**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. G/WJ/DG/A4/77/22

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| **MERCY OSEI** | **PETITIONER** |
| **VRS** | |
| **KINGSLEY OSEI** | **RESPONDENT** |

PARTIES ARE PRESENT AND SELF REPRESENTED

**JUDGMENT**

The petitioner filed a petition for divorce in the Registry of this court on 3rd August, 2022 against the respondent for the following reliefs:

a. That the marriage celebrated in fact between the Petitioner and the Respondent on 13th October 2009 be dissolved.
b. That custody of the two issues of the marriage be granted to the petitioner with reasonable access to the Respondent.
c. That the Respondent be ordered to pay to the petitioner a lump sum amount of GHC20,000.00
d. An order that the matrimonial property acquired collectively by the couple located at Takyiman Nwabiagya be sold and the proceeds shared in equal portions between the parties.

The respondent filed an answer on 31st May 2022 and cross petitioned for the dissolution of the marriage, custody of the two issues of the marriage and a declaration that the

property situate at Atwima Nwabiagya is the bona fide property of the Respondent same having been acquired through inheritance from his father and loans taken from ABSA Bank.

The Petitioner filed a reply on 22nd September 2022 and joined issues with the Respondent.

On 6th September 2022, the court referred parties to the Court Connected ADR for an amicable settlement of the ancillary reliefs however parties were unable to settle same.

**CASE OF THE PETITIONER**

It is the case of the Petitioner that parties got married on 13th October 2009 at the Principal Registrar of Marriages Office in Accra. She tendered in evidence the marriage certificate of the parties and same was admitted and marked as Exhibit A. It is the further case of the petitioner that after the marriage, parties cohabited at Nungua cold store for two years and moved to Achimota for two years and relocated to La.

Petitioner testified that the Respondent was transferred to Kumasi in 2009 compelling the family to move with him. According to Petitioner, she was unable to work because the first issue of the marriage was young and therefore the Respondent advised her to stay at home and take care of him. She informed the court that when parties moved to Kumasi, Respondent's father died and after his estate was shared, she advised Respondent to build a property on a family land in Accra for rental purposes and also buy a land at Techiman Nwabiagya which he did and built a four bedroom house on it. The family therefore moved into the said house. According to Petitioner, when she got pregnant with their second child, respondent developed a mental disorder and as a result his family members took him to Accra without her knowledge or consent. She followed up to Accra and only met him in hospital during the delivery of the second issue of the marriage.

Petitioner added that parties moved back to Kumasi and upon discussions with the Respondent, she sold her land situate at Tse Addo in Accra and rented a chamber and hall at LEKMA and relocated the family to same. Following the expiration of their rent, parties moved to Tebibiano also in Accra. According to Petitioner, Respondent started keeping late nights with the excuse that he was helping to revamp his mother's business. He eventually stopped coming home. Petitioner stated that she reported Respondent to his mother who did not show any interest. She went further to report Respondent to the head of family of the respondent who failed to take any action. She added that Respondent sent her a message indicating that he will pay her GHC50,000.00 in exchange for a divorce. He also promised to sell the house at Atwima Nwabiagye and pay for the land she sold in Accra.

She prayed the court to grant her reliefs. She did not call any witness.

**RESPONDENT'S CASE IN ANSWER**

It is the case of the Respondent that parties got married customarily in 2006 at a time when the petitioner was four months pregnant. After the marriage, parties cohabited at Beach Combe in Nungua.

It is the further case of the respondent that Petitioner's mother informed him about a land at Tse addo that she was planning to give to the parties as a gift. She asked him to get some money for the registration of the land. According to him, he had already taken a loan from ABSA Bank to take care of the financial needs of the parties. He tendered the loan request form and same was admitted and marked as Exhibit 1.

He added that he subsequently paid for the registration of the land with the assistance of his father and got the deed registered in his name. He tendered the site plan of the Tse addo land and same was admitted and marked as Exhibit 2.

He testified further that he was transferred to Kumasi in 2009 as the head of ICT for the Northern Sector of the Judicial Service. On 25th May, 2009, his father passed away and as his inheritance, he was given the sum of GHC37,666.67 from his father's estate. He tendered evidence of the amount he was paid and same was admitted and marked as Exhibit 3.

According to him, he used part of the money bequeathed to him by the will of his father to buy the land at Atwima Nwabiagya through one Mr.Boadu who used to be an internal auditor in Kumasi. Respondent tendered the document to the land in evidence and same was marked as Exhibit 4.

Respondent added that as at 2010, he was a high court registrar and there was no way he could have built a house with his salary then. He tendered in evidence his pay slip and same was admitted and marked as Exhibit 5.

According to him, parties moved into the property at Atwima Nwabiagya in December 2010.

Respondent informed the court that petitioner threatened him with a knife and took the documents to the land at Tse addo from him. She subsequently sold the land for GHC110,000.00 and paid the agent GHC10,000.00

He stated that the sum of GHC93,600.00 was paid into petitioner's UBA account following which she bought a container and an Uber with the proceeds from the sale of the land.

Respondent added that he became ill in Kumasi and was eventually transferred from Kumasi to Accra where parties rented an apartment at Tse bibiano.

According to the Respondent, the petitioner asked him not to communicate with his family members and warned him not to visit his sister and mother. She threatened him

that should he go against her wishes, she would throw out his belongings from the matrimonial home.

Respondent testified further that respondent started locking him out of the house whenever he visited his mother and subsequently lodged a complaint against him at the Police Station. According to him, one Police Officer by name Mary Ndabilla called and warned him not to step into the matrimonial home. He accordingly went to the house to pick up his belongings however petitioner threw out his belongings in the full glare of their neighbours. He subsequently moved in with his sister and has remained with her since then.

**ISSUES**

The court set down the following issues for determination;

1. Whether or not the marriage between the parties has broken down beyond reconciliation
2. Whether custody of the two children should be granted to the petitioner with reasonable access to the Respondent
3. Whether or not the property situate at Atwima Nwabiagya was jointly acquired by the parties
4. Whether or not respondent should be ordered to pay financial settlement of GHC20,000.00 to the Petitioner

**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.

**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.

His Lordship Dennis Adjei J.A stated this position of the law in **CHARLES AKPENE AMEKO V SAPHIRA KYEREMA AGBENU (2015) 99 GMJ 202,** thus;

"The combined effect of sections 1 and 2 of the Matrimonial Causes Act, 1971 (Act 367) is that for a court to dissolve a marriage, the court shall satisfy itself that it has been proven on the preponderance of probabilities that the marriage has broken down beyond reconciliation. That could be achieved after one or more of the grounds in Section 2 of the Act has been proved."

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

To succeed under the fact of unreasonable behaviour, 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.

From the evidence, apart from the bare assertions of the petitioner, no shred of evidence was led by the petitioner to prove unreasonable conduct on the part of the respondent.

She also accused him of desertion. From the evidence, Respondent admits that he moved out of the matrimonial home save that he did so due to the violence and emotional torture and verbal abuse of the petitioner. According to him, he was compelled to leave the matrimonial home because Petitioner had threatened him with a knife and he could not bear her conduct any longer. From the evidence, Petitioner admitted that she threatened Respondent with a knife but the purpose was to retrieve documents from the Tse Addo land from him.

I find from the totality of the evidence before this court, that the parties' marriage has broken down irretrievably by the fact that parties have not lived together as man and wife for well over two years. I therefore proceed under Section 47 (1) (f) of the Courts Act 1993, (Act 459) to decree that the Ordinance Marriage between Mercy Osei and Kingsley Osei celebrated at the Principal Registrar of Marriages' Office on 13th October, 2009 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 custody of the two issues of the marriage should be granted to the petitioner with reasonable access to the respondent

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*.

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.

In **OPOKU-OWUSU V OPOKU-OWUSU [1973] 2 GLR 349-354, 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."*

From the evidence, the two issues of the marriage have been living with the Petitioner since the separation of the parties accordingly for continuity in their care and control, custody is awarded to the petitioner with reasonable access to the respondent.

With respect to maintenance of the children, section 47 of Act 560 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.

I have considered the affidavit of means of the parties and I have also considered the cost of living in Accra where the children are currently resident and hold and hereby orders the respondent to pay the sum of GHC400.00 per month to the petitioner for maintenance of the two children. Petitioner is to supplement this maintenance with the sum of GHC400.00 as it is the duty of both parents to maintain issues of the marriage.

The Respondent shall be responsible for the choice of school for the children and shall pay their school fees and medical bills as and when the payments fall due.

The Respondent is ordered to provide shelter for the two issues of the marriage by paying their rent until the children attain the ages of majority or the petitioner re marries whichever event occurs first.

The Petitioner shall be responsible for the provision of casual and ceremonial clothing at home for the children.

Under no circumstances shall the custody and maintenance orders herein made be varied without recourse to a court of competent jurisdiction. The orders made may be reviewed periodically on application by either party.

**Issue three:** Whether or not the property situate at Atwima Nwabiagya was jointly acquired by the parties during the subsistence of the marriage.

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…"

From the evidence adduced at the trial, the Respondent has shown that the property situate at Atwima Nwabiagya was built with proceeds from the estate of his late father. This assertion was admitted by the petitioner when she informed the court that she was the one who advised the respondent to build the said property with proceeds from the estate of his father. Accordingly, I find and hold that the property situate at Atwima Nwabiagya is not property jointly acquired by the parties during the subsistence of their marriage and as a result the claim of the petitioner fails and same is dismissed.

**Issue four**: whether or not the petitioner is entitled to an order for financial settlement in the sum of GHC20, 000.00 from the Respondent

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.

It was held by Lord Denning M.R in **WATCHEL V WATCHEL (1973) 1 ALLER 829 at 840** that in every case the court had to consider whether to order a husband to pay a lump sum to his wife and that the circumstances are so various that few general principles can be stated. One thing is however obvious. No order shall be made as lump sum unless the husband has capital assets out of which to pay it without crippling his earning power.

From the totality of the evidence before the court, I find that the respondent has financial asset in the nature of the property situate at Atwima Nwabiagya which may be rented out to pay financial settlement to the petitioner without crippling his earning power.

Accordingly, the respondent is ordered to pay financial settlement of GHC10,000.00 to the petitioner.

**DECISION**

I find that the marriage between the parties has broken down beyond reconciliation as a result the marriage is dissolved. A certificate of divorce is to be issued accordingly.

Custody of the two issues of the marriage is awarded to the Petitioner with reasonable access to the Respondent.

Respondent is ordered to maintain the two issues with the sum of GHC400.00 a month. Petitioner is ordered to top up with the sum of GHC400.00 as both parents are responsible for maintaining the children.

Respondent shall be responsible for the choice of school for the children and shall pay their school fees and medical bills as and when the payments fall due.

Respondent is ordered to provide accommodation for the issues of the marriage until they attain the ages of majority or the petitioner remarries which ever event occurs first.

Respondent is ordered to pay financial settlement of GHC10, 000.00 to the petitioner

I find from the totality of the evidence adduced that the property situate at Atwima Nwabiagya is not a jointly acquired property same having been acquired by the respondent from the proceeds from the estate of his father. Accordingly the claim of the petitioner fails and same is hereby dismissed.

For the sake of amity between the parties, I make no order as to

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

**(DISTRICT MAGISTRATE)**