

**IN THE CIRCUIT COURT OF GHANA HELD IN ACCRA ON THURSDAY THE
3RD DAY OF NOVEMBER, 2022 BEFORE HER HONOUR ROSEMARY BAAH
TOSU (MRS) -CIRCUIT COURT JUDGE.**

SUIT NO: C5/423/2016

EDWARD AGYAKWA ASARE
11 ARYEH ADJEI LOOP
TESHIE DEMO, ACCRA

PETITIONER

VS

ESTHER OKAILEY ASARE
11 ARYEH ADJEI LOOP
TESHIE DEMO, ACCRA

RESPONDENT

.....

JUDGMENT

.....

By an amended Petition filed on the 8th October, 2020, Petitioner prayed this Honourable Court for the following reliefs

- a. The dissolution of the marriage*
- b. That the marital home be shared equally between the Petitioner and Respondent*
- c. That the marital vehicles apart from a Pick Up be settled on the Respondent.*

Respondent in her amended Answer also prayed for the following

- i. Dissolution of the marriage celebrated between the parties on the 18th day of March, 1995*

- ii. *That the matrimonial home is not for the Petitioner and cannot be given to the children of the marriage*
- iii. *That the Pick Up is a joint property*
- iv. *That the Petitioner be ordered to pay his part of the loan Joana Ewurabena Ocran granted to the parties*
- v. *That the custody of the children be granted to Respondent with visitation rights to the Petitioner*
- vi. *That the Petitioner be ordered to pay the children's school fees, medical bills and general maintenance of the children.*
- vii. *That Petitioner be ordered to pay substantial alimony to the Respondent*

FACTS OF THIS CASE

The parties to this petition were married on the 18th March, 1995 at the Church of Pentecost, Sarfo Memorial Temple at Community 5 in Tema. There are two issues of the marriage. Petitioner pleads that the marriage has broken down beyond reconciliation.

Petitioner says that Respondent has behaved unreasonably towards him and he cannot be expected to live with her as his wife again.

The particulars provided by Petitioner of Respondent's behaviour is that

- She has an ungovernable behaviour

- There are irreconcilable differences between them
- Respondent always verbally abuses the Petitioner and engages her family members to physically assault him.

Petitioner says that all efforts by family and church to help the parties reconcile their differences have been unsuccessful.

In her amended Answer, Respondent denied that the marriage had broken down beyond reconciliation and suggests that it is rather Petitioner who has lost interest in it. Respondent further pleaded that there was no dispute between the parties except a debt which arose from a loan granted to the parties by one Joana Ewurabena Ocran.

Respondent again pleaded that any other trouble the parties have had it is because Petitioner is a “womanizer”. Respondent says that it is rather Petitioner who has an ungovernable character and frequently assaults her.

Respondent says that Petitioner has refused to support the family financially, however, whenever Petitioner is in debt, she is the one who would be asked to pay off his debtors.

Respondent avers that she purchased solely, the land for the matrimonial home before the parties got married.

THE EVIDENCE LED BY PARTIES

The parties were ordered to file their pre-trial checklists and witness statements, they complied and led evidence and were cross-examined extensively.

Petitioner's evidence was not too different from his pleadings in his Amended Petition. He testified further that he and Respondent acquired the matrimonial home jointly and also acquired some vehicles together in the course of the marriage. He prayed the Court to allow Respondent to hold on to her cars, whilst he would be made to keep a Pick -Up vehicle, whose registration documents are solely in his name.

Petitioner also testified that in relation to a loan he guaranteed for Respondent, he had already paid his portion and attached documentary evidence.

Petitioner tendered the following documents in evidence

- Exhibit A – Marriage Certificate
- Exhibit B- Certificate from the Church of Pentecost
- Exhibit C- Purchase receipt
- Exhibit D- DVLA form C
- Exhibit E series- Receipts from Juantext Enterprise

Respondent testified and refuted all the allegations made by Petitioner against her. Respondent's evidence is that between the years December 2014 and November, 2015, the Petitioner was very ill and she nursed him back to good health. Upon getting back to his old form, Petitioner started to come home late because he was engaged in an extra-marital affair with one Diana Lamptey, who was introduced to Respondent as a prophetess. This led to disagreement and disaffection between the parties.

Respondent again testified that Petitioner was also involved with one Ataa, who resided in Koforidua. Respondent says that during the pendency of this affair, Respondent took a container load of jeans trousers, which she was about to sell for profit and handed them over to the said Ataa, who was Petitioner's girlfriend.

Respondent says that Petitioner was forced to apologise to her when she found it out and confronted him. According to Respondent, the reason for Petitioner's health challenges was because of his penchant for womanizing which has also been the bane of their marriage.

Respondent also accuses Petitioner of physically assaulting her on several occasions because of other women.

Respondent testified that Petitioner has appropriated several of her properties without her consent, these include cars, water closets and the container of jeans which were to be sold for profit.

ISSUES FOR DETERMINATION

Per section 1(2) of the *Matrimonial Causes Act, Act 367, 1971*, the sole ground for the granting of a Petition for dissolution shall be that the marriage has broken down beyond reconciliation.

Based on this finding, the Court goes ahead to deal with other ancillary reliefs. Counsel for Respondent in his written address filed on the 1st September, 2022, set out a few issues which would lead to a resolution of this matter and we graciously adopt these issues. The issues are

1. *Whether or not the marriage between the parties is broken down beyond reconciliation?*

2. *Whether or not the Petitioner should be ordered to pay a monthly maintenance towards the upkeep of the children and also pay their medical bills when due.*
3. *Whether or not the matrimonial home with house, half plot of land at Rasta Road and the Pick up are joint matrimonial properties and should be shared between the parties?*
4. *Whether or not the loan amount of GHS20,000 which later accrued interest to the tune of GHS150,000 from which the Respondent paid a total amount of GHS145,000 should be refunded to Respondent*
5. *Whether or not the Petitioner is entitled to a lump sum payment as financial settlement.*

ANALYSIS OF THE EVIDENCE LED

The general rule is that he who asserts must prove. He must prove the essential issues central to his case on the preponderance of probabilities which is the standard of proof in a civil matter.

Section 12(2) of the Evidence Act, NRCD 323 defines proof on the preponderance of probabilities to be

‘The degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable/likely than its nonexistence’.

The first issue to deal with is whether or not the marriage is broken down beyond reconciliation.

A careful scrutiny of the evidence led by parties show that this Petition is brought mainly on the grounds of unreasonable behaviour.

Both Petitioner and Respondent come under section 2(1)b of the *Matrimonial Causes Act 1971*(Act 367), which provides as follows

(a)For the purpose of showing that the marriage has broken down beyond reconciliation the Petitioner shall satisfy the Court of one or more of the following facts ...

(b)That the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent

Unreasonable behaviour can take the form of either an act or omission and can include severe issues of physical or emotional violence or more even milder incidents. However, the conduct complained of must be severe and higher than the ordinary wear and tear of married lie.

It was held in the case of *Knusden vs. Knusden* (1976) 1 GLR 204 CA on the test of unreasonable behaviour that

'The behavior of a party which will lead to this conclusion would range over a wide variety of acts. It may consist of one act if it is of sufficient gravity of a persistent course of conduct or series of acts of differing kinds none of which by itself may justify a conclusion that the person seeking the divorce cannot reasonably be expected to live with the spouse, but the cumulative effect of all taken together would do so'

Apart from Petitioner's assertion that Respondent has an ungovernable behaviour, that there are irreconcilable differences between the parties and that Respondent always abuses him and brings her family members to physically assault him, Petitioner has led no cogent evidence on Respondent's alleged unreasonable behaviour.

On the issue of bringing family members to assault Petitioner, the evidence is that it was a one -time occurrence. Petitioner has failed to prove the unreasonable behaviour of Respondent. I would dismiss his Petition.

On the other hand, I would uphold Respondent's cross-petition for dissolution. Her evidence of Petitioner quitting the matrimonial home after he survived his illness, refusing to support his own family and carrying all of Respondent's goods which were for sale to give to another woman, is a clear indication of the unreasonableness of Petitioner's behaviour.

I would uphold Respondent's cross-petition. I find that the marriage is broken down beyond reconciliation.

The second issue to be considered is *whether or not Petitioner should be ordered to pay a monthly maintenance towards the upkeep of the children and also to pay their medical bills when due.*

Section 47(1) of the Children's Act 1998 (Act 560) provides that a parent is under a duty to supply the necessities of health, life, basic education and reasonable shelter for the child.

Counsel for Respondent emphasizes in his written address that maintenance of a child is the primary responsibility of both parents. The evidence however is that at the time of filing this Petition or even amending it with leave of the Court, the two

issues of the marriage were 18 and 20 years old (per Respondent's evidence) and as at the time of cross-examining Petitioner on his evidence, the issues were 26 and 23 years old per the evidence of Petitioner.

Section 1 of the Children's Act 1998 (Act 560) defines a Child as a person below the age of eighteen years. I am therefore unable to make any orders on the maintenance of Ezra Aboagye Asare and Samuel Kwame Gaisie because technically, they are not children.

No evidence has also been led to show to this Court that they are suffering from a condition that would require parental support. Respondent's prayer on this issue is dismissed.

Per this same analysis, I am unable to make any orders as to custody and access to the young men.

The third issue to consider is *Whether or not the matrimonial home with house, half plot of land at Rasta Road and the Pick up are joint matrimonial properties and should be shared between the parties?*

Petitioner's evidence in relation to the matrimonial home is that he acquired it with the Respondent and he tendered in evidence exhibit C, a receipt dated 3rd December, 2001. This receipt is in acknowledgment of the payment of an amount of four million old Ghana cedis and the description is that it was for full payment of land sold to the couple.

Respondent has not challenged the authenticity of this receipt. However, in her Amended Answer, Respondent pleads that the land for the matrimonial home was acquired by her solely before the parties got married.

The evidence on record however, does not support this assertion. The exhibit C, receipt for payment of land is dated 3rd December, 2001, whilst the parties were married in 1995. This seems to suggest that at the time the final payment of the land was made the parties were married.

This is contrary to Respondent's bare assertion that she acquired the land before the parties were married.

In Respondent's evidence too, there is no indication about how the matrimonial home was acquired. Respondent also appears to accept Petitioner's testimony about how the parties met Sarah Obuobi, who led them to the vendor without much challenge.

Cross-examination of Petitioner at pages 25 and 26 of the record dated 11th November, 2021.

Que: Did you contribute towards the purchase of the land?

Ans: Yes

Que: How much did you pay as contribution?

Ans: The price of the land was 4 million old cedis as at 2001, but I paid 2.5 million old cedis, now GHS250.

Que: Do you know Sarah Obuobi?

Ans: Yes

Que: Can you tell the Court who she is?

Ans: She is a business woman who led us to the vendor.

.....

Que: Was Sarah Obuobi into sale of lands?

Ans: No

Que: So how did you get to know about the matrimonial land?

Ans: Sarah took both me and Respondent to see the vendor of the land

.....

Que: I put it to you that you never contributed towards the purchase of this land?

Ans: I contributed 2.5 million old cedis

Que: At what stage of the purchase of this land did you contribute this amount?

Ans: It was the first installment

Que: Were you given a receipt for that payment?

Ans: No when the Respondent paid off the other half then they gave us the joint receipt.

Que: So you are telling this Court that you paid 2.5 million old cedis and you never asked for a receipt?

Ans: No I didn't ask for a receipt because we were yet to complete payment.

In all, Respondent, who claims sole ownership of the matrimonial property has led next to no evidence about how she acquired the said property nor even how the matrimonial home was built.

The case of **Peter Adjei vs Margaret Adjei (Civil Appeal No: J4/06/2021)** held

'property acquired by spouses during marriage is presumed to be marital property. Upon dissolution of the marriage, the property will be shared in accordance with the 'equality is equity' principle except where the spouse who acquired the property can adduce evidence to rebut the presumption'.

Seeing that there has been a dearth of evidence on the acquisition of the matrimonial property, I have no choice than to rely on the equality is equity principle.

I therefore hold that the matrimonial home was jointly acquired by the parties in the course of the marriage and thus they are entitled to it in equal shares.

Respondent also testified about a half plot of land at Rasta Road which was acquired jointly but has been sold and proceeds kept by Petitioner. I think that at this juncture, I must deplore the manner in which evidence was led on both sides. In the case of this plot of land for example, there appears to be no certainty about it, as to its location, when it was purchased or how much it even cost.

The Courts cannot make orders that are nugatory or which cannot be carried out if not we will be put to mockery or the administration of justice would be brought into disrepute.

There has been basically no evidence led on this piece of land, and I cannot use Respondent's inconsistent answers under cross-examination to make factual conclusions.

I guess I do not need to remind Counsel for Respondent of the holding in the case of *Majolagbe vs Larbi & Ors* (1959) GLR 190 by Ollennu J.

'Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way e.g. by producing documents, description of things, reference to other facts, instances or circumstances, and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true'.

I have been unable to make a finding of fact in the case of this plot of land, I am therefore unable to declare it as joint property. I would dismiss Respondent's claim on this issue.

Petitioner prays that a Nissan Cabstar Pick -up be settled on him. He attaches the car documentation from DVLA as exhibit. Respondent on the other hand prays to the Court that this vehicle would be declared joint property.

Petitioner's evidence is that the parties acquired some cars in the course of the marriage, he prays that the said Pick-up be settled on him.

These are the responses of Respondent in respect of the car under cross-examination by Counsel of Petitioner. Record dated 5th May, 2022 at pages 33 and 34.

Que: You agree that the Pick up Cabstar was acquired by Petitioner and it is in his sole name?

Ans: No I bought it. A friend of mine called Naa gave GHS1,500(loan) to Petitioner and I also added GHS1500 to it and Petitioner also added GHS500 before we were given the documents to the car.

Que: But the said Pick Up is registered in the name of Petitioner, is that not so?

Ans: Yes and the reason why the Pick up was registered in Petitioner's name is that initially the receipt was in our joint names so when I bought the Opel Vectra, Petitioner encouraged me to register it in my name so that he would register the Nissan in his name.

Que: I put it to you that the Petitioner left behind all the other cars and took only the Nissan when he left the matrimonial home.

Ans: It did not happen that way, Petitioner took two cars, the Nissan and Renault, it was after I had made a complaint at the Police station that he returned the Renault back to me.

From this cross-examination, it appears Petitioner did make a contribution to the purchase of the vehicle, no matter how small and Respondent has also acquiesced in Petitioner's sole ownership of this property. After allowing Petitioner to keep and own this vehicle for a long period of time, Petitioner is estopped from claiming that the Pick-up Cabstar is a jointly owned property.

I find the vehicle to be solely owed and I settle it on Petitioner.

The next issue to consider is *Whether or not the loan amount of GHS20,000 which later accrued interest to the tune of GHS150,000 from which the Respondent paid a total amount of GHS145,000 should be refunded to Respondent.*

Respondent's evidence on the issue is found at paragraph's 25 to 27 of her Amended Witness Statement

25. *My Lord the Petitioner and I went to borrow some money from one Ewurabena Ocran to help our businesses but the Petitioner refused or neglected to pay his portion of the debt being an amount of Twenty Thousand Ghana Cedis (GHS20,000)*

26. *The Petitioner's refusal to pay the said amount led to accrual of interest to the tune of One Hundred and Fifty Thousand Ghana cedis (GHS150,000) which I made payment of One Hundred and Forty- five Thousand Ghana cedis (GHS145,000) with an outstanding balance of Five Thousand Ghana Cedis. (GHS5,000).*

27. *That I gave the Petitioner Fifty Thousand Ghana Cedis (GHS50,000) of the above mentioned debt to pay to the creditor which he made payment in his name*

28. *That the Petitioner left the matrimonial home mainly because of this debt issue which I was struggling to pay on behalf of the Petitioner but he still does not show any appreciation for same.*

The burden of proof was explained in the case of *Faibi vs. State Hotels Corporation* (1968) GLR 471 in holding one as follows

'Onus in law always lies upon the party who would lose if no evidence is led in the case and where some evidence has been led, it lies upon the party who would lose if no further evidence was led'.

The case of *Ackah vs. Pergah Transport Limited & Ors* (2010) SCGLR 728 held on the burden of proof as follows

'It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim will fail. The method of producing evidence is varied and it includes the testimonies of the part and material witnesses, admissible hearsay, documentary and things (often) described as real evidence) without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the Court or tribunal of fact such as a jury. It is trite

law that matters that that are capable must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence'.

And it is only when the party, usually a Plaintiff has been able to discharge this burden that the evidential burden will shift to a Defendant to give an answer to a plaintiff's claim.

The learned author, Justice S.A Brobbey in his book *'Essentials of Ghana Law of Evidence'*, states the following on the shifting of the burden of proof at page 74.

'When it is said that the burden of proof shifts, what is meant is that after one party has adduced sufficient evidence to prove his point, the burden will move to the opposing party to adduce more cogent evidence which will disprove the opponent's case and induce the court to believe him and rule in his favour. The shifting of the burden applies only to the burden to produce evidence'.

It has been held on the burden of proof on a Defendant, in the case of *Barima Gyamfi vrs. Ama Badu* (1963) GLR 96 that

'... the evidence of the defence only becomes important if it can upset the balance of probabilities which the Plaintiff's evidence might have created in Plaintiff's favour or it tends to corroborate Plaintiff's evidence or it tends to show that the evidence led on behalf of the Plaintiff was true'.

Ordinarily, when evidence is led on a loan or its repayment, a Court should reasonably expect to be told the amount which was involved in the loan, when the loan was contracted, the circumstances under which it was contracted, the interest rate and the duration of the loan.

This kind of evidence should not be difficult for a claimant to produce in support of his case.

The evidence led by Respondent in support of her claim does not provide any of these answers rather it is Respondent who has produced exhibit E series, receipts of loan repayments in support of his case that he made some payments on behalf of Respondent.

Respondent has not led any cogent evidence on these amounts she allegedly gave Petitioner to pay on her behalf. She did not also bring anyone to corroborate her evidence.

In fact, exhibit E series do not favour her case. The narration in exhibit E series too is ambiguous and does not help Respondent's cause. It reads

'Part payment of loan granted on behalf of Royal Beneficiaries Association.'

In all, I find that Respondent has not led sufficient evidence to discharge the burden on her, as such the evidential burden does not shift to Petitioner to provide any answers on Respondent's claim for refund.

I rather find that more effort was put in making a strong case for Respondent in her Counsel's written address than the real evidence led.

Unfortunately, a written address is not evidence. I would dismiss Respondent's claims on this issue.

The final issue to consider is *Whether or not the Petitioner is entitled to a lump sum payment as financial settlement.*

Financial settlement otherwise known as alimony is defined loosely as court - ordered payments awarded to a spouse or former spouse within a separation or divorce agreement. These payments are usually ordered to provide financial support to the spouse who makes a lower income or no income at all. It is usually paid to help re-establish the receiving spouse. A lump sum payment has the advantage of enabling a spouse to invest and use the income to live on and to meet any liabilities

as expenses already reasonably incurred in maintaining themselves or any child of the marriage.

This Court is entitled under section 20 of Act 367 to order that a spouse should make lump sum payments.

(1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the Court thinks just and equitable.

After considering the evidence as a whole, it is clear that Petitioner relied heavily financially on Respondent, whose business of dealing in auctioned goods appears to have been prosperous.

Though Petitioner claims to have been paying school fees and supporting the children of the marriage, he has provided no concrete evidence of such support.

Again, Petitioner quit the matrimonial home sometime in 2016 and there has been no evidence that he supported Respondent or the household since he left, even though in law he was still married to Respondent.

Under cross-examination too, Petitioner has provided no answer to Respondent's claims that he appropriated a truck load of jeans meant for sale and gifted them to his girlfriend one Ataa. Petitioner has further admitted though reluctantly, that during his long period of illness, it was Respondent who took care of him and paid some of his medical bills.

In all I find it appropriate to order Petitioner to pay alimony to Respondent to help resettle herself.

I hereby order Petitioner to pay an amount of Thirty Thousand Ghana cedis (GHS30,000) as financial settlement to Petitioner.

I therefore make the following orders on the facts of the instant case in conclusion.

- a. Respondent's prayer for the payment of maintenance, payment of medical bills and fees for the issues of the marriage is dismissed.
- b. Respondent's prayer for the matrimonial home to be declared her sole property is also dismissed. The matrimonial home is declared joint property and the parties are entitled to it in equal shares.
- c. I make no orders as to the plot of land at Rasta Road, Teshie.
- d. The Nissan Cabstar Pick-up is declared sole property of Petitioner
- e. Respondent's prayer for refund of an amount of One Hundred and Forty Thousand Ghana cedis (GHS145,000) is dismissed.
- f. Petitioner is ordered to pay an amount of Thirty Thousand Ghana Cedis to Respondent as financial settlement.
- g. Parties are to bear their own costs.

DECISION

Having heard the parties and considered the evidence, I find that the marriage celebrated by the parties on the 18th March, 1995 at the Church of Pentecost, Safo Memorial Temple, Tema, is broken down beyond reconciliation and it is accordingly dissolved.

The Marriage Certificate No. COP/TSD/97/95 with Licence number AMA/378/95 is hereby cancelled.

The parties are to bear their own costs.

(SGD)
H/H ROSEMARY BAAH TOSU (MRS)
CIRCUIT COURT JUDGE

REPRESENTATION

Parties present

Isaac Aidoo for Petitioner

Paul Selorm Kpodovia for Respondent