IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, DIVORCE & MATRIMONIAL COURT "2" ACCRA HELD ON 11TH OCTOBER, 2023 BEFORE HER LADYSHIP, JUSTICE MAVIS ANDOH (MRS).

==========

SUIT NO: DM/0135/2017

CORAM: MAVIS ANDOH (MRS.)

==========

BETWEEN

FREDERICK KWAPONG OFEI	**===**	**PETITIONER**
V		
MRS.FREDA KWAPONG	**===**	**RESPONDENT**

==========

JUDGMENT

==========

INTRODUCTION

Permit me to prefix my judgment with the saying that; ***"marriage is like a besieged city, those in want out and those out want in".*** This case is one of a love story turned sour. This suit is a protracted one that has spanned the years from 2017-2023 and after 6 long years, the matter will be brought to finality in today's judgment.

The Petitioner, in an amended petition filed on the 8th of November 2019 prayed the Court, for the dissolution of the marriage celebrated between the parties and sought the following reliefs;

a. The dissolution of the marriage contracted on the 3rd day of January 2009.
b. Any other Orders that this honorable Court may deem fit.

BRIEF FACTS

The Parties were married under the Ordinance Marriage (CAP 127) on 3rd January, 2009 at the Christ Presby Church, Akropong in the Eastern Region of the Republic of Ghana. After the celebration of the marriage, the parties cohabited in Akropong and subsequently moved to Accra. Both Parties are Ghanaians. Whereas, the Petitioner is an Auditor, the Respondent is a Teacher by profession. There are Two (2) issues of the marriage namely, Kofi Ofei Kwapong and Akua Baafiwa who were aged 7 and 5 years respectively at the time the Petition was filed.

The Petitioner filed for the dissolution of the marriage on the ground that the marriage between the parties had broken down beyond reconciliation. The crux of the Petitioner's case can be found in paragraphs 9, 11, 12, 13, 14, 15, 16 and 18 of his pleadings contained in the petition.

The Respondent was duly served with the amended Petition and she filed an amended Answer and Cross Petition on the 5th of February 2020. The Respondent in her amended Answer denied some material particulars contained in the amended Petition and crossed-petitioned praying for the following reliefs;

1. An Order dissolving the marriage celebrated between the parties on 3rd January 2009.
2. An order granting custody of the children to the marriage, Kofi Ofei Kwapong aged nine (9) and Akua Baafiwa aged (7) years to the Respondent with reasonable access to the Petitioner.
3. An order of monthly maintenance of GH¢2, 000.00 to be paid to the Respondent for the children's upkeep.
4. An order directed at the Petitioner to pay the children's school fees till they complete their university education and any default payment since 2019.

5. An order directed at the Petitioner to take care of the health and medical needs of the children until they reach the age of majority.
6. An order directed at the Petitioner to provide the Respondent and the children with accommodation comprising of two bedrooms self-contained and fully furnished, suitable for a family of three (3).
7. That Petitioner be ordered to pay to the Respondent lump sum payment of GH¢150, 000.00 to the Respondent. ***Sic.***
8. An order that one Storey house comprising of 5 bedrooms, a sitting room and a Kitchen located at Nana Korom, near East Legon Accra, which has been built by the contribution of the couple during the subsistence of the marriage be settled on the Respondent.
9. An order that, half one Storey house comprising of 5 bedrooms, a sitting room and a kitchen located at Akuapem in the Eastern Region which has been built during the subsistence of the marriage be settled on the Respondent.
10. Cost including Lawyer's fees assessed at Thirty Thousand Ghana Cedis (GH¢30, 000.00).

The Petitioner filed a Reply and Answer to the Respondent's amended Answer and Cross petition on 26th June 2020 and denied material particulars of the Answer and cross petition.

The suit was subsequently set down for trial and Case management conference was duly held in respect of this matter. It is important to mention that, there was a long line of intervening matters that stalled the progression of this suit which resulted in a long hiatus, proceedings continued after the Petitioner had filed notice of intention to proceed with the matter on 11th November 2022, the suit was eventually slated for trial.

I would like to place on record that, before trial would commence in respect of this matter, the Petitioner, who was not represented by Counsel was directed by the Court to serve all processes in respect of this suit on the Respondent so as to apprise her of proceedings every step of the way in order not to breach the ***audi alteram partem*** rule. This was because the Respondent and her Counsel had stopped attending Court.

Per the affidavits of service filed on record, indicating that the Respondent was served with every process and hearing notices, the Respondent failed and or simply refused to file any other processes aside from the amended Answer and her witness statement to contest this suit, despite having been served with all processes apprising her of every stage of the suit.

Since the Court could not wait infinitum for the Respondent to appear in Court to participate in the trial, a date was finally set for commencement of the trial. The Court, after satisfying itself that the Respondent had been duly notified through her Lawyer of the date for trial to commence, but refused, failed and or neglected to participate in the trial, proceeded to take the evidence of the Petitioner in view of the fact that the Respondent had been formally notified of the date for commencement of trial but chose not to participate.

On that, see Order 36 r (1) (2)(a) of the High Court Civil Procedure Rules, C.I 47 and the case of ***Ankomah V City Investments Ltd [2007-2008] SCGLR 1064, where the Apex Court held that;***

"… if a 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".

Legal position of the law regarding the dissolution of marriages in Ghana?

By **Section 1 (2) of the Matrimonial Causes Act of 1971 (Act 367)**, the sole ground upon which an order for the dissolution of a marriage can be made is that, the marriage has broken down beyond reconciliation. Section 2 (1) of the said Act however, requires that,

> *(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:*

By proving one or more of the facts set out in the said section, as follows:

(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 so 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; or

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

The court set down the following issues to be considered.

1. Whether the marriage has indeed broken down beyond reconciliation.
2. Whether or not the Petitioner is entitled to his reliefs.
3. Whether the Respondent is entitled to her cross petition.

The issues will be analysed together.

TRIAL

At the trial, the Petitioner testified on oath and relied on his witness statement and supplementary witness statement filed on the 28th of September 2017 and 7th May 2018 respectively, as well as on all his exhibits numbered, A-Z to give his evidence.

It is trite knowledge that, he who asserts must prove. In the case of ***Ababio V Akwasi [1994-1995] 2 GBR 774***, the Court held that; "The general position of the law is that, ***"it is the duty of the 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***". This has been given effect to by relevant Sections of the Evidence Act, 1975 (NRCD 323).

Section 10 (1) of NRCD 323 provides;
"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 Court".

Section 11(1) also provides that, 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.

See the case of **BANK OF WEST AFRICA LTD V AKUN [1963] 1GLR 176.**

It is also trite learning that, evidence is what the Court uses in resolving issues of facts arising from a case and a pleading or averment in proof of which no evidence is offered virtually serves no useful purpose in a case.

Section 2 (b) and (c) of the Matrimonial Causes Act 367, provides some of the grounds for divorce which are that; the "Respondent has behaved in an unreasonable manner that the Petitioner cannot be expected to live with the Respondent and also that the Respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.

As part of the particulars alleging that the marriage has broken down beyond reconciliation and should be dissolved, the Petitioner testified that, the Respondent had refused to live with the Petitioner as a wife from February 2013 – December 2013 and all efforts made by their family, WAJU now (DOVVSSU) and the Clergy as well as Counsel for both parties to resolve the issues have all proved futile. The parties have not lived together since the period mentioned above.

Giving evidence via his witness statement, the Petitioner testified further that the parties have not lived together as husband and wife since the petitioner made a complaint to the Respondent's parents and nothing was done about it, so since then the parties have not lived as man and wife and also due to the Respondent's behavior towards the Petitioner which such behavior include acts of violence.

In his further evidence, the Petitioner again testified amongst others that communication had broken down between the parties as such, there was complete lack of communication between the parties and the Respondent and her family in October 2016 brought drinks to the Petitioner's family for the dissolution of the customary marriage.

The Petitioner on the facts above stated prayed for the dissolution of the marriage celebrated between the parties.

The general position of the law is that, a Court ought to inquire so far as is reasonable, into the facts alleged by the Petitioner and Respondent, to satisfy itself on the evidence adduced that, the marriage between the parties has broken down beyond reconciliation. This requirement is provided for by Sections 2(2) and 2 (3) of Act 367, as follows;

"(2) On a Petition for divorce the Court shall inquire, so far as is reasonable, into the facts alleged by the Petitioner and the Respondent.

(3) 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.

The Respondent who is in the same position as the Petitioner, in relation to her Cross-Petition, similarly has to prove the facts stated in Section 2 (1), of Act 367 supra.

It is in line with the requirement of the law that, trial was conducted by the Court to ascertain whether or not the marriage has indeed broken down as alleged by the Petitioner and also by the Respondent so should be dissolved.

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

Section 2(1) of the said Act, also stipulates 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 grounds set out in Section 2(1) (a-f) above stated, which said Section

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

Section 2 (3) of Act 367 supra, stipulates 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".***

On the issue of unreasonable behavior, the Supreme Court has stated in holding 3 in the case of ***Mensah v Mensah [1972] 2 GLR @ page 198***, that; ***"in determining whether a husband has behaved in such a way as to make it unreasonable to expect a wife to live with him, the Court must consider all circumstances constituting such behavior including the history of the marriage. It is always a question of fact. The conduct complained of must be grave and weighty and mere trivialities will not suffice, for Act 367 is not a Casanova's charter, the test is objective***".

In this case it is rather the Respondent's behavior that the Court considered in arriving at the decision to make a determination whether the Petitioner who wants out of the marriage can continue in the marriage.

As stated earlier, the Respondent only filed an amended Answer and cross petition to the Petition, as well as her witness statement and no other processes despite being served with some processes and hearing notices. She did not also appear throughout the trial either in person to give evidence and/or to cross examine the Petitioner on material facts given in evidence at the trial, neither did she call any witnesses. The evidence of the Petitioner therefore stands unchallenged, so the Respondent is deemed to have admitted same.

On this see the case of ***Mantey @ another v Botwe [1989-90] 1 GLR 479.***

The parties per the unchallenged evidence, have not lived together as man and wife since 2013 and the Respondent and her family per the evidence given by the Petitioner have gone ahead to present drinks to the family of the Petitioner to signify that the marriage is over. Per the type of marriage contracted by the parties, this act of the Respondent and her family is not the norm as the marriage, being an Ordinance one has to be dissolved by the Court.

Per the unchallenged evidence placed before this Court, the parties have both led separate lives for the past 9 years and there is a complete breakdown of communication between them.

I find from the evidence adduced, from the pleadings and the witness statement filed by the Petitioner that, the parties by their act of staying apart for all these years have demonstrated to the Court that, they do not intend to remain married, as the Respondent has deserted the marriage as such it would not reasonably be expected that the Petitioner remains married to the Respondent.

I am satisfied that, the Respondent has indeed deserted the marriage, and I so find, thus satisfying Section 2(b) and (c) of Act 367.

All matters considered, based on the totality of the evidence adduced at the trial, and from the pleadings, I am satisfied that the marriage between the parties has indeed broken down beyond reconciliation. Accordingly, I decree that the marriage celebrated between the parties at the Christ Presby Church, Akropong in the Eastern Region on the 3rd of January 2009 with ***Certificate Number ACPC/M/01/09 per licence number*** PCG/M/11/08 ***BE AND IS HEREBY DISSOLVED forthwith*** and the said marriage Certificate is cancelled.

A copy of the divorce Certificate should be served on the Registrar of marriages by the parties for the amendment of the records thereof.

Having dissolved the marriage, I shall now proceed to consider the Petitioner's relief which is that, the Court makes any other orders that this honourable Court may deem fit. This is an omnibus relief that the Petitioner is seeking. The Court notes that the Petitioner in his written address is asking for custody of the two children of the marriage even though he did not make such a prayer in his reliefs.

It has been held by the Supreme Court in a plethora of cases such as ***Hannah Assi (No.2) Vrs Gihoc (NO.2) 2007-2008] 1 SCGLR 16, Muller v Home finance co ltd [2012] 2 SCGLR 1234 and Kwa Kakraba V Kwesi Bio [2012] 2 SCGLR 834*** that in doing substantial justice, the Court can make a declaration in favour of a party although the party did not specifically seek that claim in his or her reliefs, thus overruling the principle in the case of ***Nyamaa V Amponsah [2009] SCGLR 361*** which had held that, a judge who makes an order for a relief that was not sought for by a party to the action can be held to have exercised a jurisdictional irregularity.

It is apposite to mention at this juncture that, the Respondent as part of her reliefs in her Cross petition asked that she be granted custody of the children of the marriage, but as was said earlier, the Respondent failed to participate in the trial. Since the Respondent did not take part in the trial and did not give any evidence, she did not prove her claim to merit the grant of her reliefs as stated in her cross petition. It is therefore to be understood that, she has waived her rights in respect of her reliefs stated in her cross petition, which have all been rendered moot. The Respondent is therefore not entitled to her Reliefs stated in her Cross Petition.

The issue the Court is confronted with now, is the issue of custody of the two children of the marriage who should be aged 14 and 12 years old respectively now and have been living with the Respondent their mother since the parties have been living apart for some time now.

The general position of the law is that, children of tender ages ought to be looked after by their mothers, unless there are circumstances pointing to the contrary. The children involved in this matter wherein the Petitioner seeks custody are a boy and a girl aged 14 and 12 years. These children are in their teen and nascent stages of life and whatever decisions are taken in respect of them should have their best interests in mind.

The Respondent who is their mother has been living with them all these while even though per a ruling of this Court differently constituted, the Petitioner was given reasonable access to the children and this was an interim arrangement pending the final determination of the substantive matter. In the view of this Court, now that the marriage has been dissolved, it behoves on this Court to make a more permanent determination in respect of the custody of the children.

I am not closing my eyes to the fact that, for the past 9 years or so the children have been living with their mother though the Petitioner has been granted access to them.

The Petitioner has attached exhibit "I" series, which are pictures of him and the children as evidence of the kind of bonding that exists between him and the two children to show that, he is better placed to be given custody of the children since the Respondent had behaved in ways to show that she was incapable of looking after the children.

An instance the Petitioner cited against the Respondent was one occasion of the Respondent's failure to take the children to school for a whole term making them stay at home and missing out on school.

Per the record before this Court, the children are with their mother and have been with her since she was granted custody by the Court in 2018.

On the issue of custody of the children which the Petitioner is asking this Court to grant in his favor, Section 22 of Act 367 supra provides that, in proceedings under this Act, the Court shall inquire whether there are any children of the household and the Court either on its own initiative or on application by a party make an order concerning a child of the household which it thinks reasonable and for the benefit of the child. And the order may include the award of custody of the child to any person.

Such orders, apart from awarding custody of the child to anyone and regulating the right of access of any person to the child, can also provide for the educational needs and maintenance of the child out of the property or income of either party or both of the parties to the marriage.

In awarding custody, the Court should do so in the best interest and welfare of the children who are minors. See the cases of ***Attu V Attu [1984-86] GLRD @144, and Opoku –Owusu V Opoku Owusu [1973] 2 GLR @349***. In the case of ***Opoku –Owusu V Opoku Owusu, It was held that, 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. In the course the mother should have the care and control of very young children especially the girls or those who for some special reason need a mother's care and older boys to have the influence of a father…but there is no principle in custody cases that a boy of eight should other things being equal be with his father in all cases. The paramount interest is the welfare of the infant and the court must look at the whole background of the infant's life and at all the circumstances. The court awarded custody of all the children to the petitioner on the following grounds that is desirable to keep***

siblings together and not to separate them, a separation will disturb their progress and may affect them emotionally. Amongst others".

Drawing from Opoku Owusu and Opoku Owusu supra, I align my thoughts with the views expressed and say that, it is best to keep siblings together for continuity in their care and education, this Court will accordingly order that the children should remain with the parent whom has custody of them.

In my respectful view and in the best interest and welfare of the children who per the records before this Court are in the custody of the mother, I hereby pronounce that custody be granted the Respondent, with reasonable access to the Petitioner.

In order to ensure continuity in their care and stability and education, it would be in the best interest of the children to grant custody to the Respondent, their mother whom they have lived with all these while as she is their primary caregiver.

I therefore have no hesitation in granting custody of the two children of the marriage to the Respondent with the Petitioner granted reasonable access to them.

In that regard, the Petitioner is granted access to the two children every other weekend. By this, the Respondent is to spend time with the children every other weekend and return them to the Respondent on Sundays before 6.00pm or early Monday morning by dropping them off at school.

In addition to this, the Petitioner shall have access to the children through virtual means, such as telephone and or video calls every day between the times that the children are home from school and at weekends when they are not with the Petitioner in the evenings, for not less than 20 minutes every day from 5pm – 8 pm.

Following from this, the Petitioner is ordered to be directly involved in the care, maintenance, schooling and the provision of the necessaries of life to the children. In this regard, the Petitioner is to contribute an amount of GH¢1, 500.00 monthly towards the upkeep of the children. This should be paid into the bank account of the Respondent at the end of each month or the arrangement that will work best for the parties. If it will be paid into the bank account of the Respondent, the Respondent is to provide her bank account details to the Petitioner for this purpose.

Due consideration has been given to Section 22 (3)(c)of Act 367 supra, which permits the Court to make orders concerning the education of the children of the household as the Court thinks reasonable in the best interest of the children either suo motu or on an application made by a party.

Sections (6) and (47) of the Children's Act, 1998 (Act 560) provide amongst others that, no parent shall deprive a child of his welfare, and it is the duty of a parent to provide care, maintenance and necessaries of life for a child.

In reliance on the provisions of the law, on parents responsibilities towards the education of their children above mentioned, in the respectful view of the Court, both parties ought to be responsible for the education of the children till they reach the tertiary level. I accordingly, order that, going forward, the Petitioner shall pay the school fees of the two children up to the tertiary level. To this end it is ordered that the Petitioner is made aware of the schools the children will be attending henceforth and should have a say in the choosing of schools for the two children.

On the issue of maintenance of the children as indicated earlier, both parents are to be responsible for maintaining them and to provide the necessaries of life for them. In the case of ***Donkor V Ankrah [2003-2004] 2 GLR 125*** it was held that, ***"under Section 47 (1) and (2) of the Children's Act supra, where both parents of a child were earning an income,***

it had to be the joint responsibility to maintain the child, the tendency for women to look up to only men for the upkeep of children was gone…"

The Petitioner mentioned in his address that the Respondent had laid claim to some properties for which he has called on the Court not to grant. It is apposite to mention here that no evidence was led in Court to establish the fact that those properties were jointly acquired by the parties during the subsistence of the marriage to merit a half share of the properties to the Respondent. In any case since the Respondent did not appear in Court to lead any evidence on any claim made by her, this Court is unable to make any determination in her favour in respect of the properties purportedly acquired by them. As a general rule of Court, the Courts do not make orders in vacuum.

All matters not considered and a pronouncement made thereon are hereby dismissed.

I award no order as to cost.Each party is to bear their own costs.

FINAL ORDERS

1. The Ordinance marriage between the parties is hereby dissolved.
2. Custody of the children is granted to the Respondent with reasonable access given to the Petitioner.
3. The Respondent's reliefs in her counter claim are dismissed.
4. The Petitioner shall maintain the two children of the marriage with an amount of GH¢1,500.00 every month.
5. All other reliefs not granted are dismissed.
6. Each party shall bear their own costs.
7. ***Mantey @ another v Botwe [1989-90] 1 GLR 479.***

(SGD)

…….
MAVIS AKUA ANDOH (MRS)
JUSTICE OF THE HIGH COURT
DIVORCE & MATRIMONIAL COURT "2"
ACCRA.

COUNSEL:

THE PLAINTIFF IS SELF-REPRESENTED.

NO LEGAL REPRESENTATION FOR RESPONDENT.

AUTHORITIES:

1. **ORDER 36 R (1) (2)(A) OF THE HIGH COURT CIVIL PROCEDURE RULES, C.I 47**
2. *ANKOMAH V CITY INVESTMENTS LTD [2007-2008] SCGLR 1064*
3. **SECTION 1 (2) OF THE MATRIMONIAL CAUSES ACT OF 1971 (ACT 367)**
4. *ABABIO V AKWASI [1994-1995] 2 GBR 774*
5. **BANK OF WEST AFRICA LTD V AKUN [1963] 1GLR 176**
6. *SECTION 1 (2) OF THE MATRIMONIAL CAUSES ACT OF GHANA, (1971) ACT 367*
7. *MENSAH V MENSAH [1972] 2 GLR @ PAGE 198*
8. *HANNAH ASSI (NO.2) VRS GIHOC (NO.2) 2007-2008] 1 SCGLR 16*
9. *MULLER V HOME FINANCE CO LTD [2012] 2 SCGLR 1234*
10. *KWA KAKRABA V KWESI BIO [2012] 2 SCGLR 834*
11. *NYAMAA V AMPONSAH [2009] SCGLR 361*
12. *ATTU V ATTU [1984-86] GLRD @144, AND OPOKU –OWUSU V OPOKU OWUSU [1973] 2 GLR @349.*
13. **SECTIONS (6) AND (47) OF THE CHILDREN'S ACT, 1998 (ACT 560)**
14. *DONKOR V ANKRAH [2003-2004] 2 GLR 125*