

IN THE DISTRICT COURT HELD AT WEIJA, ACCRA ON TUESDAY THE 21ST
DAY OF MARCH, 2023 BEFORE HER WORSHIP RUBY NTIRI OPOKU (MRS),
DISTRICT MAGISTRATE

SUIT NO. C/KS/DG/A4/49/22

AGNES OSEI

PETITIONER

VRS

PRINCE OPOKU

RESPONDENT

PETITIONER IS PRESENT AND REPRESENTED BY RICHARD ASARE BAFFOUR ESQ.
HOLDING BRIEF FOR GEORGE ASAMANEY ESQ.

RESPONDENT IS ABSENT.

JUDGMENT

The petitioner filed a petition for divorce in the Registry of the Kasoa District court on 19th October, 2021 against the respondent for the following reliefs:

- a. An order affirming the dissolution of customary marriage celebrated between the parties as same has broken down beyond reconciliation.
- b. An order for the equitable distribution of five bedroom matrimonial property situate at New Bortianor, Accra or its sale with parties retaining equal share of the proceeds of the sale.
- c. An order for petitioner to be granted custody of the issues of the marriage with reasonable access to the Respondent.
- d. An order by the court directing the Respondent to pay a realistic amount as maintenance for the issues of the marriage taking into cognisance their ages and salary earned by the Respondent.
- e. That Respondent rents a 2 bedroom apartment for two years for the Petitioner and the children of the marriage.

f. Any other reliefs as the court may seem fit.

From the records of proceeding, it is to be noted that even though Respondent was served with the petition and a hearing notice on 4th November 2021 inviting him to appear in court to be heard, for unexplained reasons, respondent did not file any process to contest the suit or appear in court personally to be heard.

On 11th April, 2022, the suit was transferred to the Weija District Court pursuant to the order of Justice Patience Mills Tetteh (Mrs.) the Supervising High Court Judge for the Central Region.

The order was made following a motion filed by Counsel for the petitioner praying the court to transfer the suit to Weija since Respondent resides at Bortianor, same being within the jurisdiction of the Weija District Court.

Consequently, the Registrar of the Weija District court caused the transfer order and hearing notices to be issued and served on the parties to notify them to appear in court on 7th June 2022.

On 7th June, 2022, Petitioner attended court whilst the Respondent failed to attend court. Counsel for Petitioner moved an application for interim financial provision. The court having been satisfied that the Respondent was served with the said motion on 17th May 2022 as evidenced by the affidavit of service dated 17th May 2022 on the court's docket proceeded to hear and grant same.

On 16th August 2022, Respondent attended court with his lawyer and prayed the court to adjourn the matter to 4th October 2022 to enable him apply for the record of proceedings

and file an answer to the petition. The Respondent failed to attend court on the adjourned date and continued to stay away even though hearing notices and all other court processes were served on him personally as borne out by the record of proceedings.

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

"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 case of the petitioner is that parties were married under customary law on 10th May 1997 in Korme near Ho in the Volta Region of the Republic of Ghana. After the marriage, parties cohabited at Nii Boye Town for about 17 years and then moved into their jointly acquired property at New Bortianor within the jurisdiction of this court.

As at the date of filing this petition, Petitioner averred that there are six issues of the marriage namely Priscilla Opoku aged 24 years, Emmanuel Opoku aged 21 years, Bernard Opoku aged 17 years, Harriet Opoku aged 15 years, Vida Opoku aged 12 years and Caleb Opoku aged 10 years.

According to the Petitioner she was forced out of the matrimonial home due to the unreasonable behaviour of the Respondent and imminent fear of her life

She gave the particulars of unreasonable behaviour of the Respondent as follows;

- a. That the Respondent subjected the petitioner to persistent emotional, verbal and physical abuse to the point of striking the petitioner with belts and threatening her with knives.
- b. That on or about the year 2017, Respondent brought women over to the matrimonial bed in the presence of the Respondent
- c. That the Respondent neglected to adequately provide for the children of the marriage
- d. That Respondent has failed to properly maintain and sustain the growth of the issues of the marriage having been granted custody of the issues by a court of competent jurisdiction.
- e. That the Respondent accused the issues of the marriage of poisoning his food with the intent to unlawfully lock them up in police custody.
- f. That Respondent caused the arrest and detention of two of the issues of the marriage for daring to squeeze his toothpaste to brush their teeth.
- g. That the issues of the marriage are forced to go hungry due to the inadequate maintenance given to them for their upkeep.
- h. That the issues of the marriage have all vacated the matrimonial home and have moved in with the Petitioner due to the harsh environment and inadequate care.

Petitioner added that she used proceeds from her hardware shop to substantially finance the building of the matrimonial home. She accordingly prayed the court to grant her reliefs.

The following issues were set down for determination by this court;

1. Whether or not there are sufficient facts recognised by the personal law of the parties to justify a divorce?
2. Whether or not appropriate financial provision and adequate child custody arrangements have been made.
3. Whether or not the matrimonial home is the jointly acquired property of the parties and if so, whether or not the Petitioner is entitled to an equitable share of same.
4. Whether or not the petitioner is entitled to financial settlement of GHC50,000.00

MODE OF TRIAL

The Petitioner filed her witness statement and that of her witness on 21st January 2022 however even though Respondent was ordered to file same and was served with the courts notes and a hearing notice, he did not comply with the orders of the court or attend court.

BURDEN OF PROOF

It is trite that in civil cases, proof is by a preponderance of probabilities.

In the case of Ackah v Pergah Transport Ltd [2010] SCGLR 728 at page 736, Sophia Adinyira JSC (as she then was) delivered herself as follows;

“It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail.”

This position of the law was re-echoed by Benin JSC in the case of Aryee v Shell Ghana Ltd & Fraga Oil Ltd [2017-2020] 1 SCGLR 721 at page 733 as follows;

"It must be pointed out that in every civil trial all what the law requires is proof by a preponderance of probabilities. See section 12 of the Evidence Act, 1975 (NRCD 323). The amount of evidence required to sustain the standard of proof would depend on the nature of the issue to be resolved."

SHIFTING OF THE BURDEN OF PROOF

The burden of proof may shift from the party who bore the primary duty to the other.

Section 14 of the Evidence Act, 1975 (NRCD 323) provides as follows;

Except as otherwise provided, unless and until 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 he is asserting.

In the case of *Re Ashalley Botwe Lands; Adjetey Agbosu v Kotey* [2003-2004] SCGLR 420, it was held as follows;

"It is trite learning that by the statutory provisions of the Evidence Decree 1975 (NRCD 323) the burden of producing evidence in a given case is not fixed but shifts from party to party at various stages of the trial depending on the issue(s) asserted.

PETITIONER'S EVIDENCE

Petitioner testified by herself and called Priscilla Opoku as her witness.

In support of her case, petitioner repeated her pleadings before this court and added that her father gave her capital to start a business at Nii Boye Town. Out of the proceeds of the business, the sale of her personally acquired land and income from the sale of her taxi, she assisted respondent to build a five bedroom house which is the matrimonial home.

Petitioner testified that Respondent used to abuse her physically and emotionally during the subsistence of the marriage and repeated same when she went to direct service of the

court processes on him in the company of the court baillif. She tendered in evidence copies of receipts of her medical treatments. Same were admitted and marked as Exhibit A series.

She added that the Respondent had failed to pay the school fees of the last two children and she was compelled to pay same. She tendered copies of receipts and same were admitted in evidence and marked as Exhibit B series.

She prayed for an order directed at the Respondent to maintain the issues of the marriage with the sum of GHC2, 000.00 monthly and the sum of GHC50, 000.00 as financial settlement.

PW, Priscilla Opoku corroborated the story of the petitioner particularly with regards to the building of the matrimonial home. According to her, the petitioner owned a red and yellow taxi. Same was sold by the petitioner and the proceeds was used to buy building materials for the building of the matrimonial home. She testified further that the petitioner sold off her land to one police officer and one Oboahene and used the proceeds to make the matrimonial home habitable. She added that but for the timely intervention of her brother, Respondent would have slashed the petitioner with a matchet. She concluded that the Petitioner lives in a rented chamber and hall apartment whilst the Respondent lives in the matrimonial home.

THE COURT'S ANALYSIS AND OPINION

ISSUE ONE: Whether or not there are sufficient facts recognised by the personal law of the parties to justify a divorce?

Petitioner's relief one before this court is for the court to affirm the dissolution of the customary law marriage as same has broken down beyond reconciliation. It is amply clear from the facts of this case that the customary law marriage between the parties has

already been dissolved customarily even though petitioner did not state in either her pleadings or evidence before the court the date on which the said dissolution took place.

ISSUE TWO: Whether or not appropriate financial provision and adequate child custody arrangements have been made

At paragraph 7 of the petition, petitioner informed the court that a court of competent jurisdiction, that is the Accra District Court, has already determined the issues of custody and maintenance of the issues of the marriage having granted custody to the Respondent. From the evidence before this court, the Petitioner has failed or refused to comply with the orders of the court by taking custody of the children. Accordingly, I hold that appropriate financial provision and adequate child custody arrangements have already been made by the Accra District Court and as a result this court does not have the jurisdiction to disturb the orders made by the Accra District Court. The orders made by this court pursuant to the application for interim financial provision filed by the petitioner on 12th May 2022 is accordingly set aside.

ISSUE THREE: Whether or not the matrimonial home is the jointly acquired property of the parties and if so, whether or not the Petitioner is entitled to an equitable share of same.

It is provided by article 22(2) and (3) of the constitution1992 that:

22(2) Parliament shall as soon as practicable after the coming into force of this constitution, enact legislation regulating the property.

(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article –

(a) Spouses shall have equal access to property jointly acquired during marriage.

(b) Assets which are jointly acquired during the marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

It is also provided by section 20(1) of Act 367 that:

20(1)The Court may order either party to the marriage to pay to the other party a sum of money or convey to the other party movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision that the court thinks just and equitable.

In **MENSAH V MENSAH [2012] 1 SCGLR 391**, the Supreme Court set out the applicable guidelines on sharing of marital properties jointly acquired during the subsistence of the marriage as follows;

“we believe that common sense and principles of general fundamental human rights require that a person who is married to another and performs various household chores for the other partner like keeping the home, washing and keeping the laundry generally clean, cooking and taking care of the partner’s catering needs as well as those of visitors, raising up of the children in a congenial atmosphere and generally supervising the home such that the other partner has a free hand to engage in economic activities must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved. This is so because it can safely be argued that the acquisition of the properties were facilitated by the massive assistance that the other spouse derived from the other.”

In **PETER ADJEI V MARGARET ADJEI SUIT NO. J4/06/2021** dated 21 April 2021, his lordship Apau JSC delivering the majority decision of the court held as follows;

“...Any property that is acquired during the subsistence of a marriage, be it customary or under the English or Mohammedan Ordinance is presumed to have been jointly acquired by the couple and upon divorce should be shared between them on the equality is equity

principle. This presumption of joint acquisition is however rebuttable upon evidence to the contrary. What this means in effect is that it is not every property acquired single handedly by any of the spouses during the subsistence of the marriage that can be termed as a "jointly acquired" property to be distributed at all cost on this equality is equity principle. Rather it is property that has been shown from the evidence adduced during the trial to have been jointly acquired irrespective of whether or not there was direct, pecuniary or substantial contribution from both spouses in the acquisition. The operative term or phrase is "property jointly acquired" during the subsistence of the marriage. So where a spouse is able to lead evidence in rebuttal or to the contrary as was in the case of *Fynn v Fynn* supra, the presumption theory of joint acquisition collapses..."

In **Quagrain 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.

From the totality of the evidence before this court, I find that the matrimonial home was acquired jointly by the parties during the subsistence of the marriage and upon divorce same is to be shared between them on the equality is equity principle.

Accordingly same is ordered to be shared between them equally.

Consequently, the Court appoints Architectural Engineering Services Limited (AESL) as an independent valuer to conduct a valuation of the property to ascertain the market value of same for ease of sharing. It is ordered that the cost of the said valuation shall be borne by the parties equally. Each party shall exercise the option to buy out the other.

ISSUE FOUR: Whether or not the petitioner is entitled to financial settlement of GHC50,000.00

Considering the issue of financial settlement, Section 20 of Act 367 allows the court to grant financial settlement to a party upon the dissolution of a marriage. The court in doing that has to take into consideration certain factors such as the economic conditions of the parties.

In the case of **BARAKE V BARAKE [1993-1994] 1 GLR 635**, the court held as follows;

"Under section 20(1) of Act 367, the court had power to grant financial provision where married couples are divorced. The basic consideration was not based on proof of ownership or contribution towards acquisition of properties to be owned but on the needs of the parties."

The court can order a lump sum payment to be made to a spouse in addition to property settlement depending on the circumstances of the case. See Ribeiro v Ribeiro [1989-1990] GLR 109 at 115 to 116.

Applying the facts of the present case to the law cited supra, I award the sum of GHC50, 000.00 as financial settlement in favour of the Petitioner against the Respondent.

DECISION

1. The customary law marriage between the parties has been dissolved customarily between the parties.

2. The issue of custody and maintenance has already been decided by the Accra District Court and as a result this court does not have the jurisdiction to disturb the findings and orders made by the court. The interim orders made by this court with regards to financial settlement is accordingly set aside.

3. The Petitioner is entitled to 50% share of the matrimonial home which was jointly acquired by the parties during the subsistence of the marriage; The Court appoints Architectural Engineering Services Limited (AESL) as an independent valuer to value the matrimonial property to ascertain the market value of same for ease of sharing; Each of the parties shall have the option of buying out the other.
4. I award the sum of GHC50, 000.00 in favour of the Petitioner against the Respondent as financial settlement to her.
5. Costs of GHC7, 000.00 is awarded in favour of the Petitioner against the Respondent.

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