

ISHMAEL MADAMOMBE
(in his capacity as the Executor Dative of Estate
Late Nyembesi Kapungu DR 781/11)
versus
WINNIFILDAH MADAMOMBE
and
SIBONGILE MADAMOMBE
and
MOLLY KAPUNGU
and
INNOCENT MADAMOMBE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 & 19 October 2022

Pre-Trial Conference

ZW Makwanya with Ms L Mukuchura, for the plaintiff
TF Chimbadzwa, for the defendants'

TAGU J: The parties appeared before me for a Pre-Trial Conference. The facts in this case are mostly common cause. All the parties are related. The plaintiff is the father of the defendants. The plaintiff's late wife is the mother to the defendants. The plaintiff is the Executor Dative and also a beneficiary to the Estate of Nyembesi Kapungu. All defendants are also beneficiaries.

At the center of the dispute is Stand Number 9208 Paradise Park, Highfield, Harare. Under Case No. HC 6089/21 this Honourable Court granted an order to the plaintiff to allow the sale of the same immovable property, to enable beneficiaries to receive their shares. The Court Order reads as follows:

“IT IS ORDERED THAT:

1. The 5th respondent being the Master of the High Court, be and is hereby ordered to sign documents for consent to the sale of the Stand No. 9208 Paradise Highfield, Harare to enable all beneficiaries to get their shares in terms of judgment in HC 6977/16.
2. The 1st to 4th Respondents are to pay cost of suit on legal practitioner client scale, with one paying absolving the other.”

This judgment and its order are extant. In compliance with the order the Master of the High Court authorized the plaintiff as the Executor Dative to sell, otherwise than by public auction the immovable property described as: Stand 9208 Paradise Highfield, Harare. This failed to materialize because the defendants have not been cooperating with the Executor Dative to the extent that the executor was issued with a protection order that barred him from visiting the house in question among other things. Even prospective buyers or evaluators are being barred from visiting the house by the defendants. The plaintiff thus filed the present summons for the eviction of the defendants so that the house could be sold and each beneficiary to get his or her share. Also for him to be given his shares of the rentals which are being collected by the defendants.

At the Pre-Trial Conference all the parties attended except the third defendant Molly Kapungu who was said to be in South Africa and Innocent Madamombe whose whereabouts was not very clear, but said to have been occupied at his work place.

The parties could not agree on the issues to be referred to trial. On one hand counsel for the plaintiff submitted that there is no issue to refer to trial as there is an Order of Court directing that the house be sold. He said the only defence raised by the defendants is on para 4 of the proposed Joint Pre-Trial Conference issues on p 45 of the record. The issue is:

“Whether or not the 1st, 2nd, 3rd and 4th Defendants offered to buy off the Plaintiff’s 1/5 shares of stand number 9208 Paradise Park, Highfields, Harare, if so, would it be just, fair and in the best interest of beneficiaries of the estate to be evicted from stand number 9208 Paradise Park, Highfields, Harare, to facilitate the sale transaction of the property.”

Mr *Makwanya* prayed that this defence be struck off as there is a court order to the effect that the property be sold, and is silent on the issue of buying out any one. According to him the defendants have no case, there are no issues to refer to trying other than that the defendants have not been cooperating. He applied orally that the court should resort to r 49 (12) of the High Court Rules 2021. I was further referred to the case of *KM Insurance v Mr Reuben Marumahoko* HH 678/14 where MATANDA-MOYO J struck off the defendant’s meritless defence and granted an order because there were no issues to refer to trial at the Pre-Trial Conference stage.

Counsel for the defendants Mr TF *Chimbadzwa* was of the view that this matter cannot proceed to trial. He submitted further that the defendants are beneficiaries and looking at the Order each party must get its shares. He said the defendants do not object to the house being sold but

they insist on their shares. Hence the defendants insist on buying the plaintiff out. He maintained that the defendants do not dispute that the house be sold, but they propose to buy him out since they now have the money. As to the issue of rentals the plaintiff was initially collecting the same, and now the defendants are collecting. He suggested that if the case of the house is solved, and if he insists on rental remittance then he can still issue fresh summons claiming the rentals or alternatively the plaintiff should let bygones be bygones for the sake of settling the matter.

Rule 49 (12) of the High Court Rules, 2021 provides:

“A judge may dismiss a party’s claim or strike out his defence or make such order as may be appropriate if-

- (a)
- (b) any other party applies orally for such an order at the pre-trial conference or makes a chamber application for such an order.”

In the present case the counsel for the plaintiff applied orally to have the defendants’ defence to be struck out, and urged the court to grant the order sought by the plaintiff. I have also read the judgment by MATANDA-MOYO J (*supra*). The Judge clearly outlined some of the duties of a judge during pre-trial conference. These are:

- (1) identification of issues to be resolved at trial
- (2) Identifying common cause areas
- (3) Eliminating frivolous claims or defences
- (4) Identify witnesses and documents
- (5) Discuss possibilities of a settlement

The judge went on to say:

“The question is can a pre-trial Judge simply refer a matter to trial where there are no disputed issues to resolve at trial? Certainly not. To do so would amount to defeating the real purpose from which a trial court is constituted to do. When it is clear that a litigant simply refuses to settle but concedes that there are no issues for determination at trial. I am of the view that it is permissible for the pre-trial judge to enter judgment at that stage.”

I share the same sentiments. In the present case there are no issues to refer to trial which I identified. The defendants concede the same. The Order in HC 6089/21 is very clear. The defendants should comply with the same. In frustrating the executor dative from carrying out the order, the defendants have not been cooperating. They barred the executor dative from entering

the premises as well as evaluators and potential buyers. The issue of wanting to buy out the plaintiff is not part of the Order. The defendants have to be evicted to pave way for the sale of the house.

IT IS ORDERED THAT:

1. The defendants' defence is struck out.
2. Eviction of the first, second, third and fourth defendants and all those claiming occupation through them from Stand Number 9208 Paradise Park, Highfield, Harare, be and is hereby granted.
3. Defendants to pay costs of suit on an Attorney client scale.

Makwanya Legal Practice, plaintiff's legal practitioners
Tadiwa & Associates, defendants' legal practitioners