IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CICA (Civil) Appeal No 20 of 2021
(Formerly Cause No. G 0093 of 2020)

BETWEEN:

BILIKA HARRY SIMAMBA

Proposed Appellant

-and-

THE ATTORNEY GENERAL

Proposed 1st Respondent

-and-

THE GOVERNOR OF THE CAYMAN ISLANDS

Proposed 2nd Respondent

AND

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAR FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CICA (Civil) Appeal 21 of 2021
(Formerly Cause No. G 0161 of 2020)

BETWEEN:

BILIKA HARRY SIMAMBA

Proposed Appellant

-and-

THE HONOURABLE JUSTICE IAN KAWALEY

Proposed 1st Respondent

-and-

BRIDGET MYERS

Proposed 2nd Respondent

AND

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAR FROM THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. CICA (Civil) Appeal 22 of 2021
(Formerly Cause No. G 0017 of 2021)

BETWEEN:

BILIKA H SIMAMBA

Applicant

-and-

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Respondent

BEFORE:

THE RT HON SIR BERNARD RIX, Justice of Appeal
THE RT HON SIR ALAN MOSES, Justice of Appeal
THE HON SIR MICHAEL BIRT, Justice of Appeal

Appearances: **Mr Bilika Simamba in person (via zoom)**
Mr Tom Lowe, KC instructed by Ms Heather Walker of the Attorney General's Chambers for the Respondents

Heard: **31 August 2022**

Judgment delivered: **10 November 2022**

JUDGMENT

MOSES JA:

1. This is the judgment of the court to which all have contributed. On 31 August 2022 the Court refused the applicant leave to appeal against the Order of St. John-Stevens J (Acting) of 28 October 2021. In that Order the Judge struck out the applicant's claim against the Attorney General and the Governor of the Cayman Islands in Cause No. G0093 of 2020 (known as the Constitutional Petition) and his claim against The Honourable Justice Kawaley and his assistant Bridget Myers in Cause No. G0161 of 2020 (known as the Personal Action). At the same time

the Court dismissed the appellant's appeal against the Order of St. John-Stevens J of 28 October 2021 in which he made a Restraint Order to remain in effect for two years. We shall identify the full terms of that Order later in this judgment. These are the reasons for those decisions. This Court announced it would deal with all the issues in the same judgment.

Recusal

2. At the start of the proceedings on 31 August 2022, Mr. Simamba submitted that the members of this Court should recuse themselves. He adopted, although he did not repeat, the preliminary objection dated 19 December 2021 (which the Respondents state was filed on 20 January 2022). This objection contains this submission:

> *"…the decisions of successive judges in the matter so far gives a reasonable apprehension of bias and intellectual dishonesty. In particular, but without liming(sic) the generality of this statement, despite strong documentary evidence against Mr. Justice Kawaley, the judges refuse to grant me a hearing with full discovery and cross-examination…."*

He makes allegations against both of the judges of this court who have previously made rulings, Beatson and Martin JAs and against the President who rejected Mr. Simamba's complaint against Beatson JA. He suggests that the history of what he perceives as his failure to receive justice from the judges of the Grand Court and the refusal of the judges of this Court to grant him permission to appeal "*suggests that (the case) should be decided by judges who do not currently serve in the Cayman judiciary*".

3. The appeal he seeks to pursue rests in part on the interpretation of Section 29 of the Grand Court Act (2015 Revision) relating to a judge's immunity from suit. This is a matter that this Court, whether consisting of the current members of the Court or an *ad hoc* bench, will have to consider. It is not arguable that if a judge rules, in relation to proceedings brought against another judge, on an issue relating to judicial immunity from suit they will be ruling on a matter in which they have a direct or indirect interest. If that were so, there could never be such a ruling. The mere fact that Martin JA dismissed Mr. Simamba's submissions as to Section 29 is no evidence of real or apparent bias either on his part or on the part of any other members of this Court. An adverse ruling on the issue of judicial immunity is no evidence whatever of real or apparent bias.

4. The other ground on which Mr. Simamba relies is what he describes as "*the general history of this case"*. It is true that two judges in this court, Beatson JA and Martin JA, have given rulings adverse to this applicant. But the idea that that gives rise to real or apparent bias on the part of

any member of this court is baseless. Justices in the Grand Court have previously rejected Mr. Simamba's submissions, in proceedings which this court will, in part, have to consider. But it is fanciful to suggest that that provides any basis for challenging the impartiality either of those judges or of the judges of this court. The fact that one judge has made adverse rulings in the past is no basis for an assumption that that judge will not deal fairly with future applications by the same litigant (see e.g *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133 at [29]). That principle applies *a fortiori* to the members of this court who have had, in any event, no previous occasion to consider Mr. Simamba's litigation. The history of Mr. Simamba's failures to persuade other judges of the merits of his arguments affords no foundation for a challenge to the constitution of this Court, which, it ought to go without saying, will remain true to its office and to the oaths each member has taken. The members of this Court could not identify any basis for recusal.

Is Leave to Appeal Necessary?

5. Mr. Simamba asserts that he does not require leave to appeal St. John-Stevens J's Order striking out the two claims to which I referred above (G 0093 of 2020 and G 0161 of 2020). He relies on Section 26(3) of the Bill of Rights (contained in Part 1 of Schedule 2 to the Cayman Islands Constitution Order, 2009) which provides:

> *"An appeal shall lie as of right to the Court of Appeal from any final determination of any issue by the Grand Court under the Bill of Rights, and an appeal shall lie as of right from the Court of Appeal to her Majesty in Council, but no appeal shall lie from a determination by the Grand Court under this section dismissing an application on the ground that it is frivolous or vexatious."*

6. Case No. G 0161 is a personal action brought against a judge and his assistant, in which damages are sought; it is not a claim under section 26(1), by which a claim may be made that:

> *"...government has breached or threatened his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time."*

Accordingly, section 26(3) has no application to Case No. G 0161.

7. By Section 6 (f) of the Court of Appeal Act (2011 revision), no appeal shall lie :

> "(*f*) *without the leave of the Grand Court, or of the Court, from an interlocutory judgment made or given by the Judge of the Grand Court except..*" (the exceptions do not apply).

8. The issue, therefore, is whether the Order of the judge was an interlocutory determination. Mr. Simamba submits that the order was final since it disposed of the "*entire cause or matter*". By virtue of Rule 12(6)(j) of the Court of Appeal Rules (2014 Revision):

> "(*6) Notwithstanding anything in sub-rule (3), but without prejudice to sub-rule (5), the following judgments and orders shall be treated as interlocutory-*
>
> *(j) an order striking out an action or other proceedings or any pleading under GCR Order 18 rule 19 or under the inherent jurisdiction of the court;"*

9. St. John-Stevens J's Order struck out the claim under GCR O.18 r. 19(1) and/or under the inherent jurisdiction of the Grand Court. It is plain, therefore, that the Order of the judge is to be treated as interlocutory and leave to appeal is required. Even if, contrary to our view, the personal action may be said to be a claim under section 26, this will not avail Mr. Simamba for the reasons which follow in relation to the Constitutional Petition.

10. Case No. G 0093, described as the "*Constitutional Petition*", does raise issues under section 26. Mr. Simamba submits that Justice St. John-Stevens' Order was final and accordingly Section 26(3) of the Bill of Rights affords him an automatic right of appeal.

11. The judge's determination was not final for the same reasons which were fatal to Mr. Simamba's contention in relation to his personal action. By rule 12 (1):

> *"For all purposes connected with appeals to the Court of Appeal, a judgment or order shall be treated as final or interlocutory in accordance with sub-rules (2) to (7).*"

By rule 12(3):

> *"A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it."*

Thus, even in relation to a claim under section 26, the court's decision to strike out the claim is to be treated as interlocutory.

12. Mr. Simamba submits that where the rights he seeks to vindicate are enshrined in the Constitution the rules should be modified so as to ensure that section 26(3) is not "*watered down or defeated*". His invocation of section 5(1) of the Constitution Order and section 26 gets him nowhere since section 26(5) provides:

> *"Nothing in this section adversely affects the ability of courts to manage their own procedure to ensure that cases are dealt with justly, fairly and expeditiously, including their ability to dismiss applications that are vexatious or unreasonable."*

13. This is a powerful indicator that a dismissal on the grounds that the proceedings under the Bill of Rights are unreasonable or an abuse are to be treated no differently from other proceedings. Indeed, if these proceedings had been struck out on the grounds that they were frivolous or vexatious there could have been no appeal at all, by virtue of the concluding provision in Section 26(3). There is no warrant for disapplying Rule 12 merely because the proceedings have been brought under section 26. If Section 26 had meant to give a different meaning to "*final determination*", it would have said so and specifically disapplied the normal rules under Rule 12.

14. Mr. Simamba also contends that the Order should be treated as final by virtue of rule 12(5)(b), which applies to an order granting relief made at the hearing of an application by judicial review. Even if the Order of the judge was an order granting relief, which it was not, the action brought under the Constitution was not an application for judicial review.

15. For these reasons the applicant requires leave to appeal against the Orders made in both his actions.

Leave to Appeal

16. The background to both the actions is the claim filed in the Grand Court (by writ dated 6 March 2014) in which the plaintiff, Mr. Simamba, claimed damages alleging medical negligence against the Health Services Authority, (Simamba v the Health Services Authority of the Cayman Islands G 0032 of 2014).

17. The chronology of events relating to this action is essential to appreciating the merits or otherwise of the applications before this Court. The events are summarised by Martin JA when

he refused permission to appeal in a full written judgment dated 22 December ~~2022~~ 2021*. It is not possible to improve his account of the events, set out particularly in paragraph 5 of that judgment. We should merely highlight a few key matters.

18. By a summons dated 2 September 2015, the respondent sought to strike out the plaintiff's action on two grounds: first, that the HSA was immune from suit and second, that in the absence of further expert evidence his claim was bound to fail.

19. The respondent lost its application. On 17 June 2019 Kawaley J declined to strike out the claim on either of the two grounds. He granted the plaintiff, who had hitherto declined to obtain further medical evidence, an extension to 31 October 2019 to file additional expert evidence, and, although he expressed some views on the immunity issue, he made it clear he was reaching no final decision as to whether the HSA was immune.

20. The plaintiff was granted a further extension to file medical evidence until 31 March 2020. After failing to provide any further medical evidence, on 17 September 2020 the claim was struck out. It is important to underline that the plaintiff did not ever seek to appeal that decision. Instead, he sought to appeal, out of time, the Order of Kawaley J dated 17 June, 2019 by an application dated 19 June 2020. This was dismissed by Beatson JA with full written reasons accompanying the Order of this Court dated 5 August 2020 at the same time as Mr. Simamba's application to file a Constitutional Motion was refused.

21. Mr. Simamba never sought to renew the applications before Beatson JA before the Full Court, as he should have done had he wished to challenge Beatson JA's Order. The consequence is that the order to strike out the medical negligence claim cannot now be impugned; the correct procedure for challenging Beatson JA's Order was never pursued. As Martin JA emphasised, it is pointless to seek to revive the original action by bringing collateral proceedings (see Martin JA [8]).

22. The two actions which are now before this Court are no more than an attempt to revive arguments which failed before Beatson JA and which were never renewed before the Full Court. Alternatively, they are arguments which Mr. Simamba ought to have attempted to deploy in an application for leave to appeal following Kawaley J's Order striking out his claim on 17 September 2020. As St. John-Stevens J put it [34]:

"In each of the two causes (the Constitutional Petition and the Personal Action) the Applicant/Plaintiff merely repeated and recast the complaints which had

been the subject of his unsuccessful constitutional motion and the application to appeal out of time."

And later [41]:

"It is an abuse of process of the court for a litigant to keep returning to the same court when not in agreement with decisions."

23. Mr. Simamba accepts that the two actions now before this Court repeat what he has so often contended before. At paragraph 6 of his written argument he says:

"Further, the current proceedings are really the same proceedings I brought by way of a medical negligence suit in 2014, so there is no issue of me being a vexatious litigator."

Although we do not accept his conclusion, this seems to be a concession that these proceedings are collateral actions brought to challenge and undermine decisions which cannot now be appealed. He makes a similar concession at the outset of his written argument (paragraph 1) appealing the decision to restrain him from pursuing further actions in relation to his original personal injury claim:

"All I have done is pursued (sic) all possible remedies under the law in relation to the same matter."

24. This was a ground central to the judge's decision to strike out both actions [171]:

"It is also plain and obvious that simple reiteration of the same issues, when there has already been an adjudication upon them, and indeed considered by an appellate court would, in my judgment, amount to an abuse of process of this Court."

25. It is relevant to note that Mr. Simamba is no stranger to the law, its systems and its procedures. He is a qualified lawyer who worked for the Cayman Islands Government. He chose not to pursue his application before the Full Court after Beatson JA's refusal and not to appeal the decision to strike out his action in September 2020. Instead, he opted to launch collateral actions designed to undermine, but not to appeal, the rulings of the court and to avoid the consequences resulting from his own choice. This is impermissible. There is no reasonable argument to the contrary. That ground alone would have justified dismissing the applications in both actions.

26. There are other grounds for upholding the judgment. It is not necessary to identify them all. But it is worth considering the argument Mr. Simamba has persisted in advancing in relation to St-John-Stevens J's conclusions as to judicial immunity when considering the personal action brought against Kawaley J and Bridget Myers (0161 of 2020). By Section 29 of the Grand Court Act (2015 Revision):

> *"(1) Neither the Chief Justice nor any Judge nor any person acting as Chief Justice or Judge under section 97 of the Constitution shall be liable to be sued in any civil court for any act done or ordered to be done by him- (a) when acting within his jurisdiction and in the discharge of his judicial functions; or (b) whether or not within the limits of his jurisdiction, provided that he, at the time and in good faith, believed himself to have the jurisdiction to do or order the act complained of, unless it is proved that he acted maliciously and without reasonable cause."*

Mr. Simamba repeats the submission he made to the Judge, that the opening words of section 29(1)(b) "*whether or not within the limits of his jurisdiction"* mean that if a judge acts maliciously and without reasonable cause he is not immune. This interpretation is not reasonably arguable. Reading the section as a whole, it is plain that a judge has absolute immunity when acting within his jurisdiction and only qualified immunity when acting without. Any other interpretation makes nonsense of section 29(1) and on any view, Kawaley J was acting within his jurisdiction when making the orders complained of by Mr. Simamba and St. John-Stevens J was correct at [102] so to find.

27. That conclusion is not surprising in light of the decision of the English Court of Appeal in *Sirros v Moore and Others* [1975] QB 118. Lord Denning MR said:

> *"Ever since the year 1613, if not before, it has been accepted in law that no action is maintainable against a judge for anything said or done by him in the exercise of the jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, it was actuated by envy, hatred and malice, and/or uncharitableness, he is not liable to an action."* (p.132)

28. It is beyond reasonable argument that Miss Myers was acting in the course of her duties, as agent of Kawaley J (see St. John-Stevens J at [183]).

29. Underlying both these actions lies Mr. Simamba's unshakeable belief that he was deprived of a fair and just hearing in his original personal injury action. As we have said, rather than pursue appeals against decisions which led to that action finally being struck out, he has sought to bring actions which blame first Mangatal J for delaying the hearing of the case and then Kawaley J for failing to permit him to attend by video link the proceedings in which he successfully resisted the respondent's attempt to have the action struck out in June 2019. Both the Judge and Martin JA have dealt as fully as is necessary and warranted by Mr. Simamba's submissions in which he attacks both judges.

30. We adopt in full the detailed reasons given by Martin JA in concluding that each of the grounds advanced are unarguable. We do not intend to diminish their cogency and effect by repeating those reasons in words of our own. We only add that Mr. Simamba took us through the emails which led to an *ex parte* hearing on 6 May 2019. He did so in support of the contention he has repeated that Kawaley J's account of proceedings on 6 May 2017 and 3 June 2019 was not merely inaccurate but dishonest. The Court has read the 12 emails, and heard oral submissions on them. Again, we adopt the reasons given by Martin JA at [10] (4) (g) and (h). It is perhaps, necessary, to repeat that by the decision of 17 June 2019, the good faith of which he attacks, Mr. Simamba defeated the respondents' attempt to strike out his action and never challenged the decision requiring him to provide additional expert evidence until it was far too late.

31. For these reasons, which are designed to do no more than briefly add to the comprehensive reasoning of Martin JA, we refused leave to appeal in respect of both of the actions.

The appeal against the Restraint Order

32. For a period of two years from the date of the Order, unless extended by the Grand Court, the appellant was restrained from issuing any claims, proceedings or applications in any court touching or concerning any of the matters raised in the following Grand Court and Court of Appeal causes, namely:

(i) Simamba v the Health Services Authority of the Cayman Islands Cause No. G 0032 of 2014;

(ii) Simamba v the Health Services Authority of the Cayman Islands /Simamba v The Attorney General and Governor of the Cayman Islands CICA Cause No 36 of 2019;

(iii) Simamba v The Attorney General and Governor of the Cayman Islands Cause No. G 0093 of 2020;

(iv) Simamba v The Honourable Justice Kawaley and Anor Cause No. G 0161 of 2020 with the Health Services Authority of the Cayman Islands Cause No. G 0032 of 2014.

33. The nature and tone of Mr. Simamba's arguments in relation to the actions struck out and his attempt to appeal against the striking out replicate those which pervade the whole of this litigation. He cloaks his arguments in terms of outrage and insult. When faced with a decision which he does not like or is adverse, he attacks and insults the judge who made the decision. He cannot abide being told he is wrong.

34. In his judgment dated 28 October 2021, St. John-Stevens J carefully and accurately identifies the principles according to which the Grand Court may exercise its power to make a civil restraint order, answering the questions posed in the three tests: the threshold test, the discretion test and the proportionality test [52]. Those tests were derived from *Philcox v Wilson* [2018] EWHC 3138, and *Nowak v the Nursing and Midwifery Council* [2013] EWHC 1932. They were not in dispute.

35. In relation to the threshold test, he cited Lord Bingham in *AG v Barker* [2000] 1 FLR 759 at 764:

> *"The hallmark (of persistent and habitual litigious activity) is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action perhaps with minor variations after it has been ruled upon in actions against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when early litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop."*

36. The Judge observed that Mr. Simamba had repeatedly attempted to litigate the same issues [59], had made allegations against Kawaley J which were "*completely without foundation and deliberately inflammatory*" [64] and "*persistently issued claims and made applications which are totally without merit*" [71].

37. The discretion test requires the court objectively to assess the risk as to whether the litigant will, if unrestrained, issue further claims or make further applications which are an abuse of the court's process [52].

38. The Judge set out the sequence of letters in which Mr. Simamba continued to make attacks and challenges particularly against Kawaley J between September 2020 and March 2021, in what St. John-Stevens J described as offensive terms [76], and concluded that he had "*no doubt*" that if unrestrained the appellant would persist in such behaviour [77].

39. The Judge then considered the proportionality of making a restraint order and what terms were required to balance the right of access to the court against the need to restrain the appellant's behaviour, culminating in the limited order he made [79]-[82].

40. The appellant does not challenge the principles which the Judge applied. His argument is no more than that he wishes and is entitled to repeat the allegations and submissions which he has previously made over and over again. As he says in his Grounds of Appeal:

> "*The issue I have been pursuing is the same case. It has gone through a number of iterations, but they are all legitimate*."

In his written argument he yet again criticises in unrestrained and scurrilous terms the conduct of Mangatal, Kawaley, St. John-Stevens JJ in the Grand Court to which he adds as targets of attack Beatson and Martin JAs. The terms in which he does so do no more than re-inforce the conclusions of St. John-Stevens J.

41. This court cannot and should not interfere unless the judge misdirected himself or reached a conclusion outwith the range of reasonable response. No argument has been advanced which even approaches grounds which might satisfy those tests.

42. The history of Mr. Simamba's pursuit of unreasonable litigation, adopted in unjustifiably exaggerated and offensive terms, demonstrates that the Judge had good reason to restrain the appellant. It is worth recalling the list of proceedings (identified in the affidavit (5 February 2021) of Heather Walker of the Solicitor General's Office) in which he has complained about the conduct of the original personal injury claim (No. G 0032 of 2014):

(i) 12 November 2019, a complaint of breach of Section 7 of the Bill of Rights, the "*Constitutional Motion"* under section 26 which was dismissed on 5 August 2020 by Beatson JA with reasons but then replicated in the action struck out by St. John-Stevens

J on 28 October 2021 in respect of which both Martin JA and the Full Court refused leave to appeal (see ii);

(ii) 12 June 2020, (G 0093 of 2020), a challenge under section 26 against the Governor and Attorney General alleging that he was not given a fair trial; struck out by St. John-Stevens J on 28 October 2021 in respect of which both Martin JA and the Full Court refused leave to appeal;

(iii) 19 June 2020, application for leave to appeal out of time against the ruling of Kawaley J on 17 June 2019 in G 0032 of 2014, dismissed with full reasons by Beatson JA on 5 August 2020;

(iv) 21 September 2020 threats of private prosecution of Kawaley J for perverting course of justice, fraud, breach of trust by a public servant and neglect of public duties in a letter to the Director of Public Prosecutions;

(v) 28 October 2020, personal action against Kawaley J and his assistant, struck out by St. John-Stevens J on 28 October 2021 in respect of which both Martin JA and the Full Court refused leave to appeal.

43. Not content with these proceedings and his threats, Mr. Simamba has launched an ugly and abusive press campaign against members of the judiciary on the Island. They do not deserve repetition save it should be recorded that they include threats against Kawaley J "*watch this space I am not done with this judge*" and "*Get ready to deal with this matter until your last days in Cayman. The battle lines are drawn*".

44. No court should have to tolerate this behaviour. There was no ground for complaint and never could be justification for these offensive threats. It is worth repeating that Mr. Simamba is a lawyer; he knows what he is doing; his behaviour is deliberate and calculated to provoke. The courts will not be provoked but will take steps to protect the rule of law on the Islands and those who seek to uphold it. The appellant is fortunate that the Order sought and made was limited. We dismiss the appeal.