

AUSTEN GONESE
versus
LOWIS GONESE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 13 AND 14 JANUARY 2014.

Civil Trial

Miss D Munharira, for the Plaintiff.
Miss FChagadama, for the Defendant.

UCHENA J: The plaintiff married the defendant on 23 February 2002. They married in terms of the Marriages Act [*Cap 5.11*]. They were blessed with two children, X born on DATE, and Y born on DATE 2.

Their marriage was however not a happy one from the beginning because the defendant did not like the plaintiff's sister. She did not want her to visit them, nor did she want her husband to communicate with her. The dislike for her husband's sister is based on her claim that she had visions of her husband having sex with his sister. They had to abandon their rural homestead which was near the plaintiff's sister's home. The plaintiff and the defendant were church Elders of, an un-disclosed church. They sought Counselling but the defendant despite promises to change did not do so. The plaintiff issued summons leading to this trial.

The parties appeared before a pre-trial conference judge where they according to their joint pre-trial conference minute agreed on the following.

1. Custody of the two minor children namely X born on DATE, and Y born on DATE 2 be awarded to the Defendant.

2. The plaintiff shall pay maintenance of US\$100-00 per month per child and pay for their school fees and other school related requirements.
3. The plaintiff shall pay spousal maintenance to the defendant at the rate of US\$100-00 per month until she dies remarries or the order is varied by a competent court.
4. The plaintiff shall have access to the minor children on every alternative school holiday and every alternative weekend.
5. The movable property is awarded to the defendant as her sole and exclusive property.
6. The defendant shall be awarded the matrimonial home known as stand number 9427 Stoneridge Phase 2 Stone Ridge Park as her sole and exclusive property.

The case was referred to trial on the sole issue of whether or not the parties' marriage had irretrievably broken down.

The plaintiff led evidence on how their marriage had irretrievably broken down. He explained the defendant's bizarre dislike for his sister and the conditions she imposed on him as regards her visiting them and his communication with her. This included sexual sanctions against him which would be relaxed at her pleasure. He said he endured this treatment from his wife for many years as he was a church elder. He can not bear it anymore, hence his filling for divorce. He as a result has abandoned his eldership to free himself from the defendant. He said their marriage has irretrievably broken down and can not be saved, as demonstrated by the several counselling sessions with their Pastors which bore no positive result as the defendant persisted with her aversion for his sister. She at one stage demanded that his sister join their church which she did, but defendant said she was faking and could not be pacified. According to the plaintiff they last had sex in 2012 after he had issued summons in October 2011. He later tried to change that to their having had sex before he issued summons but that was clearly an attempt to strengthen his case for divorce, which he still wants in spite of their last intimacy.

The defendant led evidence and sought to change agreement number 6 in their joint pre-trial conference minute. She alleged that the plaintiff's lawyer forced her to make that concession. When asked how she could be forced by the other party's legal practitioner when she was legally represented she ended up saying she had agreed. Miss *Chagadama*, for the defendant in her address to the court conceded that it was inconceivable that the defendant could be forced by the plaintiff's lawyer in the presence of her lawyer who signed the joint pre-trial conference minute. She sought to explain the defendant's statement as a failure to

express herself, when she said she was forced. This means there is no substance in defendant's belated attempt to claim more maintenance than she had previously agreed to. It is also apparent that the plaintiff has been very generous in agreeing that she take all the movables and the immovable they acquired during the marriage. He is still paying for the matrimonial home which he fully relinquished to the defendant. This seems to indicate a desire by the plaintiff to free himself from the defendant at any cost.

On the issue of the break down of the marriage the defendant said her husband is living in adultery and will one day come to his senses and come back home. She said that is because all men do that. That is clearly an erroneous assessment of the possibility of a reconciliation. It is a notorious fact that a lot of wives and husbands permanently lost their spouses who had strayed into adultery. She later sought to base her hope in the plaintiff having promised to come back home when he spoke to her last week. The plaintiff's counsel applied to reopen his case which Miss *Chagadama* for the defendant did not oppose. When the plaintiff came back to the witness stand he vehemently denied ever promising the defendant that he will come back to her. While both the plaintiff and the defendant have shown a propensity to lie, it is not logical that the plaintiff would press on with the divorce proceedings if he intends to continue with the marriage. One does not consciously destroy that which he intends to preserve. I therefore do not believe the defendant when she says the plaintiff promised to come back home. I am thus satisfied that the marriage has irretrievably broken down. The defendant's wish to continue in marriage does not matter. A marriage can not continue with one partner. It is a mutual institution made possible by two co-operating partners. See the case of *Kumirai v Kumirai* 2006(1) ZLR 134 (H) at p 136 B-E, where MAKARAU J (as she then was) said;

“In view of the fact that the breakdown of a marriage irretrievably, is objectively assessed by the court, invariably where the plaintiff insists on the day of trial that he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. Evidence by the plaintiff that he or she no longer wishes to be bound by the marriage oath, having lost all love and affection for the defendant, has been accepted by this court as evidence of breakdown of the relationship since the promulgation of the Matrimonial Causes Act in 1985 So trite has the position become that one hardly finds authority for it to satisfy the court that the marriage still has some life in it, one has to adduce evidence to the effect that after the filling of the summons, the parties have reconciled and are living after the manner of husband and wife In my view evidence that on one occasion after the service of summons, the parties took a holiday

together and afforded each other conjugal rights, as was led in this trial, is insufficient on its own to show that the marriage has prospects of mending. If anything, it goes to show that despite attempts to rekindle the fires, the parties failed to reconcile.”

In the result, I make the following orders;

1. That a decree of divorce be and is hereby granted.
2. Custody of the two minor children namely X born on DATE, and Y born on DATE 2 be awarded to the Defendant.
3. The plaintiff shall pay maintenance of US\$100-00 per month per child and pay for their school fees and other school related requirements, until each child attains the age of majority.
4. The plaintiff shall pay spousal maintenance to the defendant at the rate of US\$100-00 per month until she dies remarries or the order is varied by a competent court.
5. The plaintiff shall have access to the minor children on every alternative school holiday and every alternative weekend.
6. The movable property is awarded to the defendant as her sole and exclusive property.
7. The defendant shall be awarded the matrimonial home known as stand number 9427 Stoneridge Phase 2 Stone Ridge Park as her sole and exclusive property.
8. Each party shall bear his or her own costs.

Legal Aid Directorate, Plaintiff's Legal Practitioners.

Legal Resources Foundation, Defendant's Legal Practitioners.