

CORAM: HER WORSHIP AMA ADOMAKO-KWAKYE (MS.), MAGISTRATE,
DISTRICT COURT '2', KANESHIE, SITTING AT THE FORMER STOOL LANDS
BOUNDARIES SETTLEMENT COMMISSION OFFICES NEAR WORKERS'
COLLEGE, ACCRA ON 11TH AUGUST, 2023.

SUIT NO. A8/35/23

BENJAMIN KOTEY

MAMPROBI- ACCRA

::

PETITIONER

VRS.

GERTRUDE NAA KOSHIE LAMPTEY

MAMPROBI-SEMPE

::

RESPONDENT

ACCRA

JUDGMENT

Introduction/Background

The marriage on trial originates from a Petition for Divorce filed on 10th October, 2022 by the Petitioner in this Honorable Court seeking for the following reliefs;

- a. *“That the celebrated ordinance marriage be dissolved as the Respondent is pregnant with another man’s child; and*
- b. *That the Petitioner be granted access to the parties’ two children and any other reliefs as the court may deem fit.”*

The undisputed facts are that the parties, an officer of the Ghana Immigration Service and a businesswoman respectively, married under the Ordinance on 8th August, 2014 at the Accra Metropolitan Assembly. They have two children namely, Elyona Naadei Kotey and Elyon Nii Kotey Kotey of seven and five years respectively. The parties contend that their marriage has broken down beyond reconciliation.

The parties were able to resolve the ancillary matters in respect of the suit and filed terms of settlement in respect of same. The parties based on their terms of settlement filed on 18th November 2022, mutually agreed as follows:

1. That the marriage between them be dissolved;
2. That the Petitioner pays monthly a sum of one thousand cedis (Gh¢ 1,000.00) to the Respondent as his contribution to the maintenance and upkeep of the issues of the marriage;
3. That the Respondent tops up the monthly maintenance of one thousand cedis (Gh¢ 1,000.00) from Petitioner to maintain the children;
4. The custody of the issues of the marriage be given to Respondent with reasonable access to Petitioner; and
5. That no award as to costs.

Petitioner's Petition

The Petitioner averred that the Respondent during the subsistence of the marriage took advantage of the Petitioner's absence on outstation duty and started having amorous relationships with other men. Petitioner further averred that one of the numerous boyfriends was a self-styled pastor who impregnated the Respondent. He added that Respondent reported the matter to DOVVSU that she was raped by the pastor. According to the Petitioner, the said pastor was arrested and arraigned before court however investigations confirmed that their affair was consensual. As such, the pastor was discharged. It was Petitioner's case that this matter compelled him to ask the Respondent to leave the matrimonial home. The Respondent therefore aborted the pregnancy out of shame.

According to the Petitioner, the Respondent has denied him access to the children even though the Petitioner has been performing his duties as a father. He added however that

he stopped paying the school fees of the children only when the Respondent authorized the school to stop Petitioner from doing so. Petitioner asserted that in order for him to have access to the children of the marriage, he reported to DOVVSU on 20th September, 2022 to compel Respondent to give him access to the children.

It was Petitioner's case that when Respondent was invited by DOVVSU, Respondent told DOVVSU that she has dissolved the marriage at the District Court and produced documents in support of same. Petitioner on the other hand averred that he was not informed of the said dissolution and had no knowledge of it. Petitioner alleged that the parties have separated for about four years and the Respondent is currently laden with pregnancy. He asserted that the marriage between the parties have broken down beyond reconciliation due to infidelity on the part of the Respondent. He thus prayed for the reliefs stated *supra*.

Respondent's Answer

In her response by way of an Answer to the Petition filed on 24th January, 2023, the Respondent indicated that the marriage has broken down beyond reconciliation. In responding to the Petition, the Respondent denied having behaved unreasonably, stating that it was rather the Petitioner who behaved unreasonably during their marriage. According to the Respondent, she has been a responsible wife and mother to both the Petitioner and the children of the marriage. Respondent vehemently denied all the averments of the Petitioner and asserted that the Petitioner was never denied access to the children. She added that Petitioner contacted them on phone and saw them at his pleasure. Respondent averred that it was rather the Petitioner who did not make efforts to find out where Respondent and the children were staying.

According to the Respondent, the Petitioner was not paying the full fees of the children and even with the ones he paid which was just on two occasions, Petitioner did not pay same on time as such, she was forced to pay the fees. She asserted that the parties have long been separated and both parties have been living separately. It was Respondent's

case that on 2nd October, 2018, the Petitioner together with his family packed her belongings to her father's house and the parties have since then not lived together as husband and wife.

Respondent further asserted that the marriage between the parties has not been a peaceful one and has been fraught with arguments and fights to the extent that some of the instances were reported to the family members and even to the police for settlement. She stated that the Petitioner has caused her so much pain and stress during the marriage and this has affected her mentally and emotionally. Although several attempts have been made by their families to settle the issues between the parties, all their efforts have proven futile. Respondent thus prayed this court to;

- a. Dissolve the ordinance marriage between the parties;*
- b. Grant custody of the children to Respondent with reasonable access to Petitioner;*
- c. Order Petitioner to pay to the Respondent such maintenance for the children pending suit and thereafter; and*
- d. Any order or further orders as the Honourable court may deem fit*

Issue

It is evident from the foregoing that this Court is called upon to determine whether or not the marriage between the parties has broken down beyond reconciliation within the purview of the Matrimonial Causes Act, 1971 (Act 367).

Evaluation of evidence/Legal Analysis

Both parties are in agreement that the marriage be dissolved. Despite this agreement by both of them, the law is that the Court must be satisfied on all the evidence that the marriage has broken down beyond reconciliation before it can grant the order for the dissolution of the marriage. The grant of dissolution of the marriage is not an automatic one which is solely based on parties consenting. It is trite that merely asserting that a marriage has broken down irretrievably would not suffice for the Court to grant a relief

for dissolution of a marriage and that the evidence before the Court should be the guiding light of the Court. See: **Charles Akpene Ameko v Saphira Kyerema Agbenu [2015] 91 G.M.J. 202 @ 221; Michael Kyei Baffour v Gloria Carlis Anaman [2018] 123 GMJ 95; Donkor v Donkor [1982-83] GLR 1158; Adjetey v Adjetey [1973] 1 GLR 216).**

Section 1(1) of the Matrimonial Causes Act, 1971 (Act 367) allows either party to a marriage to present a petition to the court for divorce. **Section 1(2) of the Act** also emphasizes that the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation. To prove that a marriage has broken down beyond reconciliation, the law requires a petitioner to plead and prove to the satisfaction of the court, one or more of the six facts set out under **Section 2(1) of the Matrimonial Causes Act (Act 367)**. Those facts in a loose list are; adultery, unreasonable behaviour, desertion, not living as man and wife for two years continuously with consent to divorce, not living as man and wife for five years continuously with no consent needed and irreconcilable differences. See **Danquah vs Danquah (1979) GLR 371**. The Court must be satisfied on all the evidence that the marriage has indeed broken down beyond reconciliation. See **Kotei v. Kotei [1974] 2 GLR 172**.

The Petitioner filed a witness statement on 1st December, 2022 which was adopted by the Court on 2nd June 2023 as his evidence-in-chief. The Petitioner testified that his job necessitated a lot of travels but he made efforts to go home whenever he had the opportunity. He stated that the Respondent indulged herself in amorous relationships with other men and he got to know that she spent nights outside the matrimonial home and sometimes brought her boyfriend to spend the night in their matrimonial home. Petitioner added that this led to quarrels between the parties anytime he came back home.

According to the Petitioner, on one of the occasions when he returned to Accra, he got to know that the Respondent had lodged a complaint of rape at DOVVSU involving her and a self-styled pastor by name Prophet Richard Adotei Allotey. He further stated that after investigations, the Attorney General recommended against prosecution since there

appeared to have been consensual sex between the said Pastor and the Respondent. This, Petitioner says made him angry and disappointed in Respondent and he therefore asked her to move out of their matrimonial home. Petitioner asserted that even though Respondent aborted the pregnancy out of humiliation, Respondent was heavily pregnant with another man's child as at the time of filing the witness statement.

It is Petitioner's case that he had been attending to the needs of the children of the marriage by paying their school fees and providing for their other needs but he stopped doing so when the Respondent authorized the school authorities not to accept any payment of fees from him. He added that the Respondent had been denying him access to the children. The Petitioner stated that he was convinced that the marriage between him and the Respondent had broken down beyond reconciliation due to the extra marital affairs the Respondent was engaged in which had led to her being pregnant for another man.

Section 2(1)(a) of Act 367 states that a Petitioner may rely on the fact that the Respondent has committed adultery and the fact that as a result of the adultery he or she finds it intolerable to live with the respondent, to prove that a marriage has broken down beyond reconciliation. What constitutes adultery has been stated in **section 43 of the MCA** as "*the voluntary sexual intercourse of a married person with one of the opposite sex other than his or her spouse*". The combined effect of the definitions of adultery given in Section 2(1) (a) and Section 43 of MCA is that the party seeking to rely on adultery as the basis of the breakdown of a marriage must establish that there was sexual intercourse with another person and that, as a result of that adultery, he or she finds it intolerable to live with the other spouse.

Justice Kingsley-Nyinah in **Quartey v Quartey and Anor [1972] 1 GLR 6** said that "*The burden of proving adultery lies on the person who alleges it and it cannot be shrugged off by evidence that is tainted, indifferent, suspicious or uncertain. The standard of proof required is*

proof beyond reasonable doubt that is, it must be proved with same degree of strictness as is required for the proof of a criminal offence”

In **Adjetey v Adjetey [1973] GLR 216**, the Court departed from the ‘proof beyond reasonable doubt approach’ and stated through Sarkodee J 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 is rare. In nearly every case, the fact of adultery is inferred from circumstances which may by fair and necessary inference, lead to that conclusion. There must be proof of disposition and opportunity of committing adultery; but the conjunction of strong inclination with evidence of opportunity does not lead to an irrebuttable presumption that adultery has been committed; and likewise, the court is not bound to infer adultery from evidence of opportunity alone.

In **Adjetey v Adjetey (supra)**, the Court came to the conclusion on one of the allegations of adultery that from the circumstances of the case, it could be inferred that adultery had been committed and that the marriage had broken down beyond reconciliation. See also the cases of **Blum v Blum [1963] 107 Sol Jo 512** and **Hume v. Hume & McAuliffe [1965] Times, March 3 CA**. According to Rayden’s book on “Divorce” (9th edn.) at Pg 178, it is not necessary to prove the direct fact or even an act of adultery in time and place; or even necessarily the name of the person with whom the Respondent is alleged to have committed adultery with. The fact is inferred from circumstances.

The Petitioner’s allegations of adultery against Respondent are founded on his averments in his witness statement that the Respondent had amorous relationship with other men one of whom is a self-styled Pastor bearing the name Richard Adotei Allotey. He averred that even though Respondent reported that she was raped, the advice from the Attorney General was to the effect that they both had consensual sex. As if this was not enough, Respondent as a result of this conduct was with child and had to abort the pregnancy out

of humiliation. Petitioner further testified that the Respondent was again pregnant with another man's child even though the parties have not lawfully divorced.

As indicated in the Quartey v. Quartey case (supra), the burden of proving adultery lies on the person who alleges it and it cannot be shrugged off by evidence that is tainted, suspicious or uncertain. Respondent barely denied these allegations made against her however, during cross examination, the evidence given by the Petitioner which was not impugned by the Respondent evidently supports Petitioner's testimony that the Respondent is pregnant for another man and lives with that man. The following as happened under cross examination is as follows;

Q. How come you say you are deprived access then?

*A. Her mother stays adjacent my family house so whenever I come to Accra, I was going there and she brings the kids for me to take them out but for some time about three years now, she has not been doing that. **She now stays with another man so I cannot just go there.***

This piece of evidence is one that the Court cannot gloss over as same is crucial to proving the allegations of adultery levelled against the Respondent. It is important for me to point out at this stage that the Respondent at the early stage of the suit was indeed heavily pregnant and her Counsel even in requesting for an adjournment then prayed for a longer date since she was almost due to be delivered of the baby. In fact, the Respondent gave birth before trial commenced. Respondent had had voluntary sexual intercourse with another man other than her spouse, the Petitioner. On this basis, the Court is satisfied that adultery under section 2(1) (a) of Act 367 has been properly established by the Petitioner and this is the finding of fact by this Court.

A Petitioner may also satisfy the court that a marriage has broken down beyond reconciliation by adducing evidence that are in tandem with **Section 2(1)(b) of Act 367**. This section is to the effect that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him or her.

The Cambridge Advanced Learner's Dictionary (4th Edition) has defined behaviour generally as "the way that a person behaves in a particular situation or under particular conditions. **Baker P in Katz v Katz [1972] 3 All ER 219** put it as follows: "*behaviour is something more than a mere state of affairs or state of mind, such as for example a repugnance to sexual intercourse, or a feeling that the wife is not reciprocating the husband's love, or not being as demonstrative as he thinks she should be. Behaviour in this context is action or conduct by one which affects the other. Such conduct may either take the form of acts or omissions or may be a course of conduct, and, in my view, it must have some reference to the marriage.*"

Unreasonable behaviour in marriage can take several forms such as threats, assault or violence, insults, deceit, infidelity, amongst others. In dealing with behaviour, the question, is whether the petitioner can reasonably be expected to live with the respondent. The court ought to take cognizance of the personalities of the individuals before it and evaluate the impact of the respondent's conduct on that particular petitioner, having due regard to the history of the marriage and their relationship. See the case of **Livingstone-Stallard v Livingstone-Stallard; Knudsen v Knudsen [1976] 1 GLR 204; Mensah v Mensah [1972] 2 GLR 198.**

The Respondent was unable to challenge the fact that she had illegally procured a divorce certificate in her bid to deceive officers of DOVVSU that the marriage existing between the parties herein had been dissolved with the Petitioner herein as the Petitioner in that fictitious matter, when the Petitioner had not instituted any action. This conduct is not only unreasonable but also has some undertones of criminality which ought to be thoroughly investigated to ascertain the people behind it.

It is worthy of notice that the parties have since 2018 not lived together as man and wife. From the evidence adduced before this Court, it is clear that the Respondent has started a new chapter of her life by her conduct of living with another man and bearing his child. If for nothing at all, the terms entered into by the parties before this Court is sufficient enough to prove that the parties to the marriage are no longer interested in resuming consortium. All the above surmise an intention not to live together again as a married

couple due to irreconcilable difference. Based on these findings, the Court is satisfied that the marriage between the parties has broken down beyond reconciliation due to the Respondent' unreasonable behaviour and adulterous conduct, entitling the Petitioner to the relief he seeks from this Court.

The Respondent had her witness statement filed on 24th January 2023. She however failed to appear in Court on the day she was to testify. It is trite law that merely filing a witness statement does not constitute evidence until the party who filed same mounts the witness box and relies on same as his or her evidence in chief. Thus, in the case of **John Dramani Mahama v Electoral Commission & Another [2021] GHASC 12 (4th March 2021)** His Lordship Anin Yeboah CJ (as he then was) succinctly held that;

"... the above rule also points to the fact that a witness statement filed and served does not constitute evidence in law till the author of the statement mounts the witness box, takes the oath and prays that the witness statement be adopted as evidence in chief pursuant to Order 38 r 3E(2), which provides thus: "(2) Where a witness is called to give oral evidence under subrule (1), the witness statement of that witness shall stand as the evidence in chief of that witness unless the Court otherwise orders."

The Respondent's witness statement which was not relied on by her and adopted by the Court cannot therefore be considered by this Court in the determination of the suit, since it does not amount to evidence.

Conclusion

From the totality of the evidence adduced in the trial, the Court finds that the Petitioner has been able to discharge the burden of proof on him and the Court is thus satisfied that the marriage has indeed broken down beyond reconciliation. It would be erroneous for this Court to rule that the marriage should still subsist.

In the light of the foregoing, I hold that:

1. The marriage celebrated between the parties on 8th August, 2014 at the Accra Metropolitan Assembly, Accra is hereby dissolved.
2. The Court enters consent judgment on the basis of the terms of settlement duly executed by the parties and filed on 18th November 2022 and incorporates same as part of this judgment which parties are to adhere to same.

[SGD]
AMA ADOMAKO-KWAKYE (MS.)
DISTRICT MAGISTRATE

Counsel

No legal representation for the Petitioner

Jocelyn Edzie, Esq. holding brief of Korbla Hlortsi-Akakpo, Esq. for the Respondent.