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: A4/5/2023

GIFTY OCANSEY **PETITIONER**

VRS

JOSEPH OCANSEY **RESPONDENT**

JUDGMENT

Per a Petition filed on the 9th day of August, 2022, the Petitioner sought the following reliefs:

(i) Dissolution of the Ordinance marriage contracted between the parties as having broken down beyond reconciliation.

(ii) Custody of the issue of the marriage to be granted to the Respondent with reasonable access to the Petitioner whilst parties jointly take care of the financial responsibility of the maintenance, medical, educational expenses of the issue.

(iii) Any other order (s) that this honourable Court may deem fit.

The Respondent also filed his answer on 6th September, 2022 and cross petitioned as follows:

i. An order for the dissolution of the ordinance marriage contracted between the parties on 14th December, 2007 forthwith.
ii. Custody of the issue of the marriage Vanessa Ocansey age 13 years be granted to the Respondent with reasonable access to Petitioner.
iii. Any other order or orders that the Court may deem fit.

After the parties had filed their written statements, the Court proceeded with trials in this suit.

EVIDENCE OF BOTH PARTIES

Respondent led evidence and admitted that he had stopped having sex with the Petitioner due to the fact that the Petitioner left the matrimonial home against his will and stayed away for almost a year before she came back. This conduct of the Petitioner made him lose interest in the marriage and he halted all sexual activities with the Petitioner. Respondent did not call any witness.

Petitioner led evidence in establishing the breakdown of the marriage beyond reconciliation. Petitioner led evidence that due to their religious beliefs, they were advised not to have sex before their marriage. After the marriage however, she discovered that the Respondent was disinterested in having sexual relations with her and unless she initiates the process, the Respondent will not have sex with her. She claimed after sometime in the marriage and basically nine years now, she has also decided not to initiate the sexual process and since then, the Respondent has not had sex with her.

Petitioner claims they sleep in separate rooms in their matrimonial home and Respondent does not have sex with her. She claimed she left the matrimonial home for some time so as the Respondent will miss her and make sexual advances at her but that yielded no results. She therefore prayed the Court for the dissolution of the marriage and custody of the issue of the marriage granted the Respondent with reasonable access to her.

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 only issue 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.

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 14th December, 2007 is hereby dissolved.

Again, on the issue of custody, the Petitioner vacated the matrimonial home leaving the issue with the Respondent and she had been in the custody of the Respondent since. For the best interest of the child herein and for continuity of education and the enjoyment of the environment that the child has been living, custody of the only issue VANESSA OCANSEY aged 13 years be granted in favour of the Respondent with reasonable access to the Petitioner herein.
Custody of the issue 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