

**IN THE CIRCUIT COURT HELD AT AMASAMAN – ACCRA ON FRIDAY
THE 15TH DAY OF SEPTEMBER, 2023 BEFORE HER HONOUR ENID
MARFUL-SAU, CIRCUIT COURT JUDGE**

SUIT NO. C4/18/2022

BETWEEN:

JOSEPH ABUDU
HOUSE NO. AZ 32
MEDIE, NEAR AMASAMAN,
ACCRA ... PETITIONER

AND

LAHEBILLA YAGWUNA
OF ACHIMOTA ... RESPONDENT

PARTIES: PETITIONER PRESENT
RESPONDENT PRESENT

COUNSEL: NO LEGAL REPRESENTATION

JUDGMENT

By a Petition filed on 20th October, 2021, Petitioner claims against Respondent the following reliefs:

- a) “An order by the Honourable Court for the marriage celebrated between the Respondent and Petitioner be dissolved forthwith.
- b) An order directed by the Honourable Court directed at Respondent to prove the paternity of their only child RUBBY ABUDU.
- c) An order by the Honourable Court that custody of the child RUBBY ABUDU of the marriage be given to the Petitioner with Respondent granted reasonable access.
- d) Any other orders that this Honourable court may deem fit.”

It is the case of Petitioner that the parties got married in or about the year 2003 under Frafra customary law at Respondent’s father’s house at Sorma’s House, Tongo in the Upper East Region. According to Petitioner, there was payment of dowry to the Bride’s family to signify the performance of the marriage. Petitioner says that immediately after the

marriage he cohabited with Respondent at Pokuase Afuaman as husband and wife until a misunderstanding arose and the Respondent left the matrimonial home to an unknown location. He says that there is one issue of the marriage who is named Rubby Abudu of about 17 years old. He says that the Respondent has behaved in such a way that he cannot be reasonably expected to live her as she has informed the families of both parties that she is not ready to continue with the marriage. He says that the customary marriage has broken down beyond reconciliation as the differences between the parties have not been reconciled.

Respondent entered appearance on 6th December, 2021 and filed an Answer and Cross Petition on 6th December, 2021. She says that Petitioner never performed her marriage rites. She states that the Petitioner never paid her bride price to her family and further that the parties have not been to her hometown. She contends that she was a seamstress when she met Petitioner and at which time she was married and had a child. According to her, both parties cohabited during courtship until rent expired and Petitioner left. She says that though the Parties have a child, due to the Petitioner's inability to adequately maintain her, the child belongs to her under Frafra customs and traditions. She says that since both parties are not married, they cannot be expected to live together as husband and wife. She says that the parties have not seen each other for over fifteen years and as a result she has not maintained contact with Petitioner. She says that there will be no need for divorce as there was no marriage. She prays as follows:

- i. "Custody of the Child named Rubby Awudu (17 years) to be granted to the Respondent with reasonable access to the Petitioner.
- ii. An order directed at the Petitioner to maintain the said child including but not limited to the payment of the child's school fees and all other educational and medical expenses as and when it falls due.
- iii. Any orders at this court may deem fit"

Section 41 of the **MATRIMONIAL CAUSES ACT, 1971 (ACT 367)**, permits the application of the provisions of the Act to a marriage other than a monogamous marriage. The section provides as follows:

"41(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 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.

(3) In the application of section 2 (1) to a marriage other than a monogamous marriage, the Court shall consider the facts recognised 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 recognised under customary law as a child of the parties."

In the instant case, Respondent has strongly refuted the claim by Petitioner that they are married under customary law. Therefore, a fundamental issue which needs to be determined is whether or not the parties are married under customary law. Petitioner testified that the parties are married customarily and have a daughter named Rubby. He testified that Respondent once reported him at the Women and Juvenile Unit (WAJU) and he was asked to show proof of their marriage so he travelled to Bolgatanga which is Respondent's hometown and her father by name Sorgma Yagwuma Doog was invited and upon confirming the marriage he was made to swear an affidavit which he tendered as *Exhibit D*. Respondent on the other hand testified that both Parties are divorced from previous marriages and after she met Petitioner, during their courtship she informed Petitioner that per the Frafra Custom it is not acceptable for a marriage to be celebrated after wedlock so the Petitioner advised that they should cohabit and so they rented an accommodation in Pokuase and cohabited

for a year. She testified that the Petitioner failed to perform the marriage rites despite her demands in the course of which she got pregnant with the issue. She stated that the parties have never been married and no form of bride price has been paid to her family by the Petitioner.

I note that *Exhibit D* is an Affidavit dated 24th January, 2005 which is titled "Affidavit of Sorgma Yagwuna Doog confirming acceptance of an amount of one million cedis and two fowls plus one guinea fowl from Mr. Joseph Abudu part dowry of Lahebilla Yagwuna". The said document indicates that the declarant is the father of Respondent and confirms that the parties are married. The document indicates that the amount represents the dowry of 1 cow for Respondent with a balance of 3 cows to be paid by Petitioner as full dowry for Respondent. It states at paragraphs 5, 6 and 7 as follows:

“5. That I have received an amount of One Million Cedis (ø1,000,000.00), two (2) fowls and one (1) guinea fowl from MR. JOSEPH ABUDU husband of LAHEBILA YAGWUNA

6. That the said amount, fowls and guinea fowl were received in the presence of Police Chief Inspector Mary Awuni of WAJU – Bolga as witness

7. That the amount represent a dowry of one (1) cow for LAHEBILLA YAGWUNA”

The document is witnessed by the said Police Officer and bears Petitioner’s signature as well.

During cross examination of Respondent by Petitioner, the following ensued when *Exhibit D* was shown to Respondent:

“Q: When we got married your father prepared Exhibit D

A: My father had a problem with his eye so I have nothing to say about this document”

In the case of **BANK OF WEST AFRICA LTD. v. ACKUN [1963] 1 GLR 176** it was held as follows:

“The onus of proof in civil cases depends upon the pleadings. The party who in his pleadings raises an issue essential to the success of his case assumes the burden of proof.”

As Petitioner alleged that there was a subsisting marriage between himself and Respondent, he had the burden of proving the existence of the marriage on a balance of probabilities.

In the case of **KOTOKOLI AND ANOTHER v. SARBAH [1981] GLR 496** it was held as follows:

“The general rule of evidence was that where an illiterate executed a document, any other party to the document who relied upon it should prove that it was read over and if necessary interpreted to the illiterate. That was a rule based mainly on commonsense. Evidence should be preserved of the fact that illiterate natives who were parties to conveyances had the contents of such conveyances clearly interpreted to them in their own native language and that they fully appeared to comprehend the nature and effect of the transactions evidenced by the document...”

See also **ZABRAMA v. SEGBEDZI [1991] 2 GLR 221**

This same rule of law applies to a deponent with vision impairment. In this case, the said father of Respondent made his mark on *Exhibit D* by thumbprinting. There is no evidence before this court as to whether or not Respondent’s father was literate however, Respondent has indicated that her father had a problem with his eye therefore having thumb printed *Exhibit D*, in the absence of a jurat, there is no evidence before this court that the said document was read over and explained to Respondent’s father and he understood same before making his mark. The probative value of *Exhibit D* is therefore diminished.

During cross examination of Petitioner by Respondent, the following ensued:

Q: You claim I am your wife, but I don’t know where you performed rites for me to become your wife

A: In Accra but I performed the marriage rites at your father’s place. I gave one cow, one guinea fowl and two fowls as your bride price.

Q: Which of my family members were present when you married me

A: Your father, your stepmother, your sister called Baby and my relatives”

...

Q: I put it to you that you are not being truthful because you informed me that you are going to your village and I gave you a

package to be given to a family member so it is not true you went there to perform marriage rites

A: After I performed the rites, there is a declaration I did to us being lawfully married. I have it.”

In the case of **IN RE BLANKSON-HEMANS (DECD.); BLANKSON-HEMANS v. MONNEY AND ANOTHER [1973] 1 GLR 464** the court held as follows:

“The assertion in Y.'s pleadings of a prior subsisting customary marriage between her and the deceased was a positive assertion capable of positive proof. The submission that marriage should be inferred was not in line with the pleadings and could not be countenanced. In any event, there was no principle of customary law that after a man has lived in concubinage for some time with a woman, their relationship should be deemed to have ripened into marriage.”

Indeed, the assertion that the Parties are married under customary law is a positive assertion which is capable of proof and Petitioner was duty bound to lead credible evidence in support of same as Respondent has strongly denied the assertion and stated that the said relationship was a concubinage.

However, though Petitioner testified that his family members were present during the marriage rites, he called no member of his family present at the rites to testify in support of his case. Indeed PW1, Elizabeth Akatu who indicated that she was a cousin of Petitioner had no personal knowledge of the marriage rites allegedly performed by the Petitioner for Respondent’s hand in marriage. Her evidence is best described as hearsay and is insignificant in establishing the case of Petitioner on this issue. Again, the testimony of Petitioner and his own *Exhibit D* are at variance. While Petitioner under cross examination stated that the items he presented was done in the presence of Respondent’s father, stepmother, sister and his relatives, paragraph 6 of Exhibit D indicates that the said items were received in the presence of Police Chief Inspector Mary Awuni of WAJU – Bolga as witness. It therefore leaves the question whether the items were presented at the WAJU office and Respondent’s father compelled to make his mark on the document or whether the items were indeed presented at a ceremony at the Respondent’s father’s house unanswered.

In the case of **YAOTEY v. QUAYE [1961] GLR 573** it was held that:

“The question whether the relationship between a man and a woman is one of marriage or of concubinage is a question of law to be determined from the facts and circumstances of the relationship;

(4) the essentials of a valid customary marriage are:

(a) agreement by the parties to live together as man and wife;

(b) consent of the families of the man and the woman to the marriage. Such consent may be implied from the conduct, e.g. acknowledging the parties as man and wife, or accepting drink from the man or his family;

(c) consummation of the marriage, ie. the parties living together openly as man and wife.”

See also RE CAVEAT BY CLARA SACKITEY: RE MARRIAGE ORDINANCE, CAP 127 [1962] 1 GLR 180

On the evidence, Respondent admits living with Petitioner for a year though not as man and wife and having an issue with him. An essential ingredient missing from the evidence is the consent of the families of the parties to the marriage. This is an essential pre-requisite of a valid customary marriage which I find missing from the evidence before me. Based on the foregoing, I find that Petitioner has failed to establish on a balance of probabilities that the parties were indeed married under Frafra Customary Law and I so hold.

Petitioner prays for custody of the only issue between the Parties, however Respondent has strongly rejected this prayer. She testified that Petitioner refused to perform naming rites when the issue was born so she named her Rubby Anaba with her father’s surname. She also says that due to the Petitioner’s inability to adequately maintain the issue, the child belongs to her under Frafra customs and traditions. The evidence is that Petitioner had not seen the issue for several years until he visited Respondent and the issue in 2021. Petitioner tendered *Exhibit A series* being photographs of a celebration of the issue’s third birthday party and *Exhibit B Series* being receipts for maintenance he paid in some months between 2005 – 2007. It therefore cannot be factual that Petitioner abandoned the issue and did not provide maintenance for her at all.

As a father, Petitioner has rights to the issue and so does the issue have the right as far as possible to know her natural parents. ***See Section 4 of Act 560.*** Respondent has prayed for the custody of the only issue. I note that the instant Petition was filed on 21st October, 2021 and therein Petitioner indicated that the issue was 17 years old. It has been almost two years

since the Petition was filed, it is therefore reasonable to conclude that the issue should be aged about 19 years this year.

Section 45 of the **CHILDREN'S ACT, 1998, ACT 560** provides as follows in considering custody or access:

“(1) A family tribunal shall consider the best interest of the child and the importance of a young child being with the mother when making an order for custody or access.

(2) In addition to subsection (1), a family tribunal shall consider

(a) the age of the child,

(b) that it is preferable for a child to be with the parents except where the rights of the child are persistently being abused by the parents,

(c) the views of the child if the views have been independently given,

(d) that it is desirable to keep siblings together,

(e) the need for continuity in the care and control of the child, and

(f) any other matter that the family tribunal may consider relevant.”

Section 1 of Act 560 defines a ‘child’ as a person below the age of eighteen (18) years. As the issue has reached the age of majority, this court is not in a position under the law to make orders as regards custody and access. The prayer for custody therefore fails. This notwithstanding, I find that the testimony of Respondent that biological children cease to belong to a father because of an inability to maintain the child under Frafra customs has not been proven. Indeed, even if the said custom was proven, such a principle would be unsustainable because it is repugnant to the principles of equity, good conscience and natural justice and the principle of the welfare of a child. **See. ABANGANA v. AKOLOGO [1976] GLR 382.**

On this basis, I hold that Petitioner is the father of the issue of the marriage and has not ceased to be so in law, custom or equity.

I shall make no order as to costs.

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