IN THE DISTRICT COURT TDC TEMA HELD ON TUESDAY THE 1ST DAY OF AUGUST 2023 BEFORE HER WORSHIP BENEDICTA____ ANTWI (MRS) DISTRICT COURT MAGISTRATE

SUIT NO: A4/08/22

EMMANUEL BROWN …. PETITIONER

VRS

AMANDA DANSO …. RESPONDENT

JUDGMENT

FACTS

On the 10th January 2022, petitioner issued a petition praying for the following reliefs;

a) An order dissolving the ordinance marriage contracted between the parties on the 8th April 2011 at Tema Metropolitan Assembly Chamber Tema
b) An order for a DNA yest to be conducted on the children of the said marriage to determine their paternity.

c) Custody of the children if the DNA test proves positive.

The petition was duly served on the respondent who eventually filed her answer on the 30th May 2022.

On the 7th June 2022 the court differently constituted gave an order DNA test to be conducted on the two children of the marriage. On the 25th October 2022, the court opened the DNA test in the presence of both parties and read out the conclusions as follows;

"the petitioner is the biological father of Madison Maame Esi Brown but not the biological father of Tayson Kwabena Brown"

The court differently constituted then made an order varying the interim maintenance of 600 cedis downwards to 300 for only the 1st child and further ordered the respondent to file her witness statement on or before the 8th November 2022. The respondent did not participate in the suit thereafter despite several hearing notices duly served on her.

In the case of **Republic v Court of Appeal Accra Ex parte East Dadekotopon Development Trust**, Civil motion No. JS/39/2015 held as follows:
"there could not be a breach of the rules of the audi alteram partem rule when it is clear from the facts that sufficient opportunity was given to a party and was abused by him"

The court thus proceeded with the hearing of the petition since the respondent willfully absented herself from the rest of the proceedings.

PETITIONER'S CASE

They got married under the ordinance on the 8th April 2011 and cohabited at Saki near Golf City Tema. Their marriage was blessed with two children aged 10 and 5 years. He states that the respondent refuses to engage in marital sex with him and has videos to prove that respondent is a lesbian. Respondent has also stopped cooking and washing for the petitioner even though he maintains the home. all attempts to resolve the problem by family members proved futile as believes the marriage has broken down beyond reconciliation. He moved out of the matrimonial home and says he is no longer interested in the marriage. He prayed for an order for DNA test to be conducted on the children.

RESPONDENTS CASE

That she works as a beautician and the petitioner works as a hotel manager. The marriage was blessed with two children aged 10 and 6 years. The problems in the marriage started about four (4) to five (5) years ago and there has been several unsuccessful attempts at reconciling their differences. She believes the marriage can be salvaged however if the petitioner insists on its dissolution, then she prays the court grants same. She prayed for an interim order for maintenance and for an order of the court directing the petitioner to provide accommodation for the children until the DNA results proves the petitioner's paternity.

She stated in her answer that the allegations of lesbianism against her were fault and she was only driven into that situation because of petitioner's emotional neglect. That the petitioner confessed to her that he was involved with another woman and she therefore believed all the evidence against her is to pave way for the petitioner to leave the marriage. She has apologized to the petitioner since the video came out but petitioner has been adamant about forgiving her. She stated that she was deceived by her friend and prayed for the court to order petitioner to take maintain the children in the marriage.

BURDEN OF PROOF

The person who asserts usually has the burden of proving same on a preponderance of probabilities. Preponderance of probabilities, according to section 12(2) of the Evidence Act, 1975 (NRCD 323) 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 its non-existence."***

Where the petitioner or the plaintiff has been able to lead sufficient evidence in support of his case, then it behoves upon the defendant to lead sufficient evidence in rebuttal otherwise the respondent or the defendant risks being ruled against on that issue or issues. Under Section 11(4) of NRCD 323, a party discharges the burden of producing evidence when the party produces "… ***sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence***".

In a petition for divorce the sole ground upon which the court will dissolve a marriage is that the marriage has broken down beyond reconciliation. This is provided for under sections 1(2) and section 2(3) of the Matrimonial Causes Act, 1971 Act 367. Section 2(3) of the Act provides as follows;

"although the court finds the existence of one or more of the facts specified in subsection (1), the 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 party 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.*

SUMMARY OF EVIDENCE

On the 27th June 2023 the petitioner testified by relying on his witness statement filed on the 13th June 2022 together with his supplementary witness statement filed on the 26th July 2022 together with a video recording on a pen drive he exhibited as exhibit A. there was no cross-examination as the respondent failed to come to court and the petitioner closed his case without calling any witnesses.

In his evidence in chief, the petitioner testified that he obtained series of videos from an unnamed person which proved that his wife was a lesbian. He states that this is the reason the respondent consistently denied him sex and does not sleep with him on the same bed. The respondent does not discharge her duties as a wife by cooking, washing and having sex with him.

In short the petitioner repeated all the averments already contained in his petition. The supplementary witness statement was only to attach a copy of the alleged lesbianism videos on the pen drive on the respondent and did not sate any new evidence.

ANALYSIS

The pen drive labeled as exhibit "A" contains seven 7 videos. The first 2 clips are videos of two women engaged in sexual activities. The faces of the parties in the videos are not visible and it is unclear how the recording was done nor how the petitioner obtained the video. The other five clips are self-recorded video clips of two women with no sound. Since the respondent never appeared before me, I am unable to conclude that the respondent is indeed the person in exhibit "A".

Due to the absence of the respondent at the trial, no objection was raised as to the relevance and admissibility of exhibit A.

The principle is that where unpleaded evidence goes on record without any objection, the court is bound to consider it so long as that evidence is admissible, however where the evidence is inadmissible to prove pleaded facts, there is a duty on the judge to exclude such evidence even if no objection is raised and it will be excluded even on appeal. **Abowaba V Adeshina (1946) 12 WACA 18, Akuffo Addo v Catheline (1992-93) 3 G B R 957-1022** cited.

Section 11(4) of the Evidence Act *supra* requires the party who alleges to lead sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.

The petitioner stated in paragraph 9 of his petition that the respondent engaged in acts of lesbianism and he has videos to prove same. This allegation was partly denied by the respondent in her answer to the petition. Respondent further stated in paragraph 9 of her answer that she does not know how she found herself in the act in the circulating video and she has remorsefully pleaded with her husband to forgive her but to no avail. Since the respondent has already admitted the act alleged in the exhibit "A" there was no burden on the petitioner to lead further evidence to prove the allegations.

The court thus reviewed exhibit A and finds that in the absence of any evidence to the contrary, the respondent has engaged in acts of lesbianism as clearly depicted by the first two clips of exhibit "A".

The court will now determine the germane issue of whether or not the marriage has broken down beyond reconciliation.

This court notes that the petitioner failed to canvass any of the grounds for divorce stated under section 2 (1) of the Matrimonial causes Act, 1971 ACT 367
However, even though the petitioner did not state adultery as a ground for the dissolution of the marriage I find that the DNA results on record, which revealed that the petitioner is not the biological father of the second child in the marriage, leads to the logical conclusion that the there is evidence of adultery, however since same was never pleaded by the petitioner nor relied on to prove his case, the court will rely on section 2 (3) of the Matrimonial causes Act *supra* and hold that, upon consideration of the totality of evidence on record, this court is convinced that the marriage has broken down beyond reconciliation.

Section 22 of the Matrimonial causes Act *supra* on custody and financial provision for children provides as follows:

" (2) the Court may, either on its own initiative or on application by a party to proceedings under this Act, make an order concerning a child of the household which it thinks reasonable and for which the benefit of the child.

(3) without prejudice to the generality of subsection (2), an order under that subsection may

a) ***Award custody of the child to any person;***

b) Regulate the right of access of any person to the child;

c) Provide for the education and maintenance of the child out of the property or income of either or both of the parties to the marriage.

Guided by the above authority and the Children's Act (1998) Act 560 section 45 (2) ((d)) which states that it is desirable for siblings to be kept together , I make the following conclusions and orders.

CONCLUSION AND FINAL ORDERS.

The court has considered extensively the evidence on record and finds that the parties were married for eleven years and believed themselves to have been blessed with two children until the DNA results showed that only the 1st child is the biological child of the petitioner.

From the foregoing, I hold that the marriage celebrated between the parties on the 8th April 2011 has broken down beyond reconciliation and same is hereby dissolved.

The interim order made by the court on the 17th May 2022 and varied on the 25th October 2022 is hereby set aside. I hereby make the following orders:

a) Custody of the child of the marriage Madison Esi Brown aged 10 years is given to the respondent with reasonable access to the petitioner. Reasonable access means every other weekend from 3:00 pm after school to 2:00 pm on Sunday and half of school vacations and holidays.

b) Petitioner is ordered to pay the sum of GH¢ 800 monthly maintenance to the respondent for the general upkeep of the child mentioned in order (a)

c) Petitioner is ordered to pay the school fees, medical and feeding expenses of the child mentioned in relief (a) and the respondent is ordered to pay the clothing expenses of the child in issue.

d) Petitioner is ordered to provide reasonable accommodation for the child in order (a).

e) Petitioner is ordered to pay a lump sum of GH¢ 20,000 financial provision as send off money to the respondent given that the parties were married for eleven years during which time respondent provided marital services to the petitioner in the marriage.

f) Each party to bear his or her own cost.

[SGD]
BENEDICTA ANTWI (MRS)
DISTRICT MAGISTRATE

PARTIES:

PETITIONER … PRESENT

RESPONDENT … ABSENT