

**IN THE CIRCUIT COURT ONE HELD AT ACCRA ON MONDAY, 24TH
MARCH 2023, BEFORE HER HONOUR AFIA OWUSUAA APPIAH (MRS),
CIRCUIT COURT JUDGE**

SUIT NO: C5/245/2022

**ERNEST ADJEI MENSAH
VIA NUNZIO MORELLO 13
90144 PALERMO-ITALY PETITIONER (SUNG PER HIS LAWFUL
ATTORNEY
ASAMOAH GYAMFI
HSE NO. BT/D9 BETOM
KOFORIDUA)**

V

**CECILIA AKUA ETUAFUL
GC-000-0341 RESPONDENT ACCRA**

JUDGEMENT

In 1993, parties herein both Ghanaians got married under customary law and in 2001 registered the customary marriage at the Office of the Registrar General. Parties after the marriage cohabited in Accra and later relocated to Italy after the marriage and are blessed with three children aged 21, 18 and 17 respectively. Petitioner per the petition alleges unreasonable behaviour, adultery and desertion by Respondent as the breakdown of the marriage. Petitioner therefore instituted this petition praying the court for the reliefs below:

- i. That the marriage between celebrated between the parties be dissolved.
- ii. Custody of the two children who are minors be granted to the Petitioner with reasonable access to the Respondent.
- iii. Any further order(s) as to this honourable court may seem fit.

In her answer and cross-petition Respondent admitted that the marriage between the parties has broken down beyond reconciliation as claimed by Petitioner but denied any unreasonable behaviour, adultery or desertion. She contended that upon the death of her father and sister who were taking care of their first child here in Ghana, she had to stay back in Ghana and take care of the child as Petitioner was not putting in effort to relocate the said child to Italy with them. She stated that it was Petitioner who intimated to her that he was no longer interested in the marriage by sending his lawful attorney and some friends to return the head drink. Respondent therefore cross-petitioned the court for the following :

- i. that the said marriage between the parties be dissolved.
- ii. That the four (4) acres of land situate and lying at Gyaware, Abrafo in the Central Region of Ghana and jointly owned by the parties be settled in favour of the Petitioner.
- iii. That the unnumbered plot of land with a 6-bedroom uncompleted structure thereon situate and lying at Ashongman and jointly owned by parties be settled in favour of the Respondent.
- iv. Any orders as the Honourable Court may deem fit.

The standard of proof in civil case such as the present action is proof on the preponderance of probabilities. Section 12(2) of Evidence Act NRCD 323 defines preponderance of probabilities as *"Preponderance of the probabilities" means that 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 than its non-existence." In the case of **ARYEH & AKAKPO V AYAA IDDRISU [2010] SCGLR 891**, the Supreme Court unanimously held that a party who has counterclaimed bore the burden of proving his counterclaim on the preponderance of probabilities and would not win on that issue only because the original claim had failed. See the cases of **Malm v Lutterodt [1963] 1 GLR SC & Apea v Asamoah [2003-2004] 1GLR SC 226, 246.**

Both Petitioner and Respondent therefore assume the onus to lead sufficient evidence in support of their assertions and their relief(s). Before the hearing of the case however, parties entered into an agreement and subsequently filed terms of agreement in which they both agreed that the marriage celebrated between them has broken down beyond reconciliation. Parties in the said terms of settlement further agreed on all other ancillary issues. Despite this express consent to the dissolution of the marriage by the parties, there is only one ground for dissolution of a marriage under the laws of Ghana. Section 1(2) of the Matrimonial Causes Act, 1971 Act 367 states "The sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation." Section 2(3) of Act 367 provides "Although the Court finds the existence of one or more of the facts specified in subsection (1), the Court shall not grant a petition for divorce unless it is satisfied, on all the evidence, that the marriage has broken down beyond reconciliation." The

court is therefore mandated to satisfy itself by evidence that indeed the marriage between the parties has broken down beyond reconciliation before a grant of dissolution. Section 2(1) of Act 367, has outlined several instances which suffice as proof of break down of a marriage. A petitioner must satisfy the court of one or more of the instances listed therein as proof that the marriage has broken down beyond reconciliation.

Issue 1 –whether or not the marriage has broken down beyond reconciliation

Both parties agree that there exists a marriage between them. Petitioner in his petition stated that the marriage between the parties was an ordinance marriage whilst Respondent contended same was a customary marriage. Petitioner's lawful attorney who testified on behalf of Petitioner at paragraph 3 of his witness statement adopted by the court as his evidence in chief conceded that the marriage between the parties is a customary marriage.

Section 41 (2) of the Matrimonial Causes Act 1967, Act 367. On application by a party to a marriage other than a monogamous marriage, the Court shall apply the provisions of this Act to that marriage, and in so doing, subject to the requirements of justice, equity and good conscience, the Court may (a) consider the peculiar incidents of that marriage in determining appropriate relief, financial provision and child custody arrangements;

(b) grant any form of relief recognised by the personal law of the parties to the proceedings, in addition to or in substitution for the matrimonial reliefs afforded by this Act.

Per section 41 of Act 367 quoted supra, a party of a marriage other than a monogamous marriage i.e customary law or Mohammedan Law may institute proceedings for divorce before the court as seen in this case. In the determination divorce in marriages other than monogamous marriages, the courts are to “consider the facts recognised by the personal law of the parties as sufficient to justify a divorce”

Petitioner’s lawful attorney testified on behalf of Petitioner. He tendered his power of attorney in evidence as exhibit A. According to him, Respondent in 2013 abandoned the matrimonial home in Italy leaving behind the Petitioner and their two younger children and parties have since not lived together as husband and wife. He stated that the marriage was fraught with misunderstandings and Respondent has made no indications of returning to her matrimonial home. Petitioner therefore prays the court for the dissolution of the customary marriage between the parties.

Respondent also testified that in 2013, she returned to Ghana to visit her ailing father. Whilst in Ghana, her father and sister who and were primary care-givers of the first child of the marriage here in Ghana both died successively. She was therefore compelled to stay behind and give the child emotional stability. She stated that Petitioner although in a position to relocate the child to Ghana failed to do so and this was a borne of contention

between them whilst she was in Italy. She stated that about 6 years ago, Petitioner showed his disinterest in the marriage by sending his lawful attorney to her in Accra to return the head drink to her in the absence of her family. She accepted the drink and parties have since then not lived as husband and wife.

Parties herein per their names are Akans. **J. B. DANQUAH** in his book **AKAN LAWS AND CUSTOMS AND THE AKIM ABUAKWA CONSTITUTION** at page 156 stated thus about divorce under the Akan custom; "It cannot be exaggerated how easily and rapidly marriages may be dissolved with little trouble. Should a husband feel that he had been offended by the wife's conduct, he would summon her before friends for the settlement of differences... Therefore the aggrieved party will have to state his or her case before responsible men. The arbitrators deliver their finding after hearing each party, and then an attempt is made to reconcile the couple. At this juncture there is no law to bind either husband or wife to the other consort. He or she may or may not take the representations of the arbitrators. If it is the husband who is pressing for divorce because of his wife's misconduct, the odds are that he would rather divorce and get his money to marry a better girl, than retain an unserviceable wife. If it is the wife who has applied for divorce, because of ill-treatment, there is not the least probability of her submitting again to the wild habits of an imprudent husband. The argument on either side strong and heated. The Arbitrators give in. The divorce is pronounced. They need not go to the Chief's Court, except for some special

reason one of them wishes to do so. Any court of self constituted arbitrators can witness a divorce. **The fact is, it lies within nobody's power to declare married partners divorced. It rests with the will of the partners alone.**(emphasis mine)”

In this present case, Petitioner herein being the husband has intimated to the court that due to their separation for over 6 years he wants the marriage dissolved. Respondent the wife herein has consented the dissolution and also prays for the marriage to be dissolved. Both parties to the customary marriage having expressed their desire, intention and decision of dissolving the marriage and have proceeded to agree to same in their terms of agreement executed between them and their respective counsel. Per the terms of agreement executed by the parties and their counsel, they agree at paragraph 5a as follows “that the marriage between the Petitioner and the Respondent be dissolved”. Parties herein having decided to dissolve their customary marriage, the court finds that the customary marriage celebrated between parties herein has indeed broken down beyond reconciliation as claimed by both parties in their petition and cross-petition. Accordingly Petition and cross-petition for dissolution of the marriage celebrated between the parties is granted as pray.

The court hereby decrees the said customary marriage celebrated between the parties in 1993 and registered at Registrar General’s Department, Accra in 2001 be and same is dissolved today, the 24th day of March, 2023 forthwith.

As mentioned supra, the parties executed terms of settlement on 10/2/2023 and prayed the court to adopt same as consent judgment during their evidence on oath.

The court therefore adopts as consent judgment consequential to the dissolution of the marriage of the parties the following terms of settlement;

- a) That the Petitioner should continue to have custody of Annalisa Agyei Mensah (the only minor issue of the marriage with reasonable access to the Respondent.
- b) That the Petitioner should continue to maintain Annalisa Agyei Mensah aged 17 years.
- c) That the 4-Acre land situate and lying at Gyaware Abrafo in the Central Region should be settled in favour of the parties equally.
- d) That the completed three (3) bedroom building which forms part of the seven (7) bedroom apartment of the Petitioner situated and lying at Ashongman in Accra should be settled in favour of the Respondent.
- e) That the other four bedroom uncompleted building which forms part of the seven(7) bedroom apartment of the Petitioner situate and lying at Ashongman in Accra should be settled on the Petitioner.
- f) That each party bears his or her own cost of this suit.
- g) That the instant terms of settlement be entered as consent judgment of the parties.

Accordingly, the court adopts the above terms of settlement as consent judgment of the parties in respect of their ancillary reliefs sought in the Petition and the cross-petition.

**PETITIONER'S LAWFUL ATTORNEY
PRESENT RESPONDENT PRESENT**

MR CHARLES GBEKLE FOR PETITIONER PRESENT

**KOFI AGAMA AKWETWI RERESNTING IRENE
ABORCHIE NYAHEFOR RESPONDENT PRESENT.**

**H/H AFIA OWUSUAA APPIAH (MRS)
(CIRCUIT COURT JUDGE)**

