

THE REPUBLIC OF TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2014 – 00410

BETWEEN

DANIYAAL MUHAMMAD

Claimant

AND

**STEPHEN ERIC MAYNARD
DIANA MAYNARD JOHNSON**

Defendants

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. R. Boodoosingh for the Claimant

Ms. E. Nayack for the Defendants

Ruling on preliminary point

1. By Claim Form and Statement of Case filed on 3rd February 2014 the Claimant (Daniyaal) sought a declaration that he is entitled to possession of a concrete dwelling house situate at No. 1 First Drive, Simeon Road (hereinafter referred to as “the property”) together with the tenancy rights thereof. By Notice of Application filed on 5th February 2014 the Claimant also sought an injunction against the Defendants to prevent them from entering and evicting him from the property.
2. By Defence and Counterclaim and an Affidavit in response deposed to by Ms. Earla Nyack both filed on 17th March, 2014, the Defendants averred that the Claimant’s claim amounts to an abuse of process and should be dismissed in light of the Judgment granted in favour of the Defendants by this court made on 25th April, 2013 (hereinafter referred to as “the Order”). The Defendants counterclaimed the sum of \$4,000.00 representing a non-refundable deposit paid to workers to assist in the execution of a writ of possession issued pursuant to that order and in respect of which the injunction had been sought. At the hearing of the application for the injunction, the Defendants gave an undertaking to the Court not to evict the Claimant from the property until the hearing and determination of this claim. Further at the hearing of 11th June, 2014 the court directed that Written Submissions be filed in respect of the issue of abuse of process raised by the Defendants as a preliminary point.

History

3. The history of previous connected proceedings is of relevance to arguments presented on this preliminary point. The Case of *Stephen Eric Maynard and Diane Maynard Johnson – v- Shariyfa Muhammad also called Gail ann Davis and Anor.* C.V.2012-01500 (hereinafter referred to as “the previous action”) forms the basis of the Defendants’ argument that the present claim amounts to an abuse of the court’s process. In the previous action the Defendants to this action brought a claim for possession in respect of the very premises which forms the subject of the present claim against the Claimant’s mother

Shariyfa Muhammad also called Gail Ann Davis (hereinafter called “Gail”) who was the First Defendant in that said action. At the time of the filing of the previous action Gail was out of the jurisdiction. She filed a statutory declaration in court stating, inter alia, that she was in fact out of the jurisdiction. She attended court only once, that is, after the matter had been adjourned a second time. The Claimant in this claim attended all other hearings on behalf of his mother. Despite being granted three adjournments and an extension of time to file Affidavits in opposition to the claim, she failed to comply with the court’s order and to present her case.

4. In the circumstances the previous action was eventually dealt with in her absence but with Daniyaal being present. Judgment was granted on 25th April 2013. The material part of the judgment for present purpose is as follows:

*“The First Defendant shall surrender possession of the premises known as 17 First Drive Simeon Road, Petit Valley, including the dwelling house situated thereon to the Claimants; and
There shall be a stay of execution of 60 days.”*

The claim

5. The allegation is that the property was previously owned by one Umilta Clerine Greenidge, now deceased, and that Clyde Maynard, now deceased was her tenant. Clyde Maynard was the father of three children, that is, the two Defendants and Gail. Clyde Maynard died intestate on the 1st March 1998 and the rights to the property were transferred to the First Defendant by Deed of Assent dated 30th November, 2006 and registered as No. DE200603112297. Subsequently, the First Defendant sold a half share interest in the property to the Second Defendant by Deed dated 18th March 2011 and registered as No. DE201100850532. Therefore the Defendants are the paper title owners to the property.

6. The Claimant allegedly began living on the property together with his two sisters when his mother migrated to Canada some twenty (20) years ago. At that time he was six (6) years old and the Defendants did not reside there. Since the Claimant's occupation of the property the Defendants have never resided there. The Claimant and his family maintained the property and planted fruit trees thereon. According to the Claimant, he and his sisters have been in exclusive and undisturbed possession of the property for a period of about twenty (20) years. Therefore the Defendants' right or title to the property has been extinguished and he is entitled to possession of same.

The Defence

7. The Defendants averred in their Defence and Counterclaim that they are in no way related to the Claimant's mother Gail and that the Claimant first came to reside on those premises in February 2010. They therefore deny the claim for adverse possession. They also aver that the claim should be dismissed because it amounts to an abuse of the court's process based on the fact that judgment was granted in their favour as against Gail in the previous action in respect of the same property. Further, that the Claimant was aware of those proceedings since he always appeared in court on behalf of Gail and should have made an application to have himself joined as a party to that action since he allegedly has an interest in the property. According to the Defendants the Claimant's claim for adverse possession is baseless since his occupation of the property stemmed from his mother's licence to occupy same and that he and his sisters only occupied the property for a mere four (4) years.
8. Further, in the Defendant's counterclaim the Defendants stated that arrangements were made by them to execute a writ of possession of the property on 4th February 2014. The Claimant filed this claim the following day after becoming aware that the execution was about to take place. A non-refundable deposit of \$4,000.00 was already paid to workers to assist in the execution however as a result of the Claimant filing an injunction the said execution did not take place and the said deposit was forfeited.

The Defence to Counterclaim

9. According to the Claimant this claim does not amount to an abuse of process and the Defendants (the Claimants to the previous action) should have made him a party to the previous action. The Claimant pleads that Gail is the biological child of Clyde Maynard and a copy of a Birth Certificate is annexed to the Defence to Counterclaim. The Claimant maintained that he and his siblings occupied the property long before 2010 and averred that the Defendants are not entitled to any remedies claimed in their counterclaim.

The Defendants' Submissions

10. The Defendants submitted that though the wording of the Order relates to Gail and not the Claimant, Daniyaal is still bound by the Order since both in open court and in the written reasons the court explained that it extended to Gail's family. Basing her argument that the Claimant was privy to the Order, the Defendants cited the case of *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54. It was submitted that the Claimant at the first case management hearing of the previous action indicated to the court that his occupation was through that of his mother's occupation.
11. The Defendants in their submissions also relied on the case of *The Orisha Shrine of Lord Ochosi v Junior De Verteuil* CV 2010-04844 to show that the Claimant was not a stranger to the Order. In that case the court found that there was an abuse of process since the Claimant in that action deposed to an Affidavit and signed the Statement of Case in a previous claim, though not in his personal capacity. The court held that there was a clear attempt by him to re-litigate an issue already determined in the Defendant's favour.
12. The Defendants also submitted on whether the issues raised in this claim could have or should have been raised by the Claimant in the previous action. Cases including *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481, [2002] 2 AC 1 and *Ashton Campbell v Aretha Clarke* CV 2012-02494 were relied upon to illustrate that this action filed by the Claimant was another attempt to litigate an issue already determined in the previous action.

In the latter case the court held that that action amounted to an abuse of process since members of the Clarke family took turns in litigating the issue of their alleged possessory title and with each new action they were tailoring their case to meet the obvious deficiencies.

13. The Defendants further submitted that the Claimant being fully aware of the previous action had the opportunity to make an application to join himself as a party to that action. The Defendants submitted that when the Order was explained to him in court, there was no objection by him but he pleaded with the court for sufficient time to relocate and the court granted a stay of execution of 60 days.
14. Finally, it was submitted by the Defendants that this claim amounts to an abuse of process because the Claimant is pursuing the appeal of the decision of the previous action on behalf of his mother which case is contradictory to this case.

The Claimant's Submissions

15. The Claimant submitted that he was not a party to the previous action and that the Claimants to the previous action (the Defendants in this action) should have summoned to court all parties which were to be affected by the Order. Counsel in his submissions referred to **Part 19.2 of the Civil Proceedings Rules 1998 as amended** which speaks of the court's power to add a new party to proceedings in certain circumstances. He submitted that the Claimants to the previous action knew Gail was not living on the property and that her family lived there. In this regard various passages from the cases of **Henderson v Henderson** (1843-1860) All E.R. Rep. 378 and **Johnson v Gore Wood Co.** (2001) 2 WLR 72 were quoted by Counsel but no analysis of the law in relation to the issues before the court was in fact made in the written arguments.

The Issue

16. The essential issue is whether the Order of the previous action applies to or binds the Claimant and in the circumstances whether the bringing of this action by him amounts to an abuse of process.
17. Part 26 of the *Civil Proceedings Rules 1998 as amended* empowers to the Court to strike out, dismiss or stay proceedings which are an abuse of process, including proceedings litigating issues already dealt with and determined in a previous action. It is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. *Paragraph 534 of Volume 11 of Halsbury's Laws of England 5th Ed 2009*. The court must therefore consider whether this claim for possession by the Claimant could have and should have been raised and/or litigated in the previous action. If this is answered in the affirmative then the bringing of this action does amount to an abuse of process and the court has the power to strike out the claim.
18. The cases of *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481, [2002] 2 AC 1 are well known authorities on abuse of process and were relied upon by both parties. They remain good law and in any event there is no dispute as to the law in this case. This court therefore does not propose to repeat the well known dicta therein.
19. For a successful argument of abuse of process in terms of re-litigation there must be more than a mere re-litigation. See *Persad v Ramkhan* CV: 2012-01390, Judgment of Rampersad J and *Bradford and Bingley Building Society v Seddon* [1999] 4 All ER 217. In *Bradford* there was an unsatisfied judgment on a claim by a defendant in an earlier action against a third party. In a subsequent action against the defendant the latter issued third party proceedings against the original and different third parties. In the judgment of Auld LJ, since the pleadings and judgment in the first action were arguably equivocal and since not all the differences in the plaintiffs claims in the second

action were unequivocal the third parties had failed to establish abuse of process. Auld LJ stated:

“In my judgment, mere re-litigation, in circumstances not giving rise to cause of action or issue estoppels, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose.’ Something more than re-litigation of a claim which could have been part of an earlier claim was required to render a second claim an abuse of process. This was an ‘additional element’: ‘Some additional element is required, such as a collateral attack on a previous decision”

20. There is no dispute that this claim involves property which was also the subject matter of the previous action. The issue of possession of the property has already been adjudicated upon in the previous action between Gail and the Defendants. This therefore begs the question as to whether this same issue of possession of the same property should be litigated upon by the Claimant in this action. It is to be observed in this regard that at the time of litigation of the first action, it was the Claimant herein who appeared and represented his mother. It is also a matter of record that Gail represented to the court in the previous action that her family including her children resided at the premises at the time of that action.
21. Further, it was incumbent on either party to that previous claim or Daniyaal having regard to the disclosure made therein, to apply to join Daniyaal as a party to the claim, his allegation of possession being directly linked to that of Gail’s defence of adverse possession. See **Part 19.2 of the CPR**. But for reasons unknown to this court no such application to join Daniyaal was made. This is a claim which by its very nature and circumstance could have been brought and dealt with in the previous claim, particularly by Daniyaal in whose interest it was to ensure that his claim was litigated.
22. Additionally, it appears to the court that Daniyaal is now attempting to re-litigate that which has already been litigated. In its present form, the case for the Daniyaal constitutes an attack

on the findings made by this court in its decision given in the previous action as it relates to the possession by Gail. It is clear to the court that the possession being claimed by Daniyaal is predicated upon the lawful possession of the premises by his mother for the statutory period, he being a minor in her care for a considerable period of her alleged possession. But that issue has already been the subject of adjudication by this court. The issue of adverse possession pleaded by Gail (to which the case of Daniyaal is inextricably linked and predicated upon) has been determined in the previous claim and cannot and ought not to be re-litigated. To so allow would be to permit an abuse of the court's process.

23. By way of example, it has been held that a person who has a common interest with a Defendant and is entitled to join the proceedings but decides not to do so, may in later proceedings be prevented from raising the issues he could have raised in the earlier proceedings. See *House of Springs Ltd and others v Waite and others* [1990] 2 All ER 990.
24. So that while it is not disputed that Daniyaal was not himself a named party to the previous action, the court does consider however that the Daniyaal is the son of Gail, that he represented her in court on various occasions in the previous action and that he could have and ought to have applied to the court to join in the action but he did not. The court therefore agrees with the submissions of the Defendants that the Claimant was privy to all that transpired in respect of the previous action and in those circumstances he is prevented from raising the issue of adverse possession in these proceedings.
25. The case of *Ashton Campbell* supra is similar to the case before the court. In that case the Claimant was the paper title owner of certain lands and the Defendant's defence was that of adverse possession of twenty-five (25) years by herself, her mother, her sister and her brother. There were two previous actions relating to the same property. The defendant and her mother were defendants in the first action in which judgment was given for the claimants. Her siblings were claimants in the second action which action they withdrew. Paragraphs 7 and 11 of the Honourable Madam Justice Gobin's reasons are of particular importance. The learned judge found that the proceedings before the court was just another

attempt to reopen a case which had gone against Ms Clarke's favour and that the Clarkes' appeared to be conveniently adjusting the claim to create or support a cause of action. Justice Gobin also found that a substantial part of the period within which some of the defendants were in occupation would have been during their infancy when they lived with their mother. Ultimately the defence and counterclaim were struck out on the basis that the subsequent action was an abuse of process.

26. In arriving at its decision, the court has also had to consider the overriding objective of the CPR. The case of *Urtis Mendoza v Daily News Limited and Ors* C.V. 2008-03176 involved an action for damages for libel. The defendant filed an application, inter alia, to have the claimant's case struck out as an abuse of process. The defendant grounded his application, inter alia, on the argument that the action was a repeat of an earlier libel action commenced by the claimant but due to want of prosecution by the claimant and/or his failure to comply with the courts directions the claim had been dismissed. The court subsequently ordered that the Claimant file affidavits in response by a certain time which was not complied with. The court then ordered that written submissions be filed and exchanged by the parties and again the Claimant failed to comply even after having been granted an extension of time to do so. The Honourable Justice Rajnauth-Lee in giving the decision of the court stated at paragraph 10 of Her Ladyship's decision as follows:-

"In actively managing litigation and in deciding whether to strike out a claim commenced under the Civil Proceedings Rules, 1998, the Court had to consider the overriding objective set out in Part 1.1(1) of doing justice and to decide whether the Claimant's wish to pursue a second case against the same Defendants outweighed the need to allot the court's limited resources to other cases."

27. The court found that the claimant failed to give any reason for his inaction in the first action and also failed to give any reason as to why the second action should be allowed to proceed. It was held that the Claimant's wish to pursue a second case against the same defendant did

not outweigh the need to allot the Court's limited resources to other cases and the claimant's case was struck out.

28. Similarly, this is a case which involves possession of property which was also the subject matter of the previous action. But even further, possession by a person who claims by virtue of possession of another whose claim to possession has been determined in the previous action. The court therefore finds that it would be inconsistent with the overriding objective to do justice between the parties if a re-litigation of the material issue was to be permitted bearing in mind the need to allot the court's limited resources to other cases.
29. Additionally the court notes that the previous action is now the subject of an appeal. Success for Gail in that appeal will in substance mean success for the Claimant in this case as far as his allegation of adverse possession is concerned. It is proper in the circumstances of this case that the Claimant await the outcome of the appeal in the previous matter and quite improper and an abuse of the court's process to essentially re-litigate that very case before this court.
30. Finally, the court has observed that at paragraph 5 of the Defence to Counterclaim filed by the Claimant, the Claimant avers that his mother is the lawful child of Clyde Maynard. The subject paragraph also avers that the Deed of assent purports to convey to the Defendants alone. It is passing strange that such an averment would find its place in a somewhat obscure paragraph in a Defence to Counterclaim. The court notes that no challenge to the deed of assent has been made by way of pleading or relief in the Claim Form or Statement of Case. Indeed the case for the Claimant appears from the proceedings filed by him, to be predicated solely on the doctrine of adverse possession. A mere mention of the fact of the relationship of parent and child in a paragraph which narrates facts only in answer to a counterclaim without more cannot in the court's view be equated with a claim against the estate of Clyde Maynard. Such a claim has not been pleaded by the Claimant. The court has therefore treated this claim as a claim in adverse possession simpliciter. No issue therefore arises there from in the court's view.

31. In the premises the Defendants are relived from the undertaking given on the 5th February 2014 and the claim is struck out for abuse of process. The Claimant shall pay to the Defendants 55% of the prescribed costs of the claim on the basis of the value of the claim being treated as a claim for \$50,000.00. The Claimant shall also pay to the Defendants the costs of the Injunction to be assessed by this court.

Ricky Rahim

Judge

25th September 2014.