**IN THE CIRCUIT COURT HELD AT DANSOMAN, ACCRA ON TUESDAY THE 6TH DAY OF JUNE, 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL BAASIT**

**SUIT NO.: CCD/C4/16/23**

**RAPHEAL QUIST - PETITIONER**

**VRS.**

**MATILDA LARBI - RESPONDENT**

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**PARTIES:**

PETITIONER – PRESENT

RESPONDENT – PRESENT

**COUNSEL:**

NO LEGAL REPRESENTATION

## JUDGMENT

**Background:**

The instant Petition was filed on the 14th day of April, 2023 at the Registry of this Court wherein the Petitioner prayed for the following reliefs;

a. Dissolution of the marriage celebrated between the Petitioner and the Respondent.

b. Custody of the child be granted to the Respondent with access to the Petitioner.

According to the Petitioner, the marriage has broken down beyond repairs and must be dissolved because the Respondent had behaved in ways that the Petitioner finds it very difficult to live with her as his wife. He continued that the Respondent is disrespectful with unreasonable attitudes resulting in unnecessary tension and increasing arguments in the matrimonial home. The Petitioner added that the Respondent's behavior has seriously affected his physical, emotional and psychological abilities to the extent that his family and Pastor have attempted on several occasions to resolve the issues in the marriage but all had proved futile. The Respondent filed an Answer to the Petition on the 20th April, 2023 and stated that the Petitioner told her severally that he is no longer interested in the marriage and eventually moved out of the matrimonial home. Consequently, on the 1st day of January 2023, the marriage was dissolved at custom of which she was compensated with an amount of GH¢50,000.00 and also to have custody of their child.

***Issues for Determination***

In view of the processes so far filed, the issues for determination are as follows;

i. Whether or not the customary marriage of the parties can be dissolved by the instant court.

ii. Whether or not Respondent has behaved in a manner that it would be unreasonable to expect Petitioner to live with her as husband and wife.

iii. Whether or not the parties have after diligent efforts have been unable to reconcile their differences.

iv. Whether or not the Respondent can have custody of the child with reasonable access to the Petitioner.

***Analysis***

The marriage celebrated between the parties which they seek to dissolve is a customary marriage and as such the first issue for determination is **whether or not the customary marriage of can be dissolved by the instant court**. To make a determination, there is the need to appreciate marriages in Ghana. Under the laws of Ghana as encapsulated in the **Marriages Act, 1984 (CAP. 127)**, there are Three (3) types of marriages, namely; Ordinance Marriage, Customary Marriage and Marriage of Mohammedans, all of which are independent of each other but whilst the Ordinance Marriage is strictly monogamous, Customary Marriage and Marriage of Mohammedans are potentially polygamous. However, the common practice in Ghana is to first contract a customary marriage and subsequently convert same into an Ordinance Marriage or Marriage of Mohammedans. When a customary marriage is converted to an Ordinance marriage, all rights, privileges and liabilities of the customary marriage cease to exist and become extinguished. The Ordinance marriage comes into being and extinguishes any other marriage previously contracted by the parties. It must be emphasized that Ordinance marriage may only be dissolved by a court and a customary marriage may be dissolved by the families in accordance with customary law.

In this instant case however, the evidence on record shows that the parties were customarily married and there is no evidence to show that the marriage was converted into Ordinance Marriage. The evidence further shows that the said marriage has been dissolved customarily, yet the Petitioner prays for the court to dissolve the said customarily and this raises the issue of whether the court can proceed to dissolve a customary marriage. Ordinarily, a customary marriage is dissolved customarily involving the families of parties and as such there need not be any court intervention to dissolve such a marriage. However, with the

enactment of the **Matrimonial Causes Act, 1971 (Act 367),** the Court may upon an Application by a party, dissolve a customary marriage.

In fact, in the case of **Adjei vs. Foriwaa** [1980] GLR 378, the learned **Korsah J.** stated as follows; *"In my view, any party to a marriage other than a monogamous one who seeks a relief from this court … must be deemed to have made an application to the court to apply the provisions of this Act to the marriage. But for the provisions of this Act, it was not the province of the … Court to entertain Petitions for divorce where the marriage was one contracted under customary law. Customary law divorce was by act of the parties not by a decree of the court. The court could be requested to ascertain whether there was a valid customary law marriage or whether such a marriage had been dissolved according to custom. But the customary procedures for the dissolution of customary law marriages did not lend themselves to a dissolution of the marriage by a court action. The courts, therefore, until the enactment of Act 367, could not entertain a Petition for the dissolution of a customary law marriage".*

In view of the above, there is the need to state the position of the law as far as the dissolution of customary marriages by the court is concerned and same is stated in the Act 367 as follows;

*Section 41 - Application of this Act;*

1) *This Act shall apply to all monogamous marriages.*

2) ***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 recognized by the***

***personal law of the parties to the proceedings, in addition to or in substitution for the matrimonial reliefs afforded by this Act.***

3) *In the application of section 2 (1) to a marriage other than a monogamous marriage, the Court shall consider the facts recognized by the personal law of the parties as sufficient to justify a divorce, including in the case of a customary law marriage, but without prejudice to the foregoing, the following: (a) wilful neglect to maintain a wife or child; (b) impotence; (c) barrenness or sterility; (d) intercourse prohibited under that personal law on account of consanguinity, affinity or other relationship; and (e) persistent false allegations of infidelity by one spouse against another:*

4) *Subsection (3) shall have effect subject to the requirements of justice, equity and good conscience.*

5) *In the application of this Act to a marriage under customary law, the words "child of the household" shall be construed as including a child recognized under customary law as a child of the parties.*

Consequently, the implication is that the Petitioner prays the court to apply the provisions of Section 41 of Act 367 in the dissolution of his customary marriage. Thus, per the said Section 41 of Act 367, the court shall determine the instant Petition for the dissolution of the parties' customary marriage and shall do so pursuant to the provisions of Act 367.

Since Act 367 is to be applied to the instant Petition, the next issue for determination is **whether or not Respondent has behaved in a manner that it would be unreasonable to expect Petitioner to live with her as husband and wife.** The Petitioner's main ground for seeking the dissolution of this marriage as specifically stated in paragraph 12 of the Petition is that the Respondent has behaved in a manner that he cannot be expected to live with her as husband and

wife. It must be emphasized that Section 2 (1) (b) of Act 367 provides that *where the Respondent has behaved in a way that Petitioner cannot reasonably be expected to live with the Respondent same also is proof of the breakdown of the marriage beyond reconciliation*. Petitioner in his evidence, testified among others that, after the birth of their child, their respective expectations changed as well as their behaviors towards each other to the extent that each became aggressive towards the other. He testified further that the matrimonial home became extremely tensed and the continuous tension in the house persisted until the 1st day of January 2022 when his family presented a drink to Respondent's family to symbolize the end the marriage and same was accepted by the Respondent's family.

Under section 2(1)(b) of Act 367, what constitutes the fact unreasonable behavior has also been discussed in the case of **Mensah vs Mensah** [1972] 2 GLR 198 where the court held 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 behavior 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"*. Similary, Amissah JA in the case of **Knudsen vs Knudsen** [1976] 1GLR 204, insisted as follows; *"the question therefore is whether the Petitioner established that the Respondent behaved in such a way that he could not reasonably be expected to live with her. Behaviour of a party, which would lead to this conclusion, would range over a wide variety of acts. It may consist of one act if of sufficient gravity or of a persistent course of conduct or of a 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."*

In this instant case, the Respondent in her Answer to the Petition, denied all the allegations of unreasonable behaviour. The Petitioner also merely repeated the averments of unreasonable behaviour on oath and the Respondent opted not to cross-examine the Petitioner to challenge him on the allegations of unreasonable behaviour. Section 10 of the **Evidence Act, 1975 (NRCD 323)** defines the burden of persuasion but Section 11(1) of NRCD 323 specifically provides that *"… the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue"*. Similarly, in the case of **Don Ackah vs Pergah Transport Ltd** [2010] SCGLR 728 specifically at page 736, the Supreme Court expounded on sections 10 and 11 of NRCD 323 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 may fail. The method of producing evidence is varied and it includes the testimonies of the party 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 are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence."* It is important to state that the evidence of Petitioner on record does not satisfactorily prove the alleged unreasonable behaviour of Respondent on the preponderance of probability.

The next issue is **whether or not the parties have after diligent efforts have been unable to reconcile their differences.** Respondent corroborated Petitioner's

assertion that there have been irreconcilable differences between them leading to the parties living their separate lives after the birth of their child in 2021. Respondent corroborated and again confirmed that their respective families met and dissolved the traditional marriage. In the case of **Kotei vs Kotei** [1974] 2 GLR 172, Sarkodee J held that *"…the sole ground for granting a petition for divorce is that the marriage has broken down beyond reconciliation. But the Petitioner is also obliged to comply with section 2 (1) of the Matrimonial Causes Act, 1971 (Act 367), which requires him to establish at least one of the grounds set out in that section…."*

**Section 8 (1) of Act 367** is on Promotion of reconciliation and makes it a requirement for a Petitioner or Counsel to inform the court of on the hearing of a Petition for divorce, of all efforts made by or on behalf of the Petitioner, both before and after the commencement of the proceedings, to effect reconciliation. Petitioner in his Petition, stated that the Respondent had behaved in ways that the Petitioner finds it very difficult to live with her as his wife. This to a large extent is unreasonable behavior as his ground for seeking the dissolution of his marriage to Respondent. The unchallenged evidence on oath by both parties also are to the effect that parties are unable to resolve their differences dispute several attempts at reconciliation including going for counseling. Parties have mutually separated from each other and had been living their respective lives for the past Seven (7) months at the time of the presentation of the Petition and the Respondent agrees to the dissolution of the marriage.

Further, according to parties, in January 2023, their families met and dissolved the marriage at custom. Nonetheless, the action of the families purporting to dissolve the "traditional" marriage between the parties suggest to the court that the families had exhausted their attempts at reconciliation hence that final step of

purporting to dissolve the marriage between the parties. The above findings, per the record, cumulatively satisfy the Court that after diligent efforts at reconciliation of the differences of the parties, same have failed. Under section **2(1)(f) of Act 367**, where the parties to the marriage have, after diligent effort, been unable to reconcile their differences, same is proof that the marriage has broken down beyond reconciliation.

The final issue is **whether or not custody of the child must be granted to the Respondent**. Section 2 (1) of Act 560 (supra) states that *'the best interest of the child shall be paramount in any matter concerning a child'* and Section 2 (2) also provides that *'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'*. It was held in **Asem vs. Asem** [1968] GLR 1146 that *"the court was obliged by statute in deciding a question of custody to have regard to the welfare of the infant as its first and paramount consideration. The crucial question for decision in the instant case was therefore which of the parents was better suited to be entrusted with the upbringing of the child"*. The onus therefore lies on the court to determine whether granting custody to the Respondent will be in the best interest of the child. It is trite that in custody cases, there is no prima facie right to the custody of the child in either parent, but the court shall determine solely which parent is for the best interest of the child, and what will best promote its welfare and happiness as posited by Act 560 stated supra.

In considering custody, Section 45(1) of Act 560 provides that *'A Family Tribunal shall consider the best interest of the child and the importance of a young child being with his mother when making an order for custody or access'.* The evidence on record shows that the child is a less than Two (2) years old and is therefore still an

infant. Infants and preschool children are the group most adversely affected by the consequences of separation or divorce. There is the need for them to have a stable, safe and secure attachments to both parents but the law posits that it will be in the best interest of children of that age to be with their mother. In the case of **Opoku-Owusu vs. Opoku-Owusu** [1973] 2 GLR 349, Sarkodee J held that *'the Court's duty is to protect the children irrespective of the wishes of the parents. In the normal course, the mother should have the care and control of very young children…'*

**Conclusion**

Having found that parties after diligent efforts are unable to reconcile their differences, the Court hereby finds the said marriage celebrated between the Parties broken down beyond reconciliation. Petitioner's claim accordingly succeeds. The Court hereby

(a) Decrees that the customary marriage celebrated between the Parties on the 20th of January, 2020 be and same is dissolved today the 6th day of June, 2023.

(b) Grants custody of the child in issue to the Respondent and the Petitioner shall reasonable access to the child in a manner agreeable to both parties and deemed to be in the best interest of the child.

**[SGD]**
**HALIMAH EL-ALAWA ABDUL BAASIT**
**CIRCUIT COURT JUDGE**