IN THE DISTRICT COURT TDC TEMA HELD ON TUESDAY THE 13TH DAY OF DECEMBER 2022 BEFORE HER WORSHIP BENEDICTA ANTWI (MRS) DISTRICT COURT MAGISTRATE

SUIT NO: A4/28/22

HAWA ABENA ADAM ... PETITIONER

VRS

DUKE MENSAH BONSU ANTWI .... RESPONDENT

JUDGMENT

In a petition filed on the 12th of May 2022, the petitioner averred that she and the respondent were both citizens of Ghana and married under the Marriage Ordinance CAP 127 on the 28th December 2013.

The parties thereafter cohabited as husband and wife in Tema and Kumasi for a period of one year and were blessed with two children aged 7 and 5 years. Differences which are not uncommon in a marriage reared its ugly head and the parties were pulled apart as they were unable to reconcile their differences.

Petitioner's case

Petitioner states that due to respondent's unreasonable and incompatible behavior they could not live happily as a married couple and as a result the parties have been separated for over two years during which time

they have not lived as husband and wife. According to the petitioner several attempts at reconciliation were made by their families to no avail.

She therefore sought for the marriage to be formally dissolved to enable the parties go their separate way. She claimed through her petition for the following reliefs:

a) Dissolution of the marriage contracted on the 28th of December 2013 at our Lady of Mercy Catholic Church, Community 1, Tema.

b) Custody of the two children of the marriage with access to the respondent upon reasonable notice.

c) Payment of school fees and medical expenses of the children.

d) Maintenance of ¢2000 monthly for the two children

e) Cost.

Respondent's case

The respondent caused his lawyers to file notice of entry of conditional appearance on the 22nd June 2022 and caused same to be served on the petitioner on the 30th of August 2022. On the 30th of September the parties filed terms of settlement of the ancillary reliefs contained in the petition. Respondent finally filed his answer to the petition on the 8th of November 2022.

In it, he stated in paragraph 4 that the marriage had not broken down beyond reconciliation as alleged by the petitioner and denied that he had behaved unreasonably. According to the respondent, it is the petitioner that has denied him entry into the house where the petitioner lives with the two children.

He claims petitioner's reconciliatory attitude caused him emotional and physical stress for the past four years to the extent that he will not object to the relief for divorce since to quote his paragraph 7; *"any further delays will create more cracks in the welfare of our children".*

On the 16th of November 2022 when the matter came before the court differently constituted, counsel for both parties sought to impress upon the court to grant the divorce without any hearing since according to them, the parties have filed their terms of settlement and have both agreed to the dissolution of the marriage.

The court however ordered for a hearing to be conducted before the marriage could be dissolved. The matter was thus adjourned to the 28th November 2022.

On the 28th November 2022 when the matter was first put before me, the court ordered the parties to file their witness statements for the hearing but Counsel for both parties again stated that there will be no need for that as the parties have both agreed to be divorced.

The court however informed the parties that a hearing will be conducted to determine whether or not the marriage has broken down beyond

reconciliation. The matter was thus adjourned to the 6th of December 2022 for hearing.

Burden of proof

In a petition for divorce, the sole ground for granting the petition shall be that the marriage has broken down beyond reconciliation. This provision can be found in **section 1(2) of the Matrimonial Causes Act, 1971 ACT 367.**

Section 2 (3) of ACT 367 further provides that a court shall not grant a petition for divorce unless it is satisfied on all the evidence that the marriage has broken down beyond reconciliation.

In proving that the marriage has broken down beyond reconciliation, the petitioner must satisfy the court that one or more of the facts under **section 2 (1) of Act 367** *supra* has occasioned and as a result the marriage has broken down beyond reconciliation.

It is also the law that the partry who asserts usually has the burden of proving same on a preponderance of probabilities in accordance with **section 12(2)** of the Evidence Act **1975 (NRCD 323)**. Preponderance of probability according to this section means:

"…. that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than it's non-existence"

Where the petitioner has been able to lead sufficient evidence in support of its case then it behooves upon the respondent to lead sufficient evidence in rebuttal otherwise the respondent risks being ruled against on that issue.

Section 11 (4) of the Evidence Act, 1975 (Act 323) further provides that:

(4) *in other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its none-existence.*

The court is also mindful of one of the cardinal duties of a court in evaluating evidence led during trial which is for the court to assess all the evidence on record in order to determine in whose favour the balance of probabilities should lie. Some cases in point are **Adwubeng v. Domfeh [1996-97] SCGLR 660** and **Takoradi Flour Mills v. Samir Faris [2005-2006] SCGLR 882**. This principle was further reiterated by the Supreme Court in the case of **In re Presidential Election Petition (No. 4) Akuffo-Addo & Ors. Vs. Mahama & Ors. [2013] SCGLR (Special Edition) 73,** the Supreme Court held at page 322 of the report as follows:

> *"Our understanding of the rules in the Evidence Decree, 1975 on the burden of proof is that in assessing the balance of probabilities, all the evidence, be it that of the plaintiff, or the defendant, must be considered and the party in whose favour the balance tilts is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict."* [Emphasis mine.]

Failure by a party to lead sufficient evidence in support of her claim will thus lead to her claim being dismissed.
The court will therefore evaluate the totality of the evidence if any, in light of the above guiding provisions.

Summary of evidence

In petitioner's evidence in chief, she stated that the parties have been having issues for the past five (5) years. One of such issues was that she bears the financial burden of taking care of the children alone. That she has not had any financial support nor emotional support from the respondent. She finally stated that all attempts to resolve their issues have proved futile and thus wanted the court to adopt the terms of settlement filed. The petitioner did not call any witnesses and the respondent did not cross examine the petitioner. The petitioner closed her case.

Respondent also mounted the box and in his evidence in chief simply stated that the marriage had broken down beyond reconciliation and prayed the court to dissolve it. Respondent did not call any witnesses and Petitioner also did not cross examine the respondent.
Both parties agreed that they have not acquired any properties together.
From the review of the evidence received during the trial, it is clear that the parties were resolved to part ways as the petition was seriously uncontested.

Issues for trial

The petitioner before the Court alleges that, the parties have not lived as husband and wife for a continuous period of two years. As a result of the respondent's unreasonable behavior and all attempts at reconciliation have proved futile

From this, the issues that fell for determination were:

1. *Whether or not the respondent has behaved unreasonably.*
2. *Whether or not the parties have not lived as husband and wife for a continuous period of two years immediately preceding the presentation of the petition.*
3. *Whether or not the marriage has broken down beyond reconciliation after diligent attempts at reconciliation.*

Unreasonable behavior is one of the grounds under **section 2 (1) of Act 367** under which a party may come for dissolution of marriage. The petitioner's case is that the Respondent has behaved unreasonably and she cannot reasonably be expected to live with him. During her evidence in chief, the petitioner stated that she bears the financial burden of the family alone.

That the respondent neither contributes financially to the upkeep of the home nor provide emotional support.

This conduct coupled with other unreconciliatory behavior of the respondent spans a period of five years. No exhibits were tendered to prove this assertion and the respondent did not cross-examine the petitioner on this during the trial.

Since no evidence was adduced to prove or disprove this issue during the trial, it remains a mere allegation of fact as the petitioner simply mounted the box to rehash the facts contained in her petition but failed to produce sufficient evidence on this fact so that upon evaluation, the court could come to the conclusion that the existence of this fact was more probable than its non-existence.

In **Mensah v. Mensah [1972] 2 G.L.R. 198 H.C**. the court had this to say on unreasonable behavior;

" *the test however is an objective one; it is whether the petitioner can reasonably be expected to live with the respondent and not whether the petitioner in fact finds it intolerable to do so. The answer must be related to the circumstances of both the petitioner and the respondent, and is eminently a question of fact in each case…*

One point is clear and it is, that the conduct complained of must be sufficiently grave and weighty to justify a finding that the petitioner cannot reasonably be expected to live with the respondent. mere trivialities will not suffice. The parties must be expected to put up with what has been described as the reasonable wear and tear of married life." [emphasis mine]

In this case the conduct complained of is the refusal of the respondent to pay for the upkeep of his family. Petitioner also says the respondent has denied her the emotional consortium required of the man in a marriage. She cites this as one of the major issues in the marriage implying that the are other issues she could not bring fore, Respondent on the other hand alleges that the petitioner deliberately denied her access to the to the

house where the children live and has undergone persistent emotional and physical stress as a result of petitioner's irreconcilable attitude for the past four (4) years to the extent he could not deny her the divorce she seeks.

The question is was the behavior of the husband so grave and unreasonable that the wife could not reasonably be expected to live with him? There is no direct evidence to prove this from the record before the court. Neither is there any evidence of diligent efforts on the part of the parties to resolve the problems in the marriage.

The petitioner has failed to satisfy the provision under section 2(2)(b) of Act 367 and in the absence of any evidence to convince the court that the respondent behaved unreasonably, this fact remains unproved. I must therefore hold, that the respondent has not behaved unreasonably.

On the second issue of whether or not the parties have not lived as husband and wife for the past two years. The court will refer to paragraph 9 of the petition where the wife asserts that; *"that for over 2 years the parties have not lived as husband and wife and have lived separately"*

The only reaction to this assertion on record is from paragraph 3 of the answer where respondent states; *"Paragraphs 7,8,9,10 and 12 of the petition are denied."* Upon denial of this fact, the onus was on the Petitioner to prove this allegation during the trial.

However, when it was time to lead evidence on the alleged facts contained in the petition, the petitioner failed to raise this issue and the respondent did not cross examine the petitioner on her evidence in chief. The only information on record as to the living arrangement of the parties came to light when the Court enquired from the Petitioner during the trial and counsel for respondent sought to clarify the living arrangement of the parties and their choice of forum. An excerpt is reproduced below :

Q: Where do you live.

Ans: Tieman near Oyarifa

Court: The Petitioner lives at Oyarifa and the Defendant is in Kumasi, why is the matter before this Court and not the District Court in Kumasi or Adenta?

Counsel for Respondent: The petitioner just moved to Adenta and the respondent chose this Court.

Court: The parties just decided to come to this court Counsel?
Counsel for Respondent: No the respondent comes to Tema often that is why.

Since no objection to the geographical jurisdiction of this court was raised by the respondent, the court did not belabour this point.

The only conclusion the Court can draw from this is that the parties are not living under the same roof because the Petitioner presently lives at Adenta and the Respondent lives in Kumasi. However, the Respondent comes to Accra often.

No evidence was led to show whether the respondent comes to Accra to see his family or that the different living arrangement of the parties is as a result of their professional occupations or it is as a result of their irreconcilable differences.

Evidence has been defined in **section 179 of the Evidence Act 1975, (Act 323)** to *mean any testimony, writings, material objects or things presented to the senses that are offered to prove the existence or non-existence of a fact*.

After evaluation of the terse evidence on record, and considering the Petitioner's failure to lead any evidence on this fact, the court never the less considered **Section 2 (1) (d) of Act 367** *supra* which provides that:

"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"*

Even though petitioner did not offer any evidence to prove this issue, the respondent consented to the dissolution of the marriage in his answer and further buttressed this in his evidence during the hearing.
On the basis of the above provision, this court finds and holds in the affirmative that the parties have not lived together as husband and wife for the past two years.

The question now remains; has the marriage broken down beyond reconciliation?

Before coming to this conclusion however, the court shall have regard to the third issue, which is the sole ground under which the court shall grant the dissolution of a marriage. Both parties agreed to terms of settlement prior to the hearing of the case and agreed on shared custody of the two children in the marriage. Both parties also emphasized their desire for the marriage to be dissolved. **Section 8 (2)** of the Matrimonial Causes Act *supra* which enjoins the court to promote reconciliation states thus:

" *if at any stage of the proceedings for divorce it appears to the Court that there is a reasonable possibility of reconciliation, the Court may adjourn the proceedings for a reasonable time to enable attempts to be made to effect a reconciliation…"*

I did not exercise any power under this section because when the matter was first put before me, the parties had already filed their terms of settlement and were insisting on the court to simply grant them their

divorce. The court had to insist that it will still conduct a hearing to prove that the marriage had broken down beyond reconciliation.

Suffice to say, the court will not put asunder what God has put together but where the parties are strong willed and have themselves expressly, unequivocally, consented to be put apart, and it appears to the Court that exercising its powers under section 8 will yield no fruitful consequence, it will be an exercise in futility for the court to insist that the parties stay together in this union.

In the circumstances therefore I hold that the respondent's consent to this divorce is proof that the marriage has broken down beyond reconciliation.

Flowing from above, I am of the considered view that the petition be granted as respondent has consented to it in clear terms.
In the premises, the marriage celebrated between the parties on the 28th December 2013 is hereby dissolved and the Terms of Settlement signed by the parties in the presence of their Lawyers and filed on the 30th September 2022 by the parties is hereby adopted as consent judgement of the court on the ancillary reliefs.

Final orders

1. Custody of the two children of the marriage be given to the Petitioner with reasonable access to the Respondent. Reasonable access means Petitioner shall release the children to the Respondent every two weeks from 6pm on Fridays to 6pm on

Sundays. Parties shall share the children's vacation breaks equally and each party may travel with the children during the period they are in their custody.

2. Respondent shall pay ¢1000.00 monthly as maintenance for the upkeep of the house subject to review bi-annually.

3. Respondent shall pay the school fees and educational expenses of the two children of the marriage. Feeding and extra educational needs of the children shall be borne by the Petitioner.
4. Clothing for the children shall be borne by both parents until each child attains the age of maturity or such a time as each child is reasonably expected to be independent.

5. Both parties shall bear the medical expenses of the two children of the marriage.

6. There will be no order as to cost.

BENEDICTA ANTWI (MRS)
DISTRICT MAGISTRATE

COUNSEL:

SUSANA TETTEH LED BY MOHAMMED ATTA FOR PETITIONER PRESENT
SELINA ASANTEWAA ODAME FOR RESPONDENT ABSENT

PARTIES:

PETITIONER ... PRESENT
RESPONDENT ... ABSENT