IN THE HIGH COURT OF JUSTICE HELD AT KUMASI IN THE ASHANTI REGION THIS FRIDAY THE 20TH DAY OF OCTOBER 2023.
BY HIS LORDSHIP JUSTICE FREDERICK TETTEH

SUIT NO.C5/02/23

MAAME AMA BONSU

VRS

GEORGE ADUSEI KESSIE

JUDGMENT:

The parties got married under the Marriage Ordinance CAP 127 on the 1st January, 2016 at the Peyer Memorial Congregation, of the Presbyterian Church. The Petitioner who is ordinarily resident in the United States of America, cohabited with the Respondent at House No. Plot 40, Block EE, Nkransa, Kumasi anytime she is in Ghana. The parties have one issue known as Kofi Dwomoh Kessie, aged 6 years and a citizen of the United States of America. On the 21st October, 2022, the petitioner filed the instant petition in this court, claiming the following reliefs:

a. That the marriage celebrated between the petitioner and the Respondent be dissolved.

b. That the petitioner be granted custody of the child Kofi Dwomoh Kessie

c. That the Respondent be ordered to make to the petitioner such maintenance pending suit and thereafter such periodical payments as may be just towards the upkeep of the child.

The Petitioner averred in her petition that the marriage celebrated between the parties has broken down beyond reconciliation. Petitioner added that, several attempts at reconciliation made by family members and well-wishers have proved unsuccessful by reason of the uncompromising attitude of the Respondent and that the Respondent is never prepared to change his ways for the better. The Petitioner further averred that, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent, and that the Respondent has caused the Petitioner much anxiety and distress. The Petitioner gave the following particulars of unreasonable behaviour;

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a. The Respondent has neglected, failed and refused to take full responsibility for taking care of the Petitioner during the marriage but only send $200.00 for the child's upkeep which cannot even pay for the child's school fees in the USA, where both petitioner and the child resides. Anytime the Petitioner reminds the Respondent of his responsibilities towards the child and the petitioner, the Respondent will tell the Petitioner that he has other things to take care of.

b. The Respondent is highly disrespectful and arrogant towards the Petitioner. He does not respect the Petitioner's views and opinions on any matter relating to the welfare of their family.

c. The Respondent is in the habit of insulting and humiliating the Petitioner at the least provocation. The respondent physically abused the Petitioner by beating her when the Respondent knew she was pregnant with their son and has made several attempts at further abusing her but failed.

The Petitioner averred that, they have not lived together as a husband and wife for over 5 years. The Petitioner further gave the following as particulars of failure to live together as husband and wife;

a. The parties have not lived under the same roof for more than five years, and they have not enjoyed the necessary consummation of the marriage during this period.

b. The Respondent has consented to the fact that the marriage has broken down beyond reconciliation

The Respondent on the other hand averred that, several attempts at reconciliation of the parties by family members and well-wishers have failed because of the unacceptable, unconscionable conduct and character of the Petitioner. The Respondent added that, the Petitioner has exhibited such an unconscionable and abhorrent conduct that it has become difficult for the Respondent to continue to live with her as a wife. The Respondent averred that, he has been remitting a monthly upkeep/maintenance of $200.00 to the Petitioner in the United States of America. The Respondent averred further that, owing to the present economic situation in Ghana, he is unable to remit $200.00 to the Petitioner for the upkeep of the child of the marriage and that, he is willing to remit $50.00.

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According to the Respondent, the Petitioner started behaving in such an unreasonable manner that it made it unbearable for him to live with the Petitioner as a husband and wife, as she has caused the Respondent so much pain, anxiety, distress, embarrassment and mental agony. The Respondent gave the following as particulars of Petitioner's unreasonable behaviour;

a. The Petitioner verbally and emotionally abused the Respondent on several occasions without provocation.

b. The Petitioner consistently failed and or refused to take good care of the child of the marriage during their stay in Ghana.

c. The Petitioner consistently refused to live in the matrimonial home, but preferred to live with her mother whenever she is in Ghana.

d. The Petitioner having the penchant to always generate quarrels with the Respondent in order to humiliate and abuse him.

It is trite law that the Evidence Act places the burden on a party who is asserting a claim to prove it by a preponderance of the probabilities. The burden of persuasion in a civil case is provided in the Evidence Act as the establishment of the existence or non-existence of a fact by a preponderance of the probabilities. Section 10 of the Evidence Act, which deals with the burden of persuasion on parties to actions states specifically as follows:

> (1). For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.
>
> (2). The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact, or; to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

With respect to the burden of providing evidence, section 11(1) of the Evidence Act provides as follows:

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> **"For the purposes 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".**

Section 12 of the Evidence Act restates the general rule that the degree of proof usually required to satisfy the burden of persuasion in civil actions is proof by the preponderance of the probabilities.

Sophia Adinyira JSC (as she then was) in **Don Ackah v Pergah Transport** [2010] SCGLR 728 held that the party with the burden to produce evidence, must produce evidence with the **'quality of credibility, short of which his claim may fail.'** She further held thus;

> **"It is a basic principle of the law of 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. It is trite law 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 probable than its non-existence".**

Finally, under section 14 of the Evidence Act, the burden of persuasion is normally on the party to whose case the fact is essential. The section provides specifically that;

> **"Except as otherwise provided by law, 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".**

From the above, when the Petitioner discharged her burden with the documentary and other evidence she proffered, the evidentiary burden shifted to Respondent, to establish his answer if any by the same evidentiary standards set by sections 10, 11, 12 and 14 of the Evidence Act. Furthermore, it is also necessary if any allegation or averment pleaded is to be proved by documents or some other evidence, the court should ensure that the proper evidence is accepted as proof of that averment.

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As stated in **Zabrama vrs Segbedzi supra**, a person who makes an averment or assertion, which is denied by the opponent, has the burden to establish that the averment or assertion is true. And this burden is not discharged unless that person leads admissible and credible evidence from which the facts asserted can properly and safely be inferred.

In the Petitioner's evidence in chief, she largely restated her pleadings in her petition for divorce and added that all efforts to reconcile their differences has failed. The Respondent in his evidence in chief also restated largely his pleadings in his answer to the petition and added that, all efforts to reconcile them has failed.

Both parties have given evidence to the effect that the marriage has broken down beyond reconciliation. They have also adduced evidence to the effect that both have behaved in such a way that they cannot be reasonably be expected to live together. In my view, the evidence of both parties regarding their conduct during the pendency of the marriage has satisfied section 2(1) (b) (c) (d) and (f) of the Matrimonial Causes Act, 1971, (Act 367). The sections read as follows:

2(1) 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:

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; or

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or

(d) that the parties to the marriage have not lived as man 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 such consent shall not be unreasonably withheld, and where the Court is satisfied that it has been so withheld, the Court may grant a petition for divorce under this paragraph notwithstanding the refusal; or

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(f) that the parties to the marriage have, after diligent effort, been unable to reconcile their differences.

Having regard to the evidence on record, I am of the considered view that, apart from not living together as husband and wife for over 2 years, and the fact that, the parties cannot reasonably be expected to live together as a husband and wife coupled with the failure on the part of the parties to have their differences resolved, I am of the further view that, the Petitioner did desert the Respondent. Accordingly, there is no doubt that, the marriage has irretrievably broken down beyond reconciliation. There is no hope of reconciliation in my view bearing in mind the evidence on record. In the circumstances, in line with Section 2(1) (b) (c) (d) and (f) of the Matrimonial Causes Act, 1971, (Act 367), I hereby order that the ordinance marriage celebrated on the 1st January, 2016 between the parties herein, is dissolved and its accompanying certificate accordingly cancelled.

On the issue of custody and financial provision for children, Section 22 of the Matrimonial Causes Act, 1971, Act 367 provides thus;

22(1) In proceedings under this Act, the Court shall inquire whether there are any children of the household.

(2) The Court may, either on its own initiative or on application by a party to proceedings under this Act, make an order concerning a child of the household which it thinks reasonable and for the benefit of the child.

(3) Without prejudice to the generality of subsection (2), an order under that subsection may;

(a) award custody of the child to any person;

(b) regulate the right of access of any person to the child;

(c) provide for the education and maintenance of the child out of the property or income of either or both of the parties to the marriage.

The above stated section gives a wide discretion to the court but does direct attention to the relevant factors which may be taken into consideration in determining any of the four heads of relief. It is worth adding that, in an application

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for custody of the children of the marriage, the court's duty is to make an order which was reasonable for the benefit of the children. In deciding what is in the best interest of the child, the conduct of the parents, and the pattern of life set up for the child since cohabitation ceased between the wife and the husband, are important to be taken into consideration. In the instant case, there is no doubt that, the child of the marriage is 6 years old and a citizen of the United States of America. Further, the child is currently living with the Petitioner in the United States of America.

By virtue of exhibit 2 series, it is obvious that, the Respondent has been remitting monies for the upkeep of the child of the marriage. Again, by virtue of exhibit 3 series, the Respondent's earnings have been stated. Having perused exhibits 2 series and 3 series, coupled with the fact that, the Respondent used to pay $200.00, I do not think that the status quo should be disturbed. It is the law that, the best interest of the child must be considered in taking decisions affecting custody. It is important to add that, the child will need the presence of both parents throughout his developmental stages. A court of law cannot deny a parent access to his child without any justifiable cause. See Sections 2(1) and (2) of the Children's Act, 1998, Act 560, Section 18(2) of the Courts Act, 1993, Act 459 as amended, and Section 72 of the Matrimonial Causes Act, 1971, Act 367. Welbourne J.A. in the case of **Kvei Baffour vrs. Carlis Anaman (2018) 124 GMJ page 95,** held thus;

> **"In an attempt to decipher the best interest or welfare of a child, which is very key in the determination of this case before this court, the following must be considered with regard to the facts of this case; the age of the child, the need for continuity in the care and control of the child and any other matter of relevance".**

Having been fortified by the above stated statutory provisions, case law coupled with the evidence on record and the current status of the parties herein, I am minded to grant custody of the only child of the marriage to the Petitioner. The Respondent would obviously have reasonable access. Bearing in mind the citizenship status of the child, both parties must endeavour to have a reasonable modality in place to enable the Respondent have access to the child periodically. Again, I am of the further view that, paying $200.00 for the upkeep of the child of the marriage in the United States of America with the obvious assistance of by the Petitioner in the present economic climate is reasonable. I hereby order the Respondent to pay to the Petitioner $200.00 every month for the upkeep of the child of the marriage, without fail, until the said amount is reviewed by a court of competent jurisdiction.

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Regarding the issue of costs, I am not minded to award costs. The parties should bear their respective costs of litigation.

SGD
H/L JUSTICE FREDERICK TETTEH
JUSTICE OF THE HIGH COURT

AUGUSTINE ASANTE ADDAE ESQ FOR PETITIONER HOLDING THE BRIEF OF F.N BROBBEY ESQ.
ABDUL MANNAN OSMAN ESQ., BEING LED BY SAEED KOFI SAM.

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