

JILET MATHUTHU

Versus

MBUSO MATHUTHU

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 October 2023 & 12 October 2023

Pre-trial conference

S. Mguni, for the plaintiff
J. Mbandeni, for the defendant

DUBE-BANDA J:

[1] At a pre-trial conference before a judge, the defendant proposed that the following issue be referred for trial, “whether or not plaintiff’s claim is based in matrimony and therefore governed by s 7 of the Matrimonial Act [Chapter 5:13].” I declined to refer this issue for trial. Thereafter, I recorded the decisions taken at the pre-trial conference and the agreements reached by the parties. I read to the parties what I had recorded and asked them to prepare a joint pre -trial conference memorandum, sign it and file it for the record. Counsel for the defendant then addressed a letter to the Registrar making the point that he cannot sign the memorandum on the basis that defendant may be taken to have agreed to have his proposed issue excluded from the issues referred to trial. Counsel then suggested that I proceed in terms of r 49(10)(b) of the High Court Rules, 2021.

[2] I declined to refer the issue proposed by the defendant for trial because of the reasons that follow. The pleadings show that the parties were married to each other in 1997 in terms of the Marriage Act [Chapter 5:11], and decree of divorce was granted in 2009. However, during the subsistence of the marriage the parties acquired stand number 13612 Cowdray Park (property) and the property is registered in their joint names. The property was not dealt with during the divorce matter, and now plaintiff claims a half share of the property on the basis that she is a joint owner.

[3] In his plea, the defendant agrees that the right, title and interest in the property is registered in the names of the parties. He however, he avers that he exclusively paid for the stand, and developed the property from a two-roomed shell to a complete house comprising

of three-bedroom etc. The defendant further pleads that the plaintiff may only be entitled to a half share of the property as it was before it was developed. In the replication, the plaintiff avers that she is entitled to a half share of the property on the basis of being a registered owner thereof.

[4] The authorities are clear about the role of a judge at a pre-trial conference. (See *Doelcam (Pvt) Ltd v Pichanick and Others* 1999 (1) ZLR 390 (H); *Marijeni v Mufudze and Others* 2000 (2) ZLR 498 (H). A judge presiding over a pre-trial conference is not a mere observer. He or she is to be an active participant at the conference. He or she is not only a figure-head to record the wishes of the parties. He or she takes an active role, to assist the parties to attempt to reach settlement and where this is not possible, to identify issues for trial with a view to curtailing the proceedings.

[5] It is a principle of our law that a party must plead its cause of action as to warn other parties of the case they have to meet and the relief sought against them. A judge must then ensure that the issues referred for trial speak to the cause of action and the pleadings. A judge may not refer an issue for trial which does not arise from the cause of action. In this case the cause of action is that the plaintiff is a joint owner of the property and therefore she is entitled to her half share of the property. The issues referred for trial must speak to this cause of action.

[6] The cause of action and the pleadings defined the issues between the parties. The issue “whether or not plaintiff’s claim is based in matrimony and therefore governed by s 7 of the Matrimonial Act [Chapter 5:13]” does not arise from the cause of action and the pleadings. The resolution of the issue proposed by the defendant will serve no useful purpose and it will take the trial no further. Again, a plea is a shield and not a sword, and a defendant cannot raise a claim *via* a plea. A defendant who is desirous to raise his own claim, has a right to institute a counter claim for those purposes. In this case if the defendant was desirous to make the point concerning the Matrimonial Causes Act it was open to him to file a counter claim. Otherwise, the plaintiff’s cause of action and the pleading on record do not permit the referral for trial of the issue proposed by the defendant. It is simply a non-issue.

[7] It is for these reasons that I declined to refer the issue proposed by the defendant for trial. I have prepared a pre-trial conference minute and referred the matter for trial.

S. Mguni & Associates, plaintiff's legal practitioners
Masiye-Moyo & Associates, défendant's legal practitioners