

**IN THE DISTRICT COURT HOLDING AT DODOWA, SHAI- OSUDOKU ON
TUESDAY THE 21ST DAY OF MARCH, 2023 BEFORE HER WORSHIP BRIDGET
AKPE AKATTAH**

SUIT NO: A4/134/2021

CHARLOTTE BINNEY

PETITIONER

VRS

PRINCE AGBAVITOR

RESPONDENT

JUDGMENT

Per a Petition filed on the 9th day of June, 2021, the Petitioner sought the following reliefs:

- (i) Dissolution of the marriage between parties.
- (ii) Custody of the two (2) children be granted to Petitioner with reasonable access to Respondent.

The Respondent also filed his answer on 22nd July, 2021 and sought the following reliefs:

- i. That the Court should allow the parties to settle their difference.
- ii. That Petitioner should be impressed upon to come back to the matrimonial home to help take care of the children.
- iii. That the Petition for Divorce should be dismissed.

The parties were referred to ADR after filing their respective written statements and terms of settlement filed. Parties then led evidence in support of their cases herein.

Petitioner led evidence in proof of the breakdown of the marriage beyond reconciliation. Petitioner claimed that the Respondent has unreasonable behavior and behaved in a way that she cannot be reasonably expected to live with him as husband and wife. In proving the unreasonable behavior, Petitioner struggled finding any behavior of the Respondent which unreasonable; she therefore claimed the Petitioner has been mean towards her two younger brothers who lived in their matrimonial home with them during the pendency of the marriage. Petitioner said she was no longer interested in the marriage due to the fact that Respondent likes long arguments and dragging issues any time there was a misunderstanding between them. Petitioner said she became disinterested in the marriage, she therefore deserted the matrimonial home leaving behind the children of the marriage on 8th January, 2021. She admitted under cross examination that she was happily living with another man who provides for her, hence she prayed the Court for dissolution of the marriage between her and the Respondent. Petitioner deserted the matrimonial home on 8th January, 2021 with intention never to return to same even after the families members of both parties tried to impress upon her to return home. Petitioner did not call any witness in this matter.

Respondent, just like the Petitioner led evidence solely without calling any witness(es). Respondent denied any allegation of unreasonable behavior towards the Petitioner. Respondent claimed the Petitioner has committed adultery with her ex-boyfriend but the respondent failed to prove the said allegation. Even though the Respondent presented a pen drive with an audio recording of the Petitioner's voice recording in which she admitted to having extra marital affairs, the said audio was not audible enough when it was played in Court. Respondent prayed the Court to impress on the Petitioner to return to the matrimonial home.

The main issue for the determination of this Court is whether or not the marriage between the parties has broken down beyond reconciliation and if so, to whom custody of the two issues be granted?

This is a matrimonial cause governed by the Matrimonial Causes Act, 1971 (Act 367). It is therefore in the nature of a civil claim. The onus therefore, of producing evidence of any particular fact, as in all civil cases, is on the party against whom a finding of fact would be made in the absence of further proof: see Section 17(a) and (b) of NRCD 323. The authorities are also in harmony that matters that are capable of proof must be proved by producing sufficient evidence so that, on all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence. This is the requirement of the law on evidence under sections 10 (1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323).

The burden of producing evidence has been defined in Section 11 (1) of NRCD 323 as follows;

“11 (1) For the purpose of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party”.

The burden of proof is also not static but could shift from party to party at various stages of the trial depending on the obligation that is put on that party on an issue. This provision on the shifting of the burden of proof is contained in Section 14 of NRCD 323 as follows:

“14 Except as otherwise provided by law, unless it is shifted, a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting”.

So in accordance with the general rule of procedure, the Petitioner had the burden of proving all the averments he made against the respondent on a preponderance of probabilities. If he succeeds in establishing his averments by evidence, the onus will then shift to the Respondent to lead some evidence to rebut same.

Under section 1(2) of the Matrimonial Causes Act, 1971 (Act 367), a Court shall not grant a petition for divorce unless the marriage is proven to have broken down beyond reconciliation. And under Section 2(1) of Act 367, for the purposes of showing that the marriage has broken down beyond reconciliation, a petitioner for divorce shall satisfy the Court of one or more of the following facts:

- a. that the respondent has committed adultery and that by reason of the adultery the petitioner finds it intolerable to live with the respondent;
- b. that the respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent;
- c. that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- d. 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;
- e. that the parties to the marriage have not lived as husband and wife for a continuous period of at least five years immediately preceding the presentation of the petition; or
- f. that the parties to the marriage have, after diligent effort, been unable to reconcile their differences.

It has been held in a line of cases including *Donkor v Donkor [1982-83] GLR 1158* that the Matrimonial Causes Act, 1971 (Act 367), did not permit spouses married under the Marriage Ordinance, Cap. 127 (1951 Rev.), to come to court and pray for the dissolution

of their marriage just for the asking. And that the petitioner in such a case for dissolution of marriage must first satisfy the court of any one or more of those facts set out in section 2 (1) of the Act (above), not only by pleading them but also by proof for the purpose of showing that the marriage had broken down beyond reconciliation. The court explained further that Section 2 (3) of the Act, provided that even if the court found the existence of one or more of those facts it should not grant a petition for divorce unless it was satisfied that the marriage had broken down beyond reconciliation.

As can be gleaned from the evidence of the parties herein, the marriage has broken down beyond reconciliation as the parties have not living together since 8th January, 2021. The Petitioner has satisfied the requirements of the law under section 1(2) of the Matrimonial Causes Act, 1971 (Act 367). As we speak, there is no marriage for now between the parties since the Petitioner is happily living elsewhere with another man for a period over two years now as we speak and the Respondent too is living elsewhere with the issues. The parties have not lived as husband and wife continuously over two years and to say that the parties should go back to marry will be doing great disservice to society.

I am of the firm conviction that the Petitioner was able to prove breakdown of the marriage based on the facts provided in section 2(1) (a) of Act 367.

On the totality of the evidence on record, I am satisfied that the marriage has broken down beyond reconciliation. I therefore grant the Petitioner's prayer and pronounce dissolution of the marriage between her and the Respondent. The marriage between the parties on 20th October, 2013 is hereby dissolved.

Again, on the issue of custody, the Petitioner vacated the Matrimonial home leaving the issues with the Respondent and they have been in custody of the Respondent since. For

the best interest of the children herein and for continuity of education and the enjoyment of the environment that the children have been living,

custody of the two issues be granted in favour of the Respondent with reasonable access to the Petitioner herein.

Custody of the issues BUBUNE AGBAVITOR and DZIDUFIA AGBAVITOR is granted in favour of the Respondent with reasonable access to the Petitioner.

No order as to costs.

(SGD)

HER WORSHIP BRIDGET AKPE AKATTAH

DISTRICT MAGISTRATE