005] UKPC 15

[39] As Lord Hope said in **Jaroo v The Attorney General of Trinidad and Tobago**[9] at paragraph 38:

> "The appropriateness or otherwise of the use of the procedure afforded by [s.18] must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future."

[40] In this case, the applicants/defendants submit that an action for judicial review or a common law action for damages is available to the respondents. Thus it is an abuse of process to seek constitutional redress. No authority is provided as to the availability of these specific remedies where one asserts a breach of constitutional right to a hearing within a reasonable time.

[41] Counsel for the respondent/claimant contends that the claim is solely one for breach of the respondent's/claimant's constitutional right to a trial within a reasonable time. While the pleadings may have contained facts that could sound in tort, the declarations and reliefs sought, relate to the constitutional infringement.

[42] I cannot accept the submissions of learned counsel for the applicants/defendants that judicial review is an available alternative remedy. Judicial review is appropriate to challenge the lawfulness of a decision or action, or a failure to act, by a public body exercising a public function. The pleadings do not seek to mount such a challenge. Instead, the respondent/claimant takes issue with the alleged failure to proceed with his case with due expedition.

[43] Further, I can discern no substantial factual dispute on this discreet issue. In their affidavit in reply the applicants/defendants accept that the respondent/claimant was taken into custody at HMP on 3rd March, 2012 and released on 23rd June, 2015. They do aver, however, that some parts of the respondent's/claimant's detention period (approximately five months) were spent serving short sentences for escaping lawful custody, malicious damage and aggravated assault.

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[9] [2002] UKPC 5

[44] In my view, in these circumstances, the constitutional motion is an appropriate vehicle by which to convey this claim into the court's jurisdiction.

[45] I would therefore reject the applicant's/claimant's submission on this issue.

**Whether the 2nd defendant is a proper party to the proceedings**

[46] The applicants/defendants have submitted that the 2nd defendant is not a proper party to the proceedings. It is said that the respondent/claimant has failed to state in what capacity or on what grounds an action for constitutional redress is being laid against the Director of Public Prosecutions. It is further said that the respondent's/claimant's affidavit does not disclose how the 2nd defendant has breached the claimant's constitutional rights.

[47] The respondent/claimant has not addressed these submissions in its response.

[48] There is no indication in the respondent's/claimant's affidavit how, if at all, the 2nd defendant was complicit in or responsible for any period of delay in bringing the case to trial. The bare assertions at paragraphs 16 and 17 that the depositions disclosed no evidence against the respondent/claimant and that the Director of Public Prosecutions was reckless in in his delay in entering a *Nolle Prosequi* are insufficient to raise a cause of action against the 2nd defendant.

[49] The court is in agreement with the submissions of learned counsel for the applicants/defendants on this issue.

[50] Having regard to the facts and matters hereinbefore discussed, I make the following orders:

**IT IS HEREBY ORDERED:**

1. That the statement of claim filed on 3rd March, 2016 on behalf of the respondent/claimant herein is struck out for failure to comply with CPR 8.1(1) and 56.7;

2. That the second defendant is not a proper party to the proceedings and should be removed as a party;
3. Unless within 14 days of the date of this order the claimant serves a supplemental affidavit on the defendant this claim will stand dismissed without further order;
4. Each party to bear its own costs.

**Trevor M. Ward, QC**
Resident Judge

**By the Court**

**Registrar**