Tong v. Tabai

High Court of Kiribati
Topping J.
10 March 1987

Civil procedure – Striking out pleadings on grounds of no reasonable cause of action – High Court (Civil Procedure) Rules 1964, Order 27, Rule 4

Injunctions – application for injunctions based on hypothetical circumstances which may or may not occur – Whether cause of action disclosed

The plaintiff issued a writ of summons and statement of claim against the defendant for standing for election as Beretitenti of Kiribati in the pending election. The defendant applied to strike out the pleadings on the ground that they disclosed no reasonable cause of action.

HELD: Under section 32(2) of the Constitution of Kiribati, candidates for the office of Beretitenti are to be nominated from among those elected as members of the Maneaba. At the date of filing of the writ of summons and statement of claim, the defendant had not been elected a member of the Maneaba since the election was still to be held. Even assuming his election, it was not certain he would be nominated as a candidate for the office of Beretitenti. The application for an injunction was therefore premature and could not succeed. Accordingly the pleadings were struck out and the action dismissed.

EDITOR'S OBSERVATION: Section 30 of the Constitution provides as follows:

(1) There shall be a president of Kiribati, who shall be known as Beretitenti.
(2) The Beretitenti shall be the Head of State and the Head of Government.

Section 38(2) of the Constitution, which reserves to the Chief Justice of Kiribati all questions relating to the "election" of a Beretitenti, also covers questions relating to the nomination of a candidate for election to the office of Beretitenti.

Cases mentioned in judgment:

Carl Zeiss Stiftung v. *Rayner & Keeler Ltd. (No. 3)* [1970] Ch. 506; [1969] 3 W.L.R. 991; [1969] 3 All E.R. 897

Drummond Jackson v. *British Medical Association* [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094

Dyson v. *Attorney-General* [1911] 1 K.B. 410

Hubbuck & Sons Ltd. v. *Wilkinson, Heywood & Clark Ltd.* [1899] 1 Q.B.

Inland Revenue Commissioners v. *National Federation of Self-Employed Businessmen* [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93

Kellaway v. *Bury* (1892) 66 L.T. 599; (1892) 8 T.L.R. 433

Wybrow v. *Chief Electoral Officer* [1980] 1 N.Z.L.R. 147

Action:
Application for order striking out pleadings.

B. Orme for the plaintiff
Atvaraci for the defendant

TOPPING J.

Judgment:

In High Court Case 4/87 the plaintiff issued a writ against the defendant and delivered a statement of claim.

This is an application by defendant to strike out the pleadings filed herein as it is said that the pleadings disclose no cause of action. Pleadings are defined by Order 1 Rule 1 of the High Court (Civil Procedure) Rules 1864 as: "Any petition or summons and also includes the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counterclaim of the Defendant". It does not specifically include a writ of summons. In England a writ of summons is clearly not a pleading – see Order 1. Rule 4(1) R.S.C. Nor in England is a statement of claim endorsed on a writ of summons a pleading, for although such a statement of claim is itself a pleading yet a writ of summons is not within the definition of a pleading, nor does the definition of a pleading apply to an originating summons in England. See Order 18 Rule 5/1 R.S.C.

There is also an application for further orders and costs. The application made on notice of motion is supported by an affidavit of Atanraoi Baiteke filed on behalf of the defendant. Jurisdiction to strike out is comprised in Order 27 Rule 4 of the High Court (Civil Procedure) Rules 1964.

This rule states:

> The Court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer.

In addition there is an inherent jurisdiction in the court to strike out that has not been invoked. The writ was issued on 27 February 1987 and its endorsement claims "[a]n injunction restraining the defendant from standing for election as Beretitenti in the elections due to be held in May 1987 in breach of the provisions of part 1 of Chapter IV of the Constitution."

The statement of claim alleges that the defendant proposes to stand for the office of Beretitenti again unless restrained by an injunction. It is further alleged that the plaintiff has a substantial personal interest and stands to suffer damage peculiar to himself if the defendant Beretitenti is not restrained from seeking nomination as a candidate.

I do not think that the contradiction between the general endorsement of the writ which claims that the defendant should be restrained from standing for election as Beretitenti, and the statement of claim which asks for him to be restrained from seeking nomination is material. It is important at this stage to appreciate that this is not a trial of the action which the plaintiff has brought.

It is simply a determination of whether the papers filed by the plaintiff show a reasonable cause of action. For that reason it is not necessary to consider in detail all the issues raised by the plaintiff in this statement of claim and to adjudicate on

them. Indeed in my view such issues are reserved to the Chief Justice by the Constitution itself.

Guidance as to the way in which a court should exercise its power to strike out is given in RSC Order 18 – 19/3.

"It is only in plain and obvious cases that recourse should be had to summary process". (*Hubbock & Sons Ltd.* v. *Wilkinson, Heywood & Clark Ltd.* [1899] 1 Q.B. 88, 91 per Lindley M.R.)

"The powers conferred by this Rule will only be exercised where the case is clear beyond doubt" (Lindley M.R. again in *Kellaway* v. *Bury* (1892) 66 L.T. 599, 602; (1892) 8 T.L.R. 433). It has been said that the court will not permit a plaintiff to be "driven from the Judgment seat except where the cause of action is obviously bad and almost incontestably bad" (Fletcher Moulton L.J. in *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, 419). None of these decisions are available to me but I rely on the Annual Practice 1982 0.18/19/3A as a correct summary of the decisions.

The power to strike out is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea (*Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd.* (No. 3) [1970] Ch. 506.

"Reasonable cause of action" means a cause of action with some chance of success when only the allegations contained in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. *Drummond Jackson* v. *British Medical Association* [1970] 1 W.L.R. 688, 692. Clearly the date of examination referred to is the date of filing of the section not the date of hearing.

The court should also consider whether, if opportunity were given, the pleading could be saved by amendment.

In relation to the present action it is to be noted that section 32(2) of the Constitution lays down the qualifications required for election to the Maneaba and the method of choosing candidates.

> The Maneaba shall after the election of the Speaker nominate from among members of the Maneaba, not less than three nor more than four candidates for election as Beretitenti, and no other person may be a candidate.

The candidates thus chosen by the members of the Maneabu submit themselves for election to the electorate in terms of section 32(3) of the Constitution.

It is therefore clear that in order to be considered for the post of Beretitenti a person must as a pre-requisite be elected to the Maneaba.

Once elected, before he can be considered for nomination as candidate the House must choose a Speaker.

After that, nomination for the post of candidate for the office of Baretitenti may be made and voted upon by the members.

It is a fact that the election which gives rise to this action has not yet been held. Until it has been held the question as to who is likely to be nominated for the office of Beretitenti is an entirely academic one. It is possible, although highly unlikely, that neither the plaintiff Dr Tong, nor the defendant the present Beretitenti will be favoured by the voters. Either or both may fail to be elected to the Maneaba. In politics anything is possible. Again even assuming the election of both to the Maneaba it may be that neither will be chosen by the members to be a candidate for

the office of Beretitenti. It may be that the present Beretitenti intends to submit his name for consideration but at present he cannot do so and there is no real likelihood of his being able to do so until he is elected to the Maneaba.

If there were doubts about his eligibility to stand for the office of Beretitenti, it might then, after his election to the Maneaba, at that stage be proper to seek an injunction to prevent his standing for nomination as Beretitenti. Atvaraci, who appeared for the defendant, relied on his affidavit and his application. Mr Brian Orme who appeared for the plaintiff relied on an affidavit which the Court accepted at the hearing. This affidavit appears to relate to an application for a prompt hearing and not specifically to this present motion but the facts contained in it are relevant to the present proceedings. He also relied on a set of legal submissions which he read aloud and was kind enough to hand in to the Court in written form.

I have had the advantage of studying these submissions. The submissions relate largely to the question of Dr Tong's locus standi. As to the question of locus standi I do not propose to consider it in detail at this stage. It is in my view arguable in view of the decision *Inland Revenue Commissioners* v. *National Federation of Self-Employed Businessmen* [1981] 2 All E.R. 93, 107.

No cogent evidence on locus standi is before this Court. The judgment of Lord Fraser of Tullybelton is particularly instructive on this point, and at a full hearing of the action evidence might establish locus standi. The remainder of the submission relates to the court's power to hear the action notwithstanding section 38 of the Constitution. With great respect to Mr Orme and whoever drew these submissions I cannot agree with them, particularly the submission as to the effect of section 38 of the Constitution. The argument put forward by Mr Orme is that the section simply reserves to the Chief Justice a special jurisdiction in relation to an election when an election has commenced, and that as such an election has not yet commenced then the special jurisdiction of the Chief Justice has not arisen.

I think that this is to ignore the effect of section 38(2) of the Constitution which states:

> Any question which may arise as to whether:
>
> (a) Any provision of this Constitution or any law relating to the election of a Beretitenti under section 32 of this Constitution has been complied with . . . shall be referred to and determined by the Chief Justice . . .

The section is clearly wider than limiting the special jurisdiction to the actual election itself but embraces any constitutional matter covered by section 32 of the Constitution, including nomination.

Section 32(1) of the Constitution deals with the question of nominations by the Maneaba for the office of Beretitenti and I would hold, if the question was relevant to this application, that the question of whether such a nomination is valid must be one covered by section 38 and reserved under that section to the Chief Justice. But that is not in issue in these present proceedings.

In respect of this present application the question of nomination is not in issue; it is simply whether the plaintiff's claim discloses a reasonable cause of action.

In the plaintiff's submissions, under the heading "Advantages in determining the issues in these proceedings" I have noted reference to the case of *Wybrow* v. *Chief Electoral Officer* [1980] 1 N.Z.L.R. 147, 149. This is not available to me but in any event would simply be persuasive. I am not qualified to express any opinion on New

Zealand law. In his affidavit Dr Tong has pointed out the advantages that would arise from an early decision as to the merits of this matter. However in my view the matter cannot be decided until the defendant is in a position to submit his name as a candidate for the vacant office, that is after election to the Maneaba if he is in fact elected.

The application for an injunction is clearly premature as it is entirely hypothetical and based purely on a set of circumstances which may or may not arise. It has at present no basis in reality and therefore the summons must succeed and the pleadings are struck out. It is important for all parties to appreciate the extent and effect of this ruling. It is not and cannot be a ruling on the merits of the plaintiff's claim nor the possible objections to it. This Court is not empowered to make such an adjudication as questions relating to the nomination and election of persons for the office of Beretitenti are reserved to the Chief Justice by virtue of section 38(2)(a) and (b) of the Constitution and any attempt to decide such questions would be ultra vires the Court. This motion is decided purely on the basis that it discloses no cause of action because it is premature and purely hypothetical. It does not prohibit the plaintiff from bringing a fresh action if and when the elections have taken place and if and when any attempt is made to nominate the defendant for the post of Beretitenti, if at that stage it is contended that he is precluded from standing in the election for the post of Beretitenti. There has been no decision on the scope of the plaintiff's claim or on its merits. This must be decided, if the action is renewed, by the Chief Justice. No finding is made as to the allegation that the plaintiff has no locus standi. The effect of this present decision is purely a limited one, vis that at present the motion is premature, based purely upon a hypothetical situation too remote in law and that at present no reasonable cause of action is disclosed.

For these reasons the pleadings are struck out. The defendant has succeeded in having the statement of claim struck out. This is a pleading. There may be room for doubt as to whether Order 1 Rule 1 of the High Court Civil Procedure Rules 1964 where pleadings are defined covers the writ of summons and the general endorsement thereon which it could be argued are not pleadings at least in term of P.S.C. Order 1 Rule 4 (1) and Order 1 Rule 5/1.

If the pleadings alone are struck out confusion may arise. The matter is not capable of amendment. However it is open to the Court under Order 27 Rule 4 when ordering the pleading to be struck out to dismiss the action or make such other order as may be just.

The statement of claim has been struck out and for the avoidance of any doubt as to the status of the action it is hereby dismissed. This will allow the plaintiff to make an entirely fresh start if and when he feels it is auspicious for him to do so. I award costs agreed by both parties in the sum of $17.80 to the defendant.

Reported by: P.T.R.