

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**H.C.A. NO. S 1418 of 2000**

**BETWEEN**

**ANNA HARRACKSINGH**

**PLAINTIFF**

**AND**

**LANGRIDGE VEERASAMMY**

**DEFENDANT**

**Before the Honourable Mr. Justice Gregory Smith**

**Appearances:**

**Mr. Harrikissoon for the Plaintiff**

**Mr. W. Seenath for the Defendant**

**REASONS**

This was an application by the Defendant to dismiss the Plaintiff's claim as being an abuse of process. After hearing submissions I did not dismiss the

Plaintiff's claim but I put the Plaintiff on terms as to the future conduct of this action and ordered her to pay all the costs of this action to date. The Plaintiff has appealed the Order for costs.

Before giving reasons for making the Order for costs, it is necessary to give a brief statement of the facts and the arguments.

In this present action (H.C.A. No. S 1418 of 2000) filed on the 17<sup>th</sup> November, 2000, the Plaintiff sues in her capacity as the executrix of her deceased mother, one Alma Harracksingh. She seeks the revocation of the Will of one Hector Nagar Veerasammy (the deceased father of her mother), (which Will is hereafter referred to as "the purported Will") as against the executor of his Will, on the ground that the purported Will was not signed by Hector Veerasammy (it was a forgery) and/or that Hector Veerasammy was not of sound mind, memory or understanding at the time he executed the purported Will. It is important to note that the purported Will is dated 21<sup>st</sup> July, 1983 and that the Defendant in the present action obtained probate of the purported Will since the 13<sup>th</sup> July, 1984.

On the 22<sup>nd</sup> September, 1988 the Plaintiff in the present action had commenced a prior action, H.C.A. No. S 1748 of 1988 against the executor of the purported Will seeking revocation of the same on the ground that at the time of the execution of the purported Will, the testator was not of sound mind, memory or understanding: (this is also one of the grounds for seeking revocation of the same, purported Will in the present action).

The Defendant in the present action had also instituted proceedings (H.C.A. No. S 385 of 1989) claiming injunctive reliefs and damages as against the present Plaintiff.

On the 14<sup>th</sup> June, 1999 the Plaintiff's prior action H.C.A. No. S 1748 of 1998 (hereafter referred to as "the prior Action") was consolidated with the Defendant's action H.C.A. No. S 385 of 1989 (hereafter referred to as "the Defendant's Action").

On the 16<sup>th</sup> June, 2000 both matters came on for trial and the Plaintiff discontinued the prior Action after which the Defendant withdrew his counterclaim in the prior Action and also discontinued the Defendant's Action.

The Defendant therefore contended that it was an abuse of process to seek to re-litigate in this present action the same issues as in the prior action, which prior action had been discontinued to his prejudice. The Plaintiff referred to the 1997 Supreme Court Practice at 18/19/15 and 18/19/16 note (5).

The reasons advanced by the Plaintiff in the present Action for now pursuing this matter was that she only discovered the Will of her deceased mother in October, 2000, and all before this she believed it had been lost or misplaced. An interesting point to note is that this Plaintiff's mother had died since the 29<sup>th</sup> August, 1988 and her mother had never brought any application to set aside the purported Will during the four years that she was alive after the grant of Probate of the purported Will.

Probate of the Will of the Plaintiff's mother was granted to the Plaintiff on the 9<sup>th</sup> February, 2001.

The Defendant in the present action produced an affidavit filed by this Plaintiff in the application for Probate of her mother's Will where she stated that the reason that she delayed in making the application for probate of her mother's Will was that she was "financially incapable". This contradicted the excuse given in the present matter where she said she had thought that the Will was lost or misplaced. The Defendant also produced a document whereby the Plaintiff had applied for a search for a Will of her mother on the 21<sup>st</sup> January 2000, which is the document used to commence the application for Probate and submitted that the Plaintiff must have had her mother's Will or must have known where to find it since January 2000; therefore, her excuse for not commencing the present action lacks bona fides. Further, since she knew of the existence of her mother's Will even before she had discontinued the prior action (June 2000), she has now unconscionably gained a tactical advantage since the Defendant's Action is now statute barred.

As against this, Counsel for the Plaintiff contended that the discontinuance of a prior action does not in law bar another action upon the same facts since there is no res Judicata in a discontinuance (see The Supreme Court Practice 1997 at paragraphs 21/5/10 – 21/5/12 and see the Doctrine of Res Judicata by Spencer Bower page 19 paragraph 27). Counsel went on to submit that even if there has been some abuse of the machinery of the Court, no real prejudice will be suffered by the Defendant since the witnesses to the purported Will are still available to give evidence and the Estate has not yet been distributed. Further, the Court must throw into the balance the public policy element of not condoning

a fraud in the execution of the purported Will as was now being alleged in the present action.

Owing to the time that had elapsed since the grant of Probate of the Purported Will (16 years), the considerable delay in prosecuting the prior action (12 years), the tactical advantage obtained by the Plaintiff in having the counterclaim in the prior action withdrawn and the Defendant's Action discontinued, and the lack of a bona fide excuse by the Plaintiff for letting the prior action be discontinued and for now commencing the present action, I found that the bringing of the present action showed some oppression and was an abuse of the process of the Court.

On the other hand, I accepted the public policy argument that the court ought not to appear to condone a fraud as was now being alleged in respect of the purported Will and I also noted that the witnesses to the purported Will were still available and that the Estate had not yet been distributed so that the trial of the present action would not be wholly oppressive as against the Defendant. For these reasons, I decided not to exercise my discretion to strike out the Plaintiff's claim even though there was abuse of the process of Court, but I put her on terms as to the prosecution of the same.

Considering my findings that there was an abuse of the process of the Court, I found that the Defendant's application to strike out the Plaintiff's claim was not misconceived, in fact, there was some substantial merit in the application, and I did not therefore think it fit to punish the Defendant by an award of costs against him.

I also noted the lack of bona fides of the Plaintiff, on whose doorstep lies the blame for having the trial for the validity of the purported Will prolonged. It was her oppressive conduct of the litigation that has caused this present action to have now been brought.

In all the circumstances, I felt it appropriate to make an award for costs against her which would reflect the Court's displeasure over her conduct of the litigation.

In the circumstances, I ordered the Plaintiff to pay all the Defendant's costs of this action incurred to date.

Dated this 17<sup>th</sup> day of July, 2001

**Justice Gregory Smith**  
**JUDGE**