

IN THE FAMILY AND JUVENILE COURT 'B', FORMER COMMERCIAL COURT BUILDING – ACCRA HELD ON WEDNESDAY, THE 4<sup>TH</sup> DAY OF JANUARY 2023.

BEFORE HER HONOUR MRS. MATILDA RIBEIRO, CIRCUIT COURT JUDGE, SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM GIFTY OKAI, AND MADAM REGINA TAGOE AS PANEL MEMBERS.

---

Suit No: A6/262/22

MARTIN SEKYERE ..... APPLICANT  
OF KWASHIEMAN  
ACCRA

VERSUS

VIVIAN TORKOLI .... RESPONDENT  
OF AKWETEMAN  
ACCRA

---

Applicant: Present

1<sup>st</sup> Respondent: Present

2<sup>nd</sup> Respondent: Absent

### JUDGMENT

Applicant has been a father to the children in issue, 1<sup>st</sup> Respondent is the biological mother of the issues and 2<sup>nd</sup> Respondent is the alleged father of some or all of the issues. Whereas 1<sup>st</sup> Respondent alleges that all three children are not for Applicant, Applicant is claiming custody of the last two being Matilda Nhyira Sekyere aged seven years and Stephen Ayeyi Sekyere aged two years.

Applicant by his Affidavit in Support of his application filed on the 1<sup>st</sup> day of February 2022 is praying for custody of the 2<sup>nd</sup> and 3<sup>rd</sup> children with reasonable access to 1<sup>st</sup> Respondent and any other orders that the court may deem fit.

According to Applicant he and 1<sup>st</sup> Respondent cohabited from 2015 to 2019 during which period they had the first two children and got married in November 2019 whilst 1<sup>st</sup> Respondent was pregnant with the 3<sup>rd</sup> child. They separated in September 2021 when 1<sup>st</sup> Respondent and her boyfriend (2<sup>nd</sup> Respondent) run away with the children in issue. He said he provided all the needs of the issues and Applicant. He averred that on the 13<sup>th</sup> day of September 2021, he returned home to meet the absence of 1<sup>st</sup> Respondent and the children. When he called 1<sup>st</sup> Respondent to enquire of the whereabouts of the children, she told him that the children are not his and that she has sent them to their biological father. He then lodged a kidnapping case against the 1<sup>st</sup> Respondent at the Tesano division of the Domestic Violence and Victim's Support Unit (DOVVSU). That in order to ascertain the paternity of the issues, the parties and the children went to the Trust Hospital, Osu for a DNA test under the direction and supervision of the Tesano Police (DOVVSU). The DNA Test results showed that he is the father of the second and third children but not the first child. He said the police then asked him to enrol the children back into school.

He said he re-enrolled the 2<sup>nd</sup> child back into Achimota Basic School and the 3<sup>rd</sup> child in Presby School Achimota, but 1<sup>st</sup> Respondent did not allow the 3<sup>rd</sup> child to go to the school. She however later asked Applicant to enrol the 3<sup>rd</sup> issue in Liver-Rose school at Tantra Hills which he did, but she only sent him to the school for a few days and stopped. He later enrolled the 3<sup>rd</sup> child again in another school (Pauline Child Minding Centre for Academic Excellence) at Kwashieman near 1<sup>st</sup> Respondent's mother's house, but she still did not take the child to school till date. He mentioned that he took custody of the second child because anytime he went to pick the child up for school, she cried that she did not want to go to the school allegedly because 1<sup>st</sup> Respondent had asked her to cry. That because he wants the best for the child, he took custody of her to ensure she is in school every day. He is therefore praying the court to grant custody of the 2<sup>nd</sup> and 3<sup>rd</sup> children to him with reasonable access

to 1<sup>st</sup> Respondent so he can ensure their welfare since 1<sup>st</sup> Respondent does not have the welfare of the issues at stake.

On the 15th day of February, 2022 1<sup>st</sup> Respondent filed an Affidavit in Opposition and deposed that the marriage between the parties was dissolved in November 2021. She admitted going to the Trust Hospital with Applicant and the children for a DNA Test but averred further that Applicant connived with the Police Officers at Tesano DOVVSU to take her along for the DNA Test under the guise that they were taking her to the office of the Department of Social Welfare and Community Development. She also denied the results of the test because the Officers at DOVVSU refused to give her a copy of the test results and also did not allow her to read it herself. That it was read to them by the Police Officer. She averred further that it was the second and third children that Applicant enrolled in school, and she refused to release the third child to him because she was only a year and eight months old by then. According to her, Applicant picked up the 2<sup>nd</sup> issue from school on the 2<sup>nd</sup> day of February 2022 and has since failed to return the 2<sup>nd</sup> issue to her. She maintained her position that the three issues are not for Applicant and prayed for custody since they are very young and will be better cared for by her. She therefore counter claimed for the under stated reliefs:

1. An order for Applicant to avail himself for the DNA Test with the three issues herein
2. An order granting custody of the issues to Respondent
3. Any further order (s) that this Honourable Court may deem fit.

To this Affidavit in Opposition, Applicant filed a response and stated that 1<sup>st</sup> Respondent willingly brought the children for the DNA Test and even the alleged father of the issues (Respondent's boyfriend) opted to pay GHC3,500.00 to the Police for the DNA test. He averred further that the 3<sup>rd</sup> child has been with 1<sup>st</sup> Respondent and considering her immoral behaviour, she is not qualified as a good mother with exemplary character to the children hence custody of the second and third children should be granted to him. He annexed Exhibits MS 1, MS 2 and MS 3 being the DNA test results on the three children conducted at the Trust Hospital. In response to 1<sup>st</sup> Respondent's counterclaim, he prayed the court to

compel 1<sup>st</sup> Respondent to bring the alleged father of the children to Court for the Court to order a DNA test to be conducted on him and the children. He then reiterated his prayer for custody of the last two children for proper care and maintenance since he has his niece and senior sister living with him and supporting with the care of the second child.

At the time, the court did not deem it necessary to order the alleged father of the issues to undergo a DNA test because he had not made any claim before the Court in respect of the issues. In order to settle the controversies however, the Court ordered for a DNA Test to be conducted on the Applicant and the three children at either Scientelect or Synlab being institutions approved by the Judicial Service to conduct DNA Tests in matters before the courts, and the cost of the test was to be borne by 1<sup>st</sup> Respondent as admitted by her. The matter was then adjourned to the 31<sup>st</sup> day of May 2022 for the DNA test results. Up until now, the DNA test has not been done because 1<sup>st</sup> Respondent has not been able to raise the money to pay for same. 1<sup>st</sup> Respondent made assertions to the effect that 2<sup>nd</sup> Respondent was present and contributed to the DNA test at the Trust Hospital, but he was not a party to the test (that is, his sample was not taken). That after the results, the police gave his money back to him when he also requested for another DNA test to be conducted and that Applicant should also be made to contribute to same since he contributed to the first one conducted on Applicant and the issues. The Court upon hearing this, deemed it expedient to join the alleged father of the issues (GIDEON MENSAH) to the suit and he was accordingly joined on 11<sup>th</sup> day of October 2022 as the 2<sup>nd</sup> Respondent. This was deemed necessary to help the court effectively and completely determine the matter before it considering the turn of events. Following which 2<sup>nd</sup> Respondent filed an Affidavit in Opposition on the 28<sup>th</sup> day of October 2022 wherein he deposed that he has not claimed ownership of the children and that it is the 1<sup>st</sup> Respondent who claims the children are for him. He also indicated his inability to appear before the Court and gave his consent for the DNA test to be conducted on the three children.

According to the 2<sup>nd</sup> Respondent, 1<sup>st</sup> Respondent was his girlfriend from 2011 to 2016 during which period they broke up several times and reconciled. He said though he took responsibility for 1<sup>st</sup> Respondent's first pregnancy, he could not inform his parents until the pregnancy was about seven months old. That he visited 1<sup>st</sup> Respondent in Koforidua after

she gave birth and later went to bring them from Koforidua to 1<sup>st</sup> Respondent's sister's place at Omanjor. He said he used to maintain 1<sup>st</sup> Respondent and the 1<sup>st</sup> child, sent them food stuff, dresses and sometimes school fees. He recounted having sex with 1<sup>st</sup> Respondent at Adaeso when she visited him with the first child and also in Accra when he visited her before she got married to Applicant, but 1<sup>st</sup> Respondent never told him that she was pregnant for him. He admitted helping 1<sup>st</sup> Respondent to move out of the matrimonial home upon her request to enable him to have access to his child or children. He said he first sent 1<sup>st</sup> Respondent and the children to his aunt's place at Ashaiman. He mentioned that when the case went to the Tesano Police Station, he was asked to help applicant pay for the DNA test and he paid GHC3,500.00 to the Police but the Police refunded the money to 1<sup>st</sup> Respondent after the outcome of the DNA test. He said when the DNA test confirmed that the first child was not for Applicant, he took over full responsibility for him and is currently living with him and providing all his needs. According to him in order for the current case in court to end so he can have his peace regarding the paternity of the children herein, he gave 1<sup>st</sup> Respondent GHC4,000.00 for her to add on and pay for the test but he does not know why she has failed to pay the money till date. He indicated his readiness to top up the money for the DNA test to be done so all parties will know their fate.

The Court observed from the evidence before it that the DNA test conducted by The Trust Hospital was under the direction of the Tesano Police as part of its investigations to resolve the case lodged before them. Although 1<sup>st</sup> Respondent prayed for the DNA test, she has not shown any seriousness in raising the funds for the DNA test as ordered. To the extent that she squandered the GHC4,000.00 given to her by 2<sup>nd</sup> respondent for the purpose. On the 1<sup>st</sup> day of November 2022, 1<sup>st</sup> Respondent's response to an enquiry by the panel was that, *"Please since I do not have the money for the test, I ask the court to deal with the matter as deemed fit. I will come back when I get the money."* So the Court applying **sections 41 and 42 of Act 560** which is to the effect *that the court may order an alleged parent to submit to a medical test and shall on the basis of the evidence before it, make such orders as it considers fit and also that the refusal of a parent to submit to a medical test, performance of customary ceremony by the father of the child, public acknowledgement of parentage, the name of the parent entered in the register of births may be*

*considered by this tribunal as evidence of parentage, and any other relevant factors, and having considered the conduct of 1<sup>st</sup> Respondent in this matter (her failure to comply with the order for DNA test she prayed for), the affidavits of all the parties and their responses to enquiries by the panel declared Applicant as the biological father of the children in issue until otherwise proven. A social enquiry was subsequently ordered to assist the court determine the issue of custody of and access to the children in issue.*

The Social Enquiry Report (hereinafter referred to as SER) submitted to the Court on the 22<sup>nd</sup> day of January 2023 confirmed that the first and second children are in school, but the third child is not in school. Applicant enrolled the 3<sup>rd</sup> child in a school (Liver-Rose International School) at Tantra Hills (where 1<sup>st</sup> Respondent was living with him) during the first term of the 2022 academic year. The Administrator of the school confirmed that 1<sup>st</sup> Respondent brought the child to school on three occasions and stopped until the third term when she brought him just once and have since not come again. The first child is in school, and his fees is paid by 2<sup>nd</sup> Respondent. The second child is also in school, and the fees paid by Applicant. The first child lives with 2<sup>nd</sup> Respondent, the second child lives with Applicant and the third child lives with 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent occupies a single room self-contained apartment at Capital Hill, Sowutuom with the 3<sup>rd</sup> child. The 2<sup>nd</sup> Respondent occupies a rented Chamber and hall facility at Tanta Hills with the 1<sup>st</sup> child whilst Applicant lives in a rented three-bedroom apartment with the 2<sup>nd</sup> child and his younger sister aged about 36years and the niece. 1<sup>st</sup> Respondent is reported to be selling 'sobolo' drink and pastries at her church and a school near her residence, but she did not show the Probation Officer the exact place she sells. Applicant on the other hand sells home used cars at a garage at Achimota 1<sup>st</sup>

The Probation Officer concluded from her investigations that it appears 1<sup>st</sup> Respondent does not have a problem with Applicant having custody of the children if the DNA test confirms that he is their biological father. It was also observed from the SER that 1<sup>st</sup> Respondent is not settled at the moment to concentrate or focus on the children and therefore could not take the 3<sup>rd</sup> child to school even though Applicant paid his school fees. Also, Applicant wants

custody of the last two children because he is of the view that 1<sup>st</sup> Respondent will not concentrate on their education and would roam with them from one man to the other. It is also reported in the SER that, the 2<sup>nd</sup> Respondent gave the 1<sup>st</sup> Respondent GHC4,800.00 to pay for the DNA test but the 1<sup>st</sup> Respondent failed to pay for it. She actually confirmed in the course of proceeding that she has been able to raise GHC4,000 and that it was left with about GHC860.00 and prayed for adjournment to the end of August 2022 to raise the balance. At the next adjourned date, she informed the court that she had used the money and that the court should deal with the matter as it deems fit. That she will come back when she is able to raise the money.

In determining this matter, this Court is minded to consider the views of the children (See section 11 and 45(2)(c) of Act 560). The first child expressed his desire to continue staying with 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> child also expressed her desire to live with Applicant. Both are willing to visit the 1<sup>st</sup> Respondent during holidays.

Unknown to Applicant, 2<sup>nd</sup> Respondent accepted responsibility for the pregnancy of the first child and has been maintaining 1<sup>st</sup> Respondent and the 1<sup>st</sup> child although Applicant named the child and has also been caring and providing for him until the incident of September 2021. It appears 1<sup>st</sup> Respondent's mother is aware of all that happened between the three parties and the relationship between her daughter and the two men herein. Interesting developments. Whilst 1<sup>st</sup> Respondent was cohabiting with Applicant, she travelled with the first child to 2<sup>nd</sup> Respondent in Adaeso and they had sex, but this did not end there. Since she was having sex with both men over the period in issue, it is difficult to say with certainty, who fathered the children in issue without a scientific analysis. At her request, the Court ordered for another DNA test, but 1<sup>st</sup> Respondent has failed to comply with same. That is the reason for the delay in the determination of this matter.

The law, under **section 32 of The Evidence Act 1975 (NRCD 323)** provides that *"a child born during the marriage of the mother is presumed to be the child of the person who is the husband of that mother at the time of the birth"*. Since the 3<sup>rd</sup> child was born during the marriage of the Applicant and 1<sup>st</sup> Respondent, he is presumed to be the child of the marriage and Applicant, the father

until otherwise proven. Also, since Applicant's exhibits MS1 MS2 and MS3 (though not ordered by the Court but was under the direction and supervision of the Tesano Police), confirmed Applicant as the father of the last two children being Matilda Nhyira Sekyere and Stephen Ayeyi Sekyere (the issues herein) but not the first issue, Martin Nana Kofi Sekyere, the court will have to accept this until otherwise proven. 1<sup>st</sup> Respondent's only reason for challenging these test results is because she was taken to the Trust hospital under the guise of being taken to the DSW and also that the report was read to them by the Police Officer instead of her being allowed to read it herself. In any case, it is the samples of the children and Applicant that are required for a DNA Test and not 1<sup>st</sup> Respondent. Also, the results have been annexed to Applicant's Affidavit which was served on her.

Now, is Applicant entitled to have custody of the second and third issues as prayed for? This Court has a duty to uphold and protect the best interest of the issues herein (see **section 2 of Act 560** and **Opoku Owusu v. Opoku Owusu [1973] 2GLR 349**. It was also held in **Ofori v Ofori [1981] GLR 745** that *"the court had power either on its own initiative or on application of either party to make in respect of any child any order which it thought reasonable and for the benefits of the child"*

Lindsey L.J laid down the principle in the English case of **In Re McGrath (1892) 9 T.L.R.65** at page 66 that *"The dominant matter for the consideration of the court is the welfare of the child but the welfare of a child is not to be measured by money only or by physical comfort only. The word "welfare" must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being"*

Coming back to Ghana, the case of **Beckley v. Beckley & Anor [1974] 1GLR 393** applied this principle when it held that *"the welfare of a child included moral and religious welfare as well as physical wellbeing"* It further held that *"Although a child of tender years should have been looked after by his mother, there were circumstances which militated against granting her custody.....Also, it was a possibility that the child would be cared for by an irresponsible maid when the mother was working, the child would be cared for by its paternal grandmother who was found to be a fit and proper person"* In **Happee v. Happee [1974] 2GLR 186**, the court was of the view



that where a mother's character was impeachable, then custody of the child will not be granted to the mother.

Although the law under **section 45(1) of the Children's Act 1998 (Act 560)** prefers that a young child is cared for by the mother, the law permits this Court to consider other relevant factors in determining whether it will be in the best interest of the child to be placed in the custody of the mother (see section 45(2) of Act 560). From the evidence on the record, Applicant has the support of his sister and niece in caring for the 2<sup>nd</sup> issue. The niece lived with Applicant, the 1<sup>st</sup> Respondent and all the issues before the Applicant and 1<sup>st</sup> Respondent's separation and assisted with the care of all the issues. Having considered the conduct of 1<sup>st</sup> Respondent, and the evidence on the record, it is the considered view of the Court that the best interest of the issues will be better served if custody is granted to Applicant since he appears to be more interested in the welfare of the issues.

Custody of the 2<sup>nd</sup> and 3<sup>rd</sup> children is hereby granted to Applicant. 1<sup>st</sup> Respondent shall have bi-weekly weekend (from 4pm on the Friday to Sunday by 5pm) and half period vacation access to them. Applicant shall enrol the 3<sup>rd</sup> issue in school upon taking custody of her.

**H/H MATILDA RIBEIRO (MRS)  
CIRCUIT COURT JUDGE**