

**IN THE CIRCUIT COURT HELD AT AMASAMAN – ACCRA ON TUESDAY
THE 31ST DAY OF OCTOBER, 2023 BEFORE HER HONOUR ENID
MARFUL-SAU, CIRCUIT COURT JUDGE**

SUIT NO:C4/12/2020

BETWEEN

CONFIDENCE NYAMEKYE
HSE NO. POKUASE
ACCRA

...

PETITIONER

AND

SAMUEL AYIVE ANONE
KOTOBABI, ACCRA

...

RESPONDENT

*PARTIES: PETITIONER ABSENT
RESPONDENT ABSENT*

*COUNSEL: ALEX GYAMFI ESQ. FOR PETITIONER ABSENT
AMEYAW NYAMEKYE ESQ. FOR RESPONDENT ABSENT*

JUDGMENT

By a Petition filed on 31st January, 2020, Petitioner claims against Respondent the following reliefs:

1. “That the said marriage be dissolved.
2. That the petitioner be given custody of the child with reasonable access by the respondent.
3. That the Respondent be ordered to make to the Petitioner such maintenance pending suit and thereafter such periodical payments as may be just.
4. That Respondent be ordered to pay to Petitioner a lump sum of Twenty Five Thousand Ghana Cedis – GHC 25,000.00.
5. Costs”

Petitioner says that the parties got married on 24th December, 2017 at the Adenta Municipal Assembly under part Three of the Marriages Act, 1884-1985 (CAP 127). She says that after the marriage the parties cohabited at

Kotobabi in Accra and there is one issue to the marriage who at the time of filing the Petition was one year and eight months. She says that she is a Nurse at Pokuase Health Centre while the Respondent is a loans officer at Dalex Finance. She says that the issue of maintenance was a matter before the District Court, Amasaman. She says that the marriage has broken down beyond reconciliation due to the unreasonable behaviour of Respondent as well as his adultery. She says that all efforts by friends of parties to reconcile them have failed hence the instant Petition.

Respondent filed an Appearance and Answer on 10th February, 2020. He says that he was previously working with Dalex Finance and denies not maintaining the issue. According to him, he takes care of the issue. He denies all the allegations made against him as regards unreasonable behaviour and adultery. He however agrees that the marriage has broken down beyond reconciliation. On 17th August, 2020 a notice of Appointment of Solicitor was filed on behalf of Respondent.

On 25th September, 2020, having noted that this matter was pending before the District Court, Amasaman, the matter was adjourned sine die. On 2nd November, 2020, proceedings of the District Court, Amasaman dated 30th October, 2020 was filed at the Registry of this court indicating that the divorce proceedings before the court has been struck out. Accordingly, this court proceed to try the instant case.

Petitioner testified on 4th March, 2022. She testified that the parties got married on 24th December, 2017 at the Adenta Municipal Assembly under part Three of the Marriages Act, 1884-1985 (CAP 127). She testified that after the marriage the parties cohabited at Kotobabi in Accra and there is one issue to the marriage named Samuel Praise Kekeli Akorle who at the time of filing the Petition was one year and eight months. She states that she is a Nurse at Pokuase Health Centre while the Respondent is a loans officer at Dalex Finance. According to her, the marriage has broken down beyond reconciliation due to the unreasonable behaviour of Respondent as well as his adultery. She testified that throughout the marriage the Respondent has been quick tempered, physically and emotionally abusive and continuously publicized the problems in the marriage. She stated that it is difficult living with Respondent because he has very little understanding and gets angry over petty issues and shouts at her frequently. She stated that this ill treatment caused her embarrassment and hardship. She testified that the Respondent is irresponsible and does not provide for the upkeep of herself and the issue. She says that he does not

pay rent, or water or light bills thereby forcing Petitioner to borrow from friends and family, this she states has resulted in her overworking herself to be able to care for the family. She testified that Respondent does not care about the welfare and safety of Petitioner talks to her as and when he likes and could remain indoors without having anything to do with her. She testified that Respondent committed adultery with two different women. She stated that attempts at reconciliation by their friends have been unsuccessful.

Respondent testified on 15th September, 2023, he testified that three weeks after the Parties got married, he saw the Petitioner with a gentleman at about 2:00am. He testified that he warned Petitioner to be wary of what the neighbours would say but she retorted that he has a small penis that cannot satisfy her but that gentleman satisfied her with his big penis. He testified that this happened on 19th January, 2018 and Petitioner left the house the following morning and returned on 21st January, 2018. He stated that when she came, she informed him that her ex-boyfriend had returned from abroad and wanted to marry her so the marriage needs to be dissolved.

He testified that he left home for a funeral on 26th January, 2018 and returned on 30th January, 2018 only to realize that Petitioner had packed all her belongings and left the matrimonial home with the issue. He testified that he does not know where she lives and only sees the issue when they come to court. He denied behaving unreasonably or committing adultery. He testified that he made a report at the Tesano Police Station when he could not find her, and she was picked up at her workplace. According to him, Petitioner informed the police that she is no longer interested in the marriage, so the allegations made by her against him are made out of malice and mischief. He testified that he does not object to the dissolution in anyway as the parties have not live together as husband and wife for the past three years. He testified that he objects to paying alimony as he did nothing, and the dissolution is the initiative of Petitioner.

The sole ground for divorce under Ghanaian law is found in Section 1(2) of the **MATRIMONIAL CAUSES ACT, 1971 (ACT 367)**. It states as follows:

“The sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation.”

In proving the breakdown of marriage, the Petitioner has a burden of proving one or more of the factors listed under Section 2(1)(a) -(f) of Act 367.

Petitioner relies on the grounds of behaviour and adultery as the grounds for the breakdown of the marriage. The particulars of these grounds were strongly denied by Respondent.

According to Section 10 of the **EVIDENCE ACT, 1975 (NRCD 323)**, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court. Section 11(1) also provides that “the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.” In a civil matter such as this, the required burden of proof is proof on a preponderance of the probabilities. Section 12(2) of NRCD 323 defines “preponderance of the probabilities” as 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.

The burden of proof on the ground of adultery as provided for under Section 2(1)(a) of the Matrimonial Causes Act, 1971 (Act 367) was set out in the case of **ADJETEY AND ANOTHER v. ADJETEY [1973] 1 GLR 216** as follows:

“Adultery must be proved to the satisfaction of the court and even though the evidence need not reach certainty as required in criminal proceedings it must carry a high degree of probability. Direct evidence of adultery was rare. In nearly every case the fact of adultery was inferred from circumstances which by fair and necessary inference would lead to that conclusion. There must be proof of disposition and opportunity for committing adultery, but the conjunction of strong inclination with evidence of opportunity would not lead to an irrebuttable presumption that adultery had been committed, and likewise the court was not bound to infer adultery from evidence of opportunity alone.”

Also, the test for determining unreasonable behaviour under Section 2(1) (b) of the Matrimonial Causes Act, 1971 (Act 367) was set out in the case of **KNUDSEN v. KNUDSEN [1976] 1 GLR 204** as follows:

“The cross-petition was based on Act 367, s. 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 instant case the conduct complained of by Petitioner of the Respondent have not been proven. Aside a repetition of the averments contained in the Petition on oath, I am unable to find that Petitioner has led credible evidence in support of the grounds she relies on in proof of the breakdown of the marriage. The Supreme Court stated in the case of **DON ACKAH VRS PERGAH TRANSPORT [2011] 31 GMJ 174** as follows:

‘It is a basic principle of the law of 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. 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 probable than its non-existence’.

The said grounds therefore fail. Both parties admit that they have not lived together as husband and wife for the past five years. Section 2(1)(d) of Act 367 provides as follows:

“2. Proof of breakdown of marriage

(1) 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:

(d) that the parties to the marriage have not lived as husband and wife for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the grant of a decree of divorce, provided that the consent shall not be unreasonably withheld, and where the Court is satisfied that it has been so withheld, the Court may

grant a petition for divorce under this paragraph despite the refusal;”

From the evidence before me, I find that the marriage between Petitioner and Respondent has broken down beyond reconciliation, since the parties have not lived together as husband and wife for over two years and both parties agree that the marriage has broken down beyond reconciliation. I therefore decree that the marriage under the Ordinance celebrated on 24th December, 2017 at the Adenta Municipal Assembly is hereby dissolved.

As already indicated, this court assumed jurisdiction over this matter after the Parties indicated to this court that the matter before the District Court, Amasaman had been struck out. Yet, during cross examination of the Respondent by counsel for Petitioner, it became apparent that there were maintenance orders made by the District Court. The following ensued:

“Q: You have been sued in this case at the District Court over maintenance

A: Yes

Q: The court made orders for you to maintain the child

A: Yes

Q: When was the last time you paid maintenance to Petitioner

A: Last year, I can’t remember the month

Q: So you are telling the court that for one year you have not paid any maintenance to Petitioner as directed by the District Court

A: Yes

...

Q: Which court made the maintenance order

A: District Court

Q: Which District Court

A: Amasaman

...

Q: And you have been there to pay maintenance

A: Yes”

As a court of competent jurisdiction has already made orders in respect of the issue of maintenance, this court shall refrain from making orders as regards maintenance.

I shall turn to the issue of custody. Petitioner prays for custody of the issue with reasonable access to the Respondent. In the case of **ATTU v. ATTU [1984-86] 2 GLR 743** it was held as follows:

“The principle that in determining whether to grant custody to an applicant or respondent the welfare of the child or children should be the fundamental or paramount consideration had been given statutory backing by Act 372, s 16 (2) which however provided that the welfare of the infant should be the “primary” consideration. Whether “primary” meant “paramount” or whether the two were used synonymously, both words connoted a situation which admitted of the existence of other factors to be taken into account in resolving issues of custody.”

In the instant case the personal circumstances of Petitioner and Respondent are unevenly balanced. While Petitioner is gainfully employed, Respondent is not and has relocated to his hometown at Kade assisting his mason friends with labourer duties. From the evidence, the issue is aged about five years old and has mostly lived with Petitioner since his birth. I consider therefore from the evidence before me that it would be in the interest of the welfare of the issue to remain with the Petitioner. The Petitioner is therefore to have custody of the issue with reasonable access to the Respondent.

Petitioner prays for a lump sum of Twenty-Five Thousand Ghana Cedis (GH¢25,000.00). Respondent has resisted this relief with the reason that the dissolution of the marriage is an initiative of the Petitioner and not his.

Section 20 of Act 367 provides as follows:

“20. Property settlement

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

(2) Payments and conveyances under this section may be ordered to be made in gross or by instalments.”

As already indicated, Petitioner failed to lead credible evidence on the grounds she relies upon in proof of the breakdown of the marriage. Though Petitioner has testified that the Respondent is employed at Dalex Finance,

the Respondent has denied this and there is no evidence before the court to show otherwise. Indeed, on the evidence it is apparent that Respondent admits having failed to make maintenance payments by the District Court because he lost his job at Legacy Capital and has since relocated to his hometown assisting his mason friends as a labourer. Hence, he is currently unemployed. Again, the following extract of what ensued during cross examination of Respondent by counsel for Petitioner lends credence to the testimony of Respondent that Petitioner was disinterested in the marriage because of the size of his penis:

“Q: And when issues came up did you report to the church

A: Yes. I went to the pastor who blessed the marriage. Petitioner gave me GH₵300 to buy medicine to enlarge my penis but I told her I am ok with what I am created with so if she doesn't like she can go. She packed and left without notice. I went to her mother and she asked me to look for her daughter I went to Tesano Police Station to report her missing, they found her at her work place and she was arrested and taken to the Police station, this is the genesis of the whole issue

Q: The pastor supposedly tried to resolve the issue but it did not work

A: Yes

Q: At the time your wife left home where was she working

A: Pokuase Health Centre”

In view of the entirety of the evidence before me, I therefore do not find that it would be just and equitable to make an order for the payment of a lump sum for the benefit of the Petitioner. The prayer is thus refused. I shall make no order as to costs.

**H/H ENID MARFUL-SAU
CIRCUIT JUDGE
AMASAMAN**