

IN THE DISTRICT COURT HELD AT WEIJA, ACCRA ON TUESDAY THE 25TH DAY OF JULY, 2023 BEFORE HER WORSHIP RUBY NTIRI OPOKU (MRS), DISTRICT MAGISTRATE

SUIT NO. G/WJ/DG/A4/84/23

SARAH AFFOA GYAMFI

PETITIONER

VRS

STANLEY YAW ASAMOAH

RESPONDENT

PETITIONER IS PRESENT AND REPRESENTED BY MITSUI KORYOO ODJIDJA ESQ HOLDING BRIEF FOR YVONNE AMEGASHIE ESQ.

RESPONDENT IS ABSENT.

JUDGMENT

Brief facts.

The petitioner is a trader whilst the respondent is a trader-wholesaler. Both parties are citizens of Ghana who got married in accordance with customary law and converted same under Part III of the Marriages Act, 1884-1985(CAP 127) on 2nd December 2017 at the Calvary Presbyterian Church, McCarthy Hill in Accra. After the celebration of the marriage, parties cohabited at Topbase Gbawe and have one issue of the marriage namely Golda Maame Yaa Serwaa Asamoah aged 4 years old.

The petitioner filed a petition for divorce at the registry of this court on 17th April, 2023 against the respondent for the following reliefs:

- a. Dissolution of the ordinance marriage contracted between the parties as having broken down beyond reconciliation.
- b. Custody of the sole issue of the marriage be granted to petitioner with reasonable access to the respondent.

- c. Maintenance and general upkeep of the sole issue of the marriage.
- d. Any further order(s) this honourable court may deem fit.

On 5th June 2023, Respondent was served with the petition and a hearing notice by substituted service pursuant to the orders of the court dated 30th May 2023 inviting him to contest the divorce however it is to be noted that for unexplained reasons, respondent did not file any process to contest the suit or appear in court personally to be heard.

The court therefore proceeded without him.

Order 25 r 1(2) (a) of the District Court Rules 2009, C.I 59 reads;

“Where an action is called for trial and a party fails to attend, the trial magistrate may where the Plaintiff attends and the Defendant fails to attend, dismiss the counterclaim if any and allow the Plaintiff to prove the claim”

In Ankumah v City Investment Co Ltd [2007-2008] 2 SCGLR 1064, Baffoe Bonnie JSC held at page 1076 as follows;

“A court is entitled to give judgment in default as in the instant case, if the party fails to appear after notice of the proceedings has been given to him. For then, it would be justifiable to assume that he does not wish to be heard.”

THE CASE OF THE PETITIONER

The petitioner grounded her petition on the fact that the marriage contracted between the parties has broken down beyond reconciliation due to the conduct of the respondent and she cannot reasonably be expected to live with him as a wife.

She particularised the unreasonable behaviour of the respondent to the extent that when parties’ tenancy expired on 20th December 2020, the respondent relocated to an unknown location and has since failed or refuse to disclose his whereabouts to the petitioner.

She averred that respondent informed her to spend the night with her sister at Tetegu with the promise of taking her to the new matrimonial home the following day however she has never heard from the respondent to date.

According to her, she has called respondent severally on phone however he has failed and or refused to pick up her calls and on days that he picks up his calls, he engages in unnecessary quarrels with her or would give her flimsy excuses without showing her his whereabouts.

She added that parties have been separated for more than two years since respondent deserted her and parties have not had sex, communicated or shared any intimacy since then.

She concluded by stating that all attempts at reconciliation have proved futile as respondent has failed to honour all invitations extended to him by family members and the church leadership.

She prayed for the dissolution of parties' marriage as same has broken down beyond reconciliation.

After close of pleadings and the evidence before the court, the following issues were set down for determination;

- i. Whether or not the marriage contracted between the parties has broken down beyond reconciliation
- ii. Whether or not the petitioner is entitled to be granted custody of the issue of the marriage with reasonable access to the respondent.
- iii. Whether or not the petitioner is entitled to maintenance of the child.

BURDEN OF PROOF

It is trite that section 12 of the Evidence Act, 1975 (NRCD 323) provide that the standard in all civil action is by a preponderance of probabilities.

In **NARTEY V MECHANICAL LLOYD ASSEMBLY PLANT LTD [1987/88] 2 GLR 314 at 344, Adede JSC** reiterated the position of the law cited supra by stating:

“A person who comes to court no matter what the claim is must be able to make a case for the court to consider otherwise he fails.”

In **ABABIO V AKWASI IV [1994-1995] GBR 774, AIKINS JSC** delivered himself thus;

“The general principle of law is that it is the duty of a plaintiff to prove what he alleges. In other words, it is the party who raises in his pleadings an issue essential to the success of his case who assumes the burden of proving it. The burden only shifts to the defence to lead sufficient evidence to tip the scales in his favour when on a particular issue, the plaintiff leads some evidence to prove his claim. If the defendant succeeds in doing this, he wins if not he loses on that particular issue.”

THE COURT'S ANALYSIS AND OPINION

Issue one: whether or not the marriage between the parties has broken down beyond reconciliation.

Section 1(2) of the Matrimonial Causes Act, 1971 (Act 367) provides that the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation.

Section 2 (1) of Act 367 explains that for the purpose of showing that the marriage has broken down beyond reconciliation, the petitioner 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 provided that the consent shall not be unreasonably withheld and where the court is satisfied that it has been withheld the court may grant a petition for divorce under this paragraph despite the refusal
- (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
- (f) That the parties after a diligent effort been unable to reconcile their differences.

Section 2(2) of Act 367 imposes a duty on the court to enquire into the facts alleged by the petitioner and the respondent. Section 2(3) also provides that 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.

From the evidence, the Petitioner based her allegations for the breakdown of the marriage on the unreasonable behaviour of the Respondent.

To succeed under this fact, the petitioner must first establish unreasonable conduct on the part of the Respondent and secondly, she must establish that as a result of the bad conduct, she cannot reasonably be expected to live with him.

At page 123 of the book, "At a glance! The Marriages Act and the Matrimonial Causes Act Dissected by Mrs Frederica Ahwireng-Obeng, the learned writer on unreasonable behaviour stated;

"Unreasonable behaviour has been defined in English law as conduct that gives rise to life, limb or health or conduct that gives rise to a reasonable apprehension of such danger". The above statement reiterated the position of the law in GOLLINS V GOLLINS [1964] A.C 644

She added that the principle of law is that, the bad conduct complained of must be grave and weighty and must make living together impossible. It must also be serious and higher than the normal wear and tear of married life.

The respondent was not in court to cross examine the petitioner on her assertions.

In **Quagraine v. Adams [1981] GLR 599** it was held that in a situation where a witness testifies and his opponent fails to cross-examine him, the court may consider the witness's testimony as admitted by his opponent

I therefore find and hold that the petitioner has been able to prove on a balance of probabilities that parties have not lived as husband and wife for more than two years due to the conduct of the respondent and she cannot reasonably be expected to live with him as a wife.

I therefore proceed under Section 47 (1)(f) of the Courts Act 1993, (Act 459) to decree that the Ordinance Marriage between Sarah Affoa Gyamfi and Stanley Yaw Asamoah celebrated at the Presbyterian Church, Calvary Congregation Weija Gbawe in Accra on 2nd December, 2017 is hereby dissolved.

I hereby order the cancellation of the marriage certificate issued. A certificate of divorce is to be issued accordingly.

Issue two: Whether or not respondent is entitled to custody of the children of the marriage with reasonable access to the petitioner

The courts have consistently held that on the award of custody of a child, the welfare of the child must be the paramount determining factor. This principle has been given statutory force by section 2 of the Children's Act, 1998 (Act 560) which states:

The best interest of the child shall be paramount in any matter concerning a child.

This principle of the law was stated in **OPOKU-OWUSU V OPOKU-OWUSU [1973] 2 GLR 349-354** where it was held as follows;

"in such an application, the paramount consideration is the welfare of the children. The court's duty is to protect the children irrespective of the wishes of the parents."

The considerations for custody or access have been provided in Section 45 of Act 560 as follows;

A family tribunal shall consider the best interest of a child and the importance of a young child being with his mother when making an order for custody or access. Subject to subsection (1), the tribunal shall consider

- (a) the age of the child

- (b) that it is preferable for the child to be with his parents except where his rights are persistently abused by his parents
- (c) the views of the child if the views have been independently given
- (d) that it is desirable to keep siblings together
- (e) the need for continuity in the care and control of the child
- (f) Any other matter that the Family tribunal finds relevant.

Applying the law to the facts of the present case, it is uncontroverted that the issue of the marriage who is aged 4 has been living with her mother, the petitioner since the separation of the parties. I find and hold that as a young child it is in her best interest that custody be granted to the petitioner to ensure continuity in her care and control.

It is accordingly ordered that custody of Golda Maame Yaa Serwaa Asamoah be granted to the petitioner with reasonable access to the respondent.

Issue 3: whether or not the respondent is entitled to maintenance for the only issue of the marriage.

With respect to maintenance of the child, section 6 of the children's Act, 1998 (Act 560) provides that no parent shall deprive a child his welfare whether the parents of the child are married or not or whether they continue to live together or not.

Section 47 of Act 560 also provides that a parent or any other person who is legally liable to maintain a child or contribute towards the maintenance of the child is under a duty to supply the necessaries of health, life, education and reasonable shelter for the child.

Section 49 of Act 560 provides amongst others that in considering the maintenance order, a family tribunal shall consider the income and wealth of both parents of the child or of the person legally liable to maintain the child and the cost of living in the area where the child is resident.

The respondent is ordered to maintain the only issue of the marriage with the sum of GHC1, 000.00 a month.

It is ordered that the respondent shall be responsible for the payment of school fees and medical bills of the child as and when payments fall due.

The respondent is ordered to provide accommodation for the only issue of the marriage until she attains the age of 18 years or the petitioner remarries whichever event occurs earlier.

Costs of GHC2, 000.00 is awarded in favour of the petitioner against the respondent.

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**H/W RUBY NTIRI OPOKU (MRS.)
(DISTRICT MAGISTRATE)**