CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 20TH APRIL, 2023

SUIT NO. C5/75/20

ROOSEVELT OSABUTEY - PETITIONER

VRS

MARY ELIKEM NANI OSABUTEY - RESPONDENT

JUDGMENT

On the 21st day of November, 2009, at the Tema Metropolitan Assembly marriage registry, the parties herein called upon the world to attest to and recognize the fact that they had become one unit under the law by marrying under the ordinance. More than a decade thereafter, and precisely on the 16th day of July, 2020, the petitioner herein, petitioned this court for a dissolution of their union on the basis that their marriage has broken down beyond reconciliation.

The parties cohabited in Tema after the marriage and have two issues. The petitioner premises this petition on the grounds that the respondent has behaved in an unreasonable manner such that he cannot be expected to continue to live with her as husband and wife. He prayed the court for:

1. The marriage celebrated between the parties on the 21st day of November, 2009 be dissolved
2. Custody of the children of the marriage be granted to the petitioner with access to the respondent.

In her answer and cross petition, the respondent averred that their marriage has indeed broken down beyond reconciliation. She grounds this on the unreasonable behavior of the petitioner and adultery.

She cross petitioned for;

1. That the marriage celebrated between the parties be dissolved
2. That the respondent be granted custody of the issues of the marriage and the petitioner granted access
3. An order for payment of alimony in the sum of fifty thousand Ghana cedis (Ghs 50,000) to the respondent
4. An order for property settlement by way of transfer of half of all the matrimonial properties jointly acquired by the parties as particularized in paragraph 19 to the respondent or payment of their monetary value in lieu of transfer.
5. Cost on full indemnity basis.

The petitioner filed a reply and answer to the respondent's answer and cross petition. The daggers having been drawn the issues for the court to determine are;

1. Whether or not the marriage celebrated between the parties has broken down beyond reconciliation
2. Whether or not custody of the issues should be granted to the petitioner or respondent.
3. Whether or not the respondent is entitled to the sum of fifty thousand Ghana cedis (Ghs 50,000) as financial settlement

4. Whether or not the parties acquired any marital properties and if so whether or not the respondent is entitled to half of the marital property or its monetary value
5. Whether or not the respondent is entitled to costs on a full indemnity basis.

THE CASE OF PETITIONER

Petitioner tendered in evidence a copy of their marriage certificate as EXHIBIT A. The case of the petitioner is that the respondent takes delight in assaulting him, is disrespectful to he and his family and has even assaulted his sister. That they are no longer compatible.

That whilst the respondent was going through his phone, he also requested for her phone to do same and the respondent became aggressive and assaulted him mercilessly. That she even broke the door when he run into their bedroom and locked himself up. That he reported this to the police and was given a police medical form to attend hospital. He tendered EXHIBIT B as the medical form.

That in 2019, the respondent told his sister that he could not achieve an erection. That she also reported same to some pastors and accused him of having HIV causing him to undergo an HIV test. That these accusations were so embarrassing that it led him to attempt suicide.

That well wishers, family members and pastors have tried to reconcile them without success due to the recalcitrant nature of the respondent. That respondent has on several occasions indicated to him that she is no longer interested in the marriage and he is at liberty to proceed to court for a dissolution of the marriage.

That the respondent once informed his friend by name Francis Agbolosu that whenever she sees the petitioner lying in bed, she felt like stabbing him with a knife to kill him.

He denied committing adultery. He further testified that the matrimonial home is the property of his late father and upon his death, same devolved on his mother and the children. That there were offices on the land and some other buildings. That his brother used to live there but he later renovated same to live in.

Also that the parcel of land at Dawhenya was acquired by his sister. He tendered in evidence EXHIBIT C as proof. That the only property which he has acquired is a piece of land at Mobole on the Afienya/Dodowa road.

Again, his evidence is that the respondent does not take care good care of the children and takes delight in physically assaulting them, particularly the first child.

THE EVIDENCE OF PW1

PW1's evidence is that on the 21st May, 2020, he visited the petitioner's house as he occasionally does because petitioner is his friend. That in a conversation with the respondent, she told him that when she sees the petitioner, she sometimes feels like stabbing him with a knife.

THE EVIDENCE OF PW2

PW2 testified as the sister of the petitioner. Her evidence is that the matrimonial home of the parties was acquired by their late father. That upon his death, the petitioner renovated part of the offices and lived in it with his family. Prior to this, one of the brothers used to live in the property. That she is also knows that the property evidenced

by EXHIBIT C belongs to their sister; Ruby Osabutey who is a graduate teacher at Winneba.

THE EVIDENCE OF PW3

The evidence of PW3 is that after the death of the father of petitioner, who was his uncle, he relocated to live in the matrimonial property which were offices. That when the petitioner decided to relocate to live in the same offices, he vacated same and built a wooden structure on the same piece of land where he stays.

That petitioner's brother rather came to live in the offices for sometime after which petitioner engaged his services as a mason to pull down the structure and build a storey building. That he did same and aside from some building materials that were already on the land, all expenses were borne by the petitioner.

THE CASE OF THE RESPONDENT

According to the respondent, after their marriage, they cohabited in the same house with the respondent's mother and siblings. It was upon her insistence that they moved to their own residence in Sakumono in 2015.

That although the land on which they constructed the home belonged to the petitioner's late father, they pulled their resources together to build the current three bedroom house which hitherto was a dilapidated clay building.

Further that they agreed that the petitioner would procure a loan for the structure and repay the loan obligations from his salary whilst she used her money to take care of the home. That she was fully involved in the construction process and took food to the workers on site.

That due to the toxic relationship between she and her in laws, she moved into the structure alone before its completion stage. That the petitioner joined her four months later and that was when they managed to almost complete the structure.

She continued that the petitioner assaults her both physically and verbally and berates her in public. That he once created a scene at her office. That he also assaulted her after she complained about his locking her up in their home for three days without access to food. She reported to the police. She tendered in evidence **EXHIBIT 1** as proof of the police invite to the petitioner.

That the petitioner constantly locks her out of the house. That in May, 2020, he strangled her whilst she was on the phone with her father and said he would kill her. He also dragged her out of the house naked.

That three days thereafter, she realized the petitioner was involved in an amorous relationship with one Sandra Ofei Nyarko and had promised to marry her. She tendered in evidence an audio recording between the petitioner and his paramour, pictures of the petitioner and the said Sandra as well as a letter written to the petitioner as **EXHIBIT 2 and 3 seri**es as well as EXHIBIT 4 and 8.

That she confronted the petitioner and he snatched her phone in order to delete everything on it upon the suspicion that she had copied incriminating evidence from his phone. That he later assaulted her and she bit his hand in self defence.

That the petitioner continued to assault her. She tendered in evidence EXHIBIT 5 series as copies of a medical report and photographs of injuries she sustained from one such

incident. That the petitioner demands to eat freshly cooked food everyday and this coupled with her various attendance at DOVVSU has affected her work. She tendered in evidence EXHIBIT 6 and 7 series as proof of this.

Also that the petitioner informed her father that he wanted to divorce her. All attempts by family members and pastors to reconcile them have failed due to the petitioner's adulterous and violent behavior. That in June, 2020, both families met at DOVVSU to reconcile them but this was not successful.

That contrary to the petitioner's claim that she abuses the children, the children rather miss her when they are away from her. She tendered in evidence as part of EXHIBIT 3, a phone conversation between her and the children.

That in addition to the matrimonial property, they also acquired a piece of land at Afienya on the Dodowa road. She tendered in evidence EXHIBIT 9 as a copy of the lease.

THE EVIDENCE OF RW1

RW1 is the father of respondent. His evidence is that on the 16th day of May, 2020, the petitioner informed him that he was no longer interested in the marriage and wanted a divorce. They could not conclude the conversation and so he called him the next day to question him.

That after the petitioner answered the phone, he heard him screaming that "I am going to kill you if you don't leave my house'' as well as what appeared to be a tussle as he could hear the respondent screaming in pain. He later got to know that the respondent's

scream was as a result of the petitioner strangling her. He called his sons to go and find out if the respondent was alive.

CONSIDERATION BY THE COURT

Divorce is by means of enquiry and a court must satisfy itself by way of evidence that indeed the marriage has broken down beyond reconciliation. Thus although the respondent in her answer admits that the marriage has broken down beyond reconciliation and also alleges unreasonable behavior and adultery on the part of the petitioner, the Court through evidence must satisfy itself that the marriage has broken down beyond reconciliation. See the case of ***Ameko v. Agbenu [2015] 91 G.M.J.***

Blacks' law dictionary, (8th edition, 2004 p. 1449) defines divorce as "***the legal dissolution of a marriage by a Court***." In Ghana, when a couple decide to marry under the Ordinance, then they can only obtain a divorce through the Courts. The ground upon which a divorce can be obtained from the Courts is clearly stated under the ***Matrimonial Causes Act, 1971 (Act 367).***

In **section *1 (2)*** *of* ***Act 367***, the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation. In proving that the marriage has broken down beyond reconciliation, a petitioner must establish one of six causes i.e. adultery; unreasonable behavior; desertion for a period of two years; consent of both parties where they have not lived together as husband and wife for a period of two years; not having lived together as husband and wife for a period of five years; and finally, inability to reconcile differences after diligent effort.

Petitioner's basis for arriving at the conclusion that their marriage has broken down beyond reconciliation is unreasonable behavior. As the respondent had also cross

petitioned, the burden of proof and persuasion laid on the each of them to establish their case. The respected ***Benin JSC*** in the case of ***John Tagoe v. Accra Brewery Ltd. [2016] 93 G.M.J. 103 @ 123*** *was convicted that: "It is trite law that he who alleges, be he plaintiff or a defendant, assumes the initial burden of producing evidence. It is only when he has succeeded in producing evidence that the other party will be required to lead rebuttal evidence, if need be***."**

The burden on both of them is akin to a double edged sword. Akamba JA (As he then was) in the case of ***Kwaku Mensah Gyan & I Or. v. Madam Mary Armah Amangala Buzuma & 4 Ors. (Unreported) Suit No. LS: 794/92 dated 11th March, 2005*** explained: *"What is required is credible evidence which must satisfy the two fold burdens stipulated by our rules of evidence, N.R.C.D. 323. The first is a burden to produce the required evidence and the second, that of persuasion. Section 10 & 11 of N.R.C.D. 323 are the relevant section.*

1. Whether or not the marriage has broken down beyond reconciliation.

The petitioner's basis for arriving at the conclusion that her marriage to the respondent has broken down beyond reconciliation is that the respondent has behaved in such an unreasonable manner that he cannot be expected to continue to live with her as husband and wife and further that all attempts made by their families, pastors and friends to reconcile them have failed.

The respondent cross petitions for a dissolution of the marriage on the grounds of adultery, unreasonable behavior and failure to reconcile their differences after diligent effort.

I will first deal with the ground of adultery. Adultery is defined by the ***Blacks Law Dictionary (8th ed. 2004 at page 160)*** as "voluntary sexual intercourse between a married person and someone other than the person's spouse''.

In order for adultery to be basis for holding that a marriage has broken down beyond reconciliation, a party relying on same must prove not only the adultery but the fact that he or she found it intolerable to continue to live with the offending spouse after the notice of adultery came to his or her attention.

In proof of her claim of adultery, the respondent tendered in evidence documentary evidence by way of photographs of petitioner and his paramour and also audio recordings of various conversations between petitioner and his paramour. It also included a letter supposed written by the paramour to the petitioner. They were admitted into evidence without any objection as EXHIBIT 2, 3 and 4.

Whereas EXHIBIT 2 series and 4 on their own do not amount to much by way of evidence, EXHIBIT 3 series which are audio conversations lasting for about an hour leaves no doubt that indeed the petitioner was committing adultery with one Sandra. It is a conversation in petitioner's very voice and in same, they discuss issues pertaining to sexual relations, future plans of marriage and issues concerning the respondent. I find from that evidence that the petitioner committed adultery.

However, the evidence on record does not show that the respondent was repulsed by that adultery and found it intolerable to live with the petitioner after she found out. Her own evidence is to the contrary. She blames the petitioner for his desire to dissolve their marriage so he can be with his paramour, her father testified that it is the petitioner who

rather called for a dissolution of their traditional marriage and respondent says it is the petitioner who sacked her out of the matrimonial bedroom.

Her own evidence does not in any way show that she was averse to the adultery committed and which the respondent as still committing. On the basis that she did not find it intolerable to live with the petitioner by virtue of his adultery, I hereby find that she is not entitled to a finding that the marriage has broken down beyond reconciliation.

I would now proceed to the grounds of inability to reconcile differences and unreasonable behavior which both parties make claims of. ***Act 367*** does not define what constitutes unreasonable behaviour. By virtue of the varied nature of mankind character and sensibilities, it may very well prove a herculean task if an attempt is made to set in stone what acts constitute unreasonable behaviour.

However, the test that is used is whether or not the act committed by one spouse is such that all right thinking men would hold that the act is unfair and unjust and the spouse who has been so offended, cannot be expected to continue to live with the other as husband and wife.

In determining what constitutes unreasonable behavior, the test to be applied is an objective one. Hayfron Benjamin J (as he then was) held in the case *of* ***Mensah v. Mensah (1972] 2 G.L.R. 198*** that "In determining whether a husband has behaved in such a way as to make it unreasonable to expect a wife to live with him, the court must consider all circumstances constituting such behaviour including the history of the marriage. It is always a question of fact. The conduct complained of must be grave and weighty and

mere trivialities will not suffice for **Act 367** is not a Cassanova's Charter. The test is objective".

This test was relied on by the Court of Appeal in the case **of *Knusden v. Knusden [1976] 1 GLR 204-216*** where the court held that "The cross-petition was based on ***Act 367, Section 2 (1) (b)*** under which the test to be applied in determining whether a particular petitioner could or could not reasonably be expected to live with the particular respondent was an objective one, and not a subjective assessment of the conduct and the reaction of the petitioner".

In assessing such conduct, the court had to take into account the character, personality, disposition and behaviour of the petitioner as well as the behaviour of the respondent as alleged and established in the evidence. The conduct might consist of one act if of sufficient gravity or of a persistent course of conduct or series of acts of differing kinds, none of which by itself might be sufficient but the cumulative effect of all taken together would be so."

In the case ***of Ansah v. Ansah [1982-1983] GLR 1127, Owusu Addo J***. held that "the test under the section, was whether the petitioner could reasonably be expected to live with the respondent inspite of the latter's behavior. The test was therefore objective. But the answer obviously had to be related to the circumstances of the petition in question. That had to be a question of fact in each case. It followed that the conduct complained of must be sufficiently serious since mere trivialities would not suffice".

The petitioner's basis for claiming that the respondent has behaved unreasonably is that she takes delight in assaulting him, is disrespectful towards him and his family and has made known the fact that she sometimes wants to kill him. Also that she has made false

allegations including impotency and HIV against him and caused him much embarrassment and anxiety.

He tendered in evidence amongst others a report he made to the police after the respondent assaulted him. EXHIBIT B and B1 are police medical forms dated the 22nd of May, 2020 and 14th July, 2020. It indicates that the petitioner reported assault against the respondent on both dates. The reports indicate injuries of bites on petitioner's shoulder and various abrasions.

PW1 and PW2 also testified to the assaults and the respondent expressing her desire to kill the petitioner. I had no cause to doubt their evidence and I found PW2 to be particularly credible as he gave a good account of himself as a witness who was in court to tell the truth as he knew it.

The respondent under cross examination initially denied assaulting the petitioner but later admitted that she had assaulted him in self defence. That she bit him and also assaulted him with an iron.

The respondent on her part also called her father to testify to the fact that he once overheard the respondent shouting about an attempted strangulation by the petitioner. I believed his witness.

It appeared that one of their go to's for resolving differences in their marriage was to assault each other even without provocation. Assault is not an expected incident of marriage and to the extent that they both made it their first resort, I find their actions unreasonable.

That ties in to the inability to reconcile their differences. From their own evidence, their families have met and attempted to resolve these incidents of assault and misunderstandings between them all to no avail. PW2 testifies that in one of such meetings, the respondent assaulted her by slapping her. Respondent on her part says that it was PW1 who first slapped her and she then stopped her when she tried to do it a second time.

Between the two of them, I found PW1 to be much more credible on this. Respondent had been evasive under cross examination when it comes to her part of the assault and only sought to highlight that of the petitioner. From the evidence, she had played an equal part if not more in the acts of assault that had occurred in their marriage.

The fact that even at a meeting to reconcile them, they had engaged in this assault shows how pervasive it had become in their marriage. Although their marriage was based on a vow to love and honour each other, from their evidence, they have not shared a matrimonial bed since 2018 but have had cause severally to report each other to the police station for various acts of assault. Their marriage has shifted direction from a love dance into a boxing arena.

To borrow the words of counsel for the petitioner in his eruditely written address filed on behalf of the petitioner on the 31st day of March, 2023, at page 8, "it was calm and smooth sailing when the parties embarked on this connubial voyage but soon, progress stalled. It turned stormy and well, the cables snapped and the anchor could not hold the ship when the billows brought their forces to bear''.

Their marriage can at best be described as toxic and it is manifestly evident, that all attempts made to reconcile them have failed. More importantly, it appears that no

further attempt to reconcile them would succeed. In the circumstances, I find that their marriage has broken down beyond reconciliation.

On the grounds that after diligent efforts, the parties have failed to reconcile their differences, I hereby find that their marriage has broken down beyond reconciliation. Accordingly, I hereby pronounce a decree of dissolution with regard to their marriage celebrated on the 21st day of November, 2009 at the Registry of the Tema Municipal Assembly. Their marriage certificate is hereby cancelled.

2. Whether or not custody of the issues should be granted to the petitioner or respondent.

There are two issues of the marriage, a boy and a girl aged 10 and 6 as at the date of presentation of this petition. They should be 12 and 8 as at now.

According to **AZU CRABBE CJ** in the case of ***Braun v. Mallet [1975] 1 GLR 81-95*** "in questions of custody it was well-settled that the welfare and happiness of the infant was the paramount consideration. In considering matters affecting the welfare of the infant, the court must look at the facts from every angle and give due weight to every relevant material''. See also the case of ***Gray v Gray [1971] 1 GLR 422;***

This provision is referred to as the welfare principle and it has been concretized by Statute in ***section 2 of the Children's Act, 2008 (Act 560).***

Section 2—Welfare Principle.

(1) The best interest of the child shall be paramount in any matter concerning a child.

(2) The best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child.

A court in arriving at decisions as to custody and access of a child is bound to consider the best interest of the child and the importance of a young child being with his mother. The court must also consider the age of the child; that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents; the views of the child if the views have been independently given; that it is desirable to keep siblings together and the the need for continuity in the care and control of the child.

In the case of ***Barake v. Barake [1993-94] 1 GLR 635 Brobbey J*** (as he then was) held that "the welfare of the child was the primary consideration for the determination of the custody of a child. The welfare of the child however had to be considered in its largest sense. Although some of the factors taken into account in deciding on the welfare of the child were the positions of the parents, the position of the child and the happiness of the child, the first consideration should be who his parents were and whether they were ready to do their duty''.

Although both parties in their pleadings sought for custody of the children, learned counsel for the respondent in her well written address filed on behalf of the respondent on the 3rd of April, 2023 at page 12 submitted that it would be best to grant joint custody to the parties herein for reasons stated in the address.

At the early stages of proceedings, the respondent filed an application for alternative accommodation and access to the children. At the time, both she, the petitioner and the children were living in the matrimonial home. In moving the application, her then counsel made it clear that the respondent's prayer for alternative accommodation was for herself only and that the children were to remain in the matrimonial home in the custody of the petitioner.

I granted her application and the children have since December, 2020 been in the custody of the petitioner. By her shift from sole custody to joint custody, it appears that the respondent has no issues with the present arrangement being maintained.

There has been no report of abuse, neglect or deprivation on the part of the petitioner towards the children. They have been under his sole care for more than two (2) years and are used to his control.

Although the position of the law is that it is best for children to be in the care and custody of their mother and the courts per the case of ***Opoku Ware v. Opoku Ware [1973] 2 GLR 349*** are more inclined to doing so, the ultimate decision must boil down to what is in the best interest of the children.

It is the petitioner who has maintained his position for custody of the children, it is he who has indicated at all points that he wants to have the children and do his "duty by them''. The respondent could have sought for interim custody of the children when she prayed for alternative accommodation. She did not. That in itself is an indication that she was not fully prepared to do her "duties by the children'' particularly so as the eldest is a girl who was then ten years of age.

As the children have settled into a life with the petitioner who is their biological father, I see no reason to disrupt their lives at the present by making a contrary order, particularly as the respondent does not appear to be in a hurry for that arrangement to be amended.

Accordingly, I hereby grant custody of the two issues to the petitioner with reasonable access to the respondent. If the petitioner remarries, he is to ensure that the children are not abused, neglected or put to any form of depravity by virtue of his new marriage. His duty to them as a father must at all times remain paramount and in equal importance to whatever duties he may acquire by virtue of any new marriage (children to report abuse to the registrar to be brought to the notice of the judge and the police).

The respondent is to have access to the children on weekends from Saturday morning through to Sunday evening and is to return them by 4:pm during school terms. Save for vacations where the children have school related activities or extra classes, they are to spend equal time with both parents.

3. ***Whether or not the respondent is entitled to the sum of fifty thousand Ghana cedis (Ghs 50,000) as financial settlement.***

In the case of ***Oparebea v. Mensah [1993-94] 1 GLR 61,*** the court held that in order to determine a claim made under ***Section 20 (1) of the Matrimonial Causes Act***, the court must examine the needs of the party making the claim and not the contributions of the parties during the marriage.

The case of ***Riberiro v. Ribeiro [1989-1990] 2 GLR 109*** provides a good guidance to a court when making decisions on financial provision. My consideration should not only

be based on the need of the respondent but also on the financial strength of the petitioner as well as the standard of living to which the respondent was accustomed to during the marriage.

In the case of ***Obeng v. Obeng 2015 [GHASC 112]***, Akamba JSC in delivering the decision of the Supreme Court held that "ordinarily, a court should only order a lump sum payment when the husband has capital assets out of which to pay without crippling his earning power. When he has available assets sufficient for the purpose, the courts should not hesitate to order him to pay a lump sum. The payment should be outright and not subject to conditions except where there are children when it may be desirable to make it the subject of a settlement. (see ***Wachtel v. Wachtel (1973) 1 AER 829 at 830***''.

Any order for financial provision must be based on equitable grounds. Factors to be considered in arriving at an equitable decision include the earning capacities of the parties, property or other financial properties which each of the parties has or is likely to have in the foreseeable future, the financial needs, obligations and responsibilities of each of the parties and the standard of living enjoyed by the family before the breakdown of the marriage.

Both parties are gainfully employed. The petitioner is a network engineer whereas the respondent is an employee of Khomarah printing press. Whereas the petitioner earns a monthly salary of almost two thousand, five hundred Ghana cedis (Ghs 2,500), the respondent earns a monthly salary of about one thousand, five hundred Ghana cedis (Ghs 1,500). There is no evidence of any capital sum of money that the petitioner has. Indeed, respondent through learned counsel had sought to put forth the case that the

petitioner's salary was not enough to enable him service the payment of a loan and still take care of the home.

As it stands now and in the course of these proceedings, it is based on the same salary that he maintains the children and pays all their related bills and also pays part of the accommodation costs of the respondent. In the course of these proceedings, the respondent has had the full benefit of her salary to herself.

She does not expend her time to care for the children for the court to attempt to quantify same. The petitioner cares for the children as well as maintains them and although the care and maintenance of children is a joint obligation where both parents earn an income, the petitioner has not sought for the respondent to contribute to the maintenance of the children.

Be that as it may, in the course of their marriage, she had been devoted to the care of the children. Perhaps, she could have expended that time in furthering her career or engaged in a side business like the petitioner did. Within that period, she freed the petitioner's time such that he did not only focus on his work but had time to do 'random jobs'.

Also, petitioner puts forth the claim that he was a responsible husband and father who maintained the home throughout the course of the marriage. Now that they are no longer married, the respondent cannot rely on him to maintain her in anyway; not even feeding.

For these reasons, it would be fair that he settles her with a reasonable amount to enable her cushion the fall. Accordingly, the petitioner is to pay to her the sum of fifteen

thousand Ghana cedis (Ghs 15,000) as financial settlement within ninety days (90) from the date of judgment failure of which the amount would attract interest at the commercial bank rate from the date of judgment till the date of final payment.

4. Whether or not the parties acquired any marital properties and if so whether or not the respondent is entitled to half of the marital property or its monetary value

The respondent in her answer and cross petition averred that in the course of their marriage, they had acquired a piece of land at Dawhenya, the matrimonial home as well as a piece of land at Afienya. As she was asserting the positive, the burden of proof laid on her.

The burden of proof laid on her to lead evidence to establish that they had acquired these properties in the course of their marriage and same should be declared as marital property. It is only after she had established these in the mind of the court, that the principle of equality is equity would be applied in the distribution of the matrimonial property.

The law as espoused by the Supreme Court in reliance on Article 22 of the 1992 Constitution is that any property acquired by spouses during the course of their marriage is to be presumed (rebuttably) to be jointly acquired. In other words, property acquired by the spouses during marriage is presumed to be marital property unless contrary evidence is led.

See the case of ***Arthur (No 1 v. Arthur No 1) [2013-2014] SCGLR 543, Vol. 1*** **which re-affirmed the decision in the oft cited case of** ***Gladys Mensah v. Stephen Mensah [2012]***

1 SCGLR 391 in which the veritable Dotse JSC in delivering the judgment of the court, gave effect to the provision in ***Article 22*** of the ***Constitution, 1992***.

The principle to be applied in the distribution of marital property is that of equality is equity. See the majority decision in the Supreme Court decision *of* ***Peter Adjei v. Margaret Adjei (Civil Appeal No.J4/06/2021) delivered on the 21st day of April, 2021***. *Pwamang JSC* in reading the majority decision held that "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''.

In her written evidence in chief, she appeared to have abandoned the claim for the Dawhenya land. I say appeared because she did not repeat her claim for it and neither did she lead any evidence in support of same. However, learned counsel for the respondent had cross examined extensively on same. As cross examination serves a myriad of purposes amongst which being that it affords a party an opportunity to put across her case, I would consider the issue based on the evidence on record.

The petitioner in denying the claim as to the acquisition of the said land contended that same belonged to his elder sister. He tendered in evidence EXHIBIT C as a copy of the lease covering the said land. It is dated the 1st day of June, 2012 and is between Roland Tetteh Nyavor on one hand and Ruby Osabutey on the other hand.

The authenticity of EXHIBIT C was not challenged under cross examination. It thus bears out his claim about ownership of the said parcel of land.

In cross examining petitioner, learned counsel for respondent sought to put forth a case that the said owner of the land; Ruby Osabutey has transferred her interest in same to the petitioner. At page 27 of the record of proceedings, this is what transpired;

Q: *You said in paragraph 33 of your evidence in chief that the land at Dawhenya belongs to your sister Ruby Osabutey. Not so?*

A: True my lord.

Q: You bought the said land from your sister together with your colleague Francis Agbolorsu during the subsistence of the marriage for GH¢10,000.

A: Not true my lord.

Q: I suggest to you that you bought the said land with your colleague Francis Agborlorsu during the subsistence of your marriage for GH¢10,000.

A: That is not true my lord.

Q: Your sister Doris is the one who took you, your colleague and the respondent to the land after you purchased it.

A: Not true my lord.

Q: And your colleague later on sold his portion of the land to you. Is that not so?

A: Not true my lord.

Francis Agbolosu testified in this court as PW1, as his name had been mentioned in relation to the land by respondent through her counsel, it would have been prudent to cross examine him on same as cross examination is at large. No such attempt was made to cross examine him to solicit the truth or otherwise of his involvement in this land.

PW2 also corroborated the claim of petitioner. The evidence from PW2 is that their sister is a teacher at Winneba and the said piece of land was acquired by teachers. Both

petitioner and PW1 maintained this under cross examination by astute counsel for the respondents.

PW2 who is a sister to petitioner had strenuously denied that this land at Dawhenya is matrimonial property or even belongs to the petitioner. She stoutly defended her claim that it belonged to their sister under cross examination. I found her to be credible. She had not only denied, but testified of facts, events and circumstances from which the court could infer that her evidence was more probable than not.

Respondent on the other hand, did not lead any positive evidence in proof of her claim. It is a legal known that a mere assertion which is denied by the opposing side, even when repeated on oath does not constitute proof. **Majolagbe v. Larbi & Ors. (1959) GLR 150** held that "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 eg, 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 the averment on oath or having it repeated on oath by his witnesses. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true''. See also the case of ***Adjetey Agosu v. Kotey &Ors [2003-2004] SCGLR 420.***

On the basis that the respondent has, on a balance of probabilities failed to prove her claim that the Dawhenya land is marital property I hereby proceed to dismiss her claim.

Respondent also contended that they acquired a piece of land at Afienya. She tendered in evidence EXHIBIT 9 as a copy of the lease agreement. There is no controversy about the piece of land at Afienya having been acquired in the course of the marriage. The

petitioner admits same although he says the land is at Mobole on the Afienya road. At page 28 of the record of proceedings, petitioner had answered;

Q: *It was the respondent who expressed interest and negotiated for the land which is situated on the Afienya road. Is that not so?*

A: Yes, my lord.

Q: She subsequently discussed with you to purchase the land.

A: True my lord.

I hereby find that the said land was marital property.

With regard to the matrimonial home, the respondent's claim is that they jointly acquired same. That she contributed financially as well as by supporting the workers with the supply of food. Her case is that the land was gifted to the petitioner by his late father and they in turn constructed their matrimonial home on same.

The petitioner denied this and said the matrimonial home sits on family property. That the said land belonged to their late father who used same as a factory and upon his death, devolved to his mother, his siblings and he himself. That the building sits on a 14*42 ft piece of land which used to be the office of his late father when the land was used as a factory.

Although the petitioner had put forth the claim that the house is renovated property, I find that the evidence of his own witness, PW3 who is not only his relative but also the mason who built the said house, contradicts his claim.

According to the witness, the petitioner made him to pull down the whole office building and then he proceeded to construct the current matrimonial home on same. That evidence corroborates the claim of respondent that the house had been built from scratch and was not a renovation.

However, the evidence on record is that the said house was built on family land. Although the respondent had tried to dance around this, she had finally admitted at page 62 of the record of proceedings, under cross examination by learned counsel for the petitioner that:

Q: By paragraph 7 of your written evidence in chief, you admit that the land on which the Sakumono house stands was petitioner's late father's property. Is that correct?

A: Yes Your Honour.

Q: Are you aware of any instruments that have willed out or by any other means alienated the property from the father's name.

A: No instrument Your Honour, but he, his mother and his sister told me that portion of the land was given to him by his father before he died.

Q: Did they tell you by which instrument that portion was given to him.

A: No. He specifically told me that his father did that before he died so everybody is aware.

Q: I put it to you that after petitioner's father's death, the land on which the matrimonial property so called stands is family property.

A: Yes Your Honour. The whole land is in his father's name as family property.

The respondent's own admission dismisses her contention that the matrimonial home is a jointly acquired property. By her admission that it sits on family land and the position of the law being that a land is construed together with whatever is situated thereon in terms of ownership, a house situated on family property cannot be considered as

marital property which would be subject to distribution upon the dissolution of the marriage.

That however does not take away from the fact that the house on the land was built in the course of the marriage and used as their matrimonial home. Although I found the respondent to be exaggerating the extent of her contribution to the building of the house particularly in her claim that she provided for both their nuclear family as well as the extended family of the petitioner including his mother during this period (even though she was not on good terms with his mother) and her sudden claim under cross examination that part of her insurance claim payout was used by the petitioner in the building, I find that I do not entirely disbelieve her claim. She had only exaggerated same.

I believe her claim that she had had to make sacrifices by contributing her salary to the maintenance of herself and the children during the period of construction of the house. Although she had no evidence of this, it is elementary that marital decisions are not made in the same manner as commercial decisions and the courts do not require mathematical precision. See the case of ***Abebreseh v. Kaah [1976] 2 GLR 46.***

Now that they are divorced, the petitioner and the children would have the use and occupation of the said house during his lifetime whereas the respondent would not. She would have to live in rented premises as she currently does until she finds her feet. It would be fair in the circumstances to settle the half of the petitioner's share in the mobole land on the respondent. Accordingly, I hereby settle the entirety of the mobole land which was acquired in the course of marriage on her. The petitioner is to transfer title into her name within thirty days from the date of judgment at his own cost.

5. Whether or not the respondent is entitled to costs on a full indemnity basis.

The principle of ordering a petitioner to pay the respondent's legal fees is usually premised amongst others on a fault basis. That is where the Court determines that the marriage has broken down beyond reconciliation due to the fault of one party, particularly the very petitioner who had hurled the respondent to court, that party may be ordered to pay the legal costs and all other incidental costs incurred by the other party in prosecuting the case.

Another consideration is the financial strength of both parties. The respondent claims for costs on a full indemnity basis. As she cross petitioned and had the obligation to prove her cross petition the same way as the petitioner had a duty to prove his petition, I find that she cannot be entitled to this. She was not in court simply on the basis of the petitioner's claims, she had her own claims to prosecute in this court.

Again, I have also not attributed the breakdown of their marriage at the doorsteps of the petitioner alone. On these basis, I find that she is not entitled to her claim for costs on a full indemnity basis. Each party is to bear their own costs in suit.

(SGD)

H/H BERTHA ANIAGYEI (MS)
(CIRCUIT COURT JUDGE)

CHARLES WALKER DAFEAMEKPOR FOR AFFUM AGYAPONG FOR THE PETITIONER

MARYAM SHUAIBU SHARIFF FOR THE RESPONDENT PRESENT