

CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 17TH NOVEMBER, 2022

SUIT NO. C5/74/21

OLIVIA NANA EKUA APPIAH - PETITIONER

VRS

DERRICK MENSAH - RESPONDENT

JUDGMENT

On the basis that their marriage has broken down beyond reconciliation due to the unreasonable behavior of the respondent, the petitioner filed a petition for dissolution of their marriage as celebrated on the 17th day of December, 2016 at the Tema Metropolitan Assembly. There is one issue of the marriage.

The particulars of unreasonable behavior are that the petitioner falsely accuses her of infidelity. That he reported her to the police for infidelity and they were advised to separate. Upon the instructions of the police, the respondent rented a place for her and she moved out of the matrimonial home. This was over a year prior to the filing of the petition. That there has not been any sexual intimacy between them and the respondent has failed to allow her back into his life. He has also refused to remit her. She prayed for a dissolution of their marriage as well as an order directed at the respondent to renew her rent.

In his answer, the respondent admitted that their marriage has broken down beyond reconciliation. He laid the blame at the doorsteps of the petitioner. That this was due to her extreme infidelity which she boldly expressed, her lack of care and love towards him and their only child, her desertion from the matrimonial home amidst many others.

He denied reporting petitioner to the police and said it was rather one of the men whom petitioner was having an affair with who came to threaten him in the matrimonial home. That the threat was made to his mother in his absence and so she lodged a complaint to the police. He only went to give a statement.

That at the police station, the family of the man rather came to taunt him for reporting to the police a man who was taking care of his wife when he himself could not. That the petitioner's infidelity even extended to his former classmates. That it was the petitioner who requested that they separate and that he rents a place for her else she would kill herself. That he paid for two years rent for her commencing from April, 2020.

That about two and half months after she moved into the new place, the petitioner moved out of the premises and to date, he does not know of her whereabouts. That the petitioner is not interested in the custody of their son whom he has maintained and cared for alone. He agreed that their marriage be dissolved and that custody of their only issue be granted to him with reasonable access to the respondent.

The issues for the court to determine are;

- 1. Whether or not the marriage between the parties has broken down beyond reconciliation**
- 2. Whether or not the respondent should be ordered to renew the rent of the petitioner**
- 3. Whether or not custody of the only issue of the marriage should be granted to the respondent with reasonable access to the petitioner.**

THE CASE OF THE PETITIONER

The petitioner repeated the claims in her petition. She added that after their separation, the respondent ceased communication with her and together with his family, prevented her from having access to their son on weekends. That she is not informed when the child is unwell. That there is desertion on the part of the respondent and she cannot continue to wait in vain for him. She prayed the court to dissolve their marriage and grant her access to the issue on weekends and vacations.

THE CASE OF THE RESPONDENT

According to the respondent, the petitioner came into the marriage with a daughter and in the course of their marriage, they also had a son. According to him, for the three years of their marriage, the petitioner was unemployed and so he catered for the home and also for her parents during their time of illness. That whenever petition spent any money on their son, she would demand same from him even though he was taking care of her daughter whom she had come into the marriage with.

That the petitioner would attend church programmes which were to end at 9pm but would return home the next morning at 4:am. She became angry when he confronted her and would insult him. That he realized that petitioner married him out of gratitude. That petitioner took off her wedding rings severally and threw them away with a demand that he should take her back to her father as she is fed up with the marriage. That she later stopped wearing it with the excuse that when she took the rings to be polished, they got missing. He also took his off.

He continued that the petitioner embarrassed him by accusing a lady in their church of having an affair with him and he had to quit the church. He repeated his answer to the petitioner and added that he has lived with their son since he was two years old. That

the son is now four years old. He contended that the court should dissolve their marriage.

CONSIDERATION BY COURT

1. *Whether or not the marriage between the parties has broken down beyond reconciliation.*

Divorce is by means of enquiry and a court must satisfy itself by way of evidence that indeed the marriage has broken down beyond reconciliation. In the case of *Ameko v. Agbenu [2015] 91 G.M.J.* the court of Appeal relying on the Supreme Court decision in the case of *Elaine Dorothy Ampiah v. Mr. Joseph Alex Ampiah (Civil Motion No J5/39/2011)* granted a certiorari to quash a decree of dissolution on the basis that same was not “warranted by statutory rules of procedure” as the trial judge had failed to take any evidence and granted the decree based upon the consent of the parties.

The court of Appeal in the *Ameko case (Supra)* held that “from the record of appeal, it is clear that no evidence was taken before the dissolution of the marriage in question. The judge did not make any enquiry and satisfy itself as required by *Section 2(2) and (3) of the Matrimonial Causes Act.*

Blacks’ law dictionary, (8th edition, 2004 p. 1449) defines divorce as “*the legal dissolution of a marriage by a Court.*” In Ghana, when a couple decide to marry under the Ordinance, then they can only obtain a divorce through the Courts. The ground upon which a divorce can be obtained from the Courts is clearly stated under the *Matrimonial Causes Act, 1971 (Act 367).*

In *section 1 (2) of Act 367*, the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation. In proving that the marriage has broken down beyond reconciliation, a petitioner must establish one of six causes i.e. adultery; unreasonable behavior; desertion for a period of two years; consent of both parties where they have not lived together as husband and wife for a period of two years; not having lived together as husband and wife for a period of five years; and finally, inability to reconcile differences after diligent effort.

It is he who asserts who bears the burden of proof and so the burden of persuasion lies on petitioner to lead cogent and positive evidence to establish the existence of her claim in the mind of the court. See the case of *Takoradi Flour Mills v. Samir Paris [2005-6] SCGLR 882* and *Ackah v. Pergah Transport Ltd (2010) SCGLR 728*. As the respondent has counterclaimed, he bears the same burden of proof in establishing his claim. See the case of *Messrs Van Kirksey & Associates v. Adjeso & Others [2013-2015] 1 GLR 24*.

The petitioner's basis for presenting this petition is that the respondent has behaved in such an unreasonable manner that she cannot continue to live with him as husband and wife. The respondent in his cross petition says it is rather the petitioner who has committed adultery with many men and deserted the matrimonial home.

Although the petitioner as part of her claim of unreasonable behavior had sought to present her case to be that the respondent had reported her to the police for infidelity, the abundant evidence on record which I find to be credible is rather that it was a man whom the respondent had accused petitioner of being involved with who had threatened the life of the respondent. That it was respondent's mother who made the complaint to the police and the petitioner was invited. Whereas the petitioner had kept saying an issue arose leading to the report to the police, without speaking of the said

issue, the respondent had laid to bare the bones of the said issue. Petitioner's attempt in hiding the said issue led the court to believe that she was not being entirely truthful.

Be that as it may, the respondent never caught the petitioner in any act evidencing a romantic embrace with another man. His claims that several people admitted having relationships with the petitioner is mere hearsay as he neither mentioned the name of these people or called any of them to testify.

They both admit that they had not lived together in the same house or as husband and wife for more than a year prior to the presentation of the petition.

In their evidence before the court, both parties testified that their marriage has broken down beyond reconciliation and prayed the court to dissolve the said marriage.

There is no disputing the fact that until this action, the respondent did not even know the name of the place where the petitioner was residing. He says it was in this court that he realized she lived in Newtown. They both also testify that their respective families have been involved in this matter and could not resolve it. That the petitioner's parents were in support of the petitioner moving out of the matrimonial home.

Their marriage but for the marriage certificate evidencing the solemnization of their union is all but dead. In the circumstances, it would be best to rid them of the legal yoke of their marriage to enable them have an opportunity at starting life over especially since they are both young. *Section 2 (1) (f) of the Matrimonial Causes Act, 1971 (Act 367) provides 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; that the

parties to the marriage have, after diligent effort, been unable to reconcile their differences”.

On this basis, I hereby find that all diligent attempts made to reconcile the parties have failed. On that footing, their marriage has broken down beyond reconciliation and accordingly, issue a decree to dissolve the said union. Their marriage which was celebrated on the 17th day of December, 2016 at the Tema Metropolitan Assembly is hereby dissolved. Their marriage certificate is accordingly cancelled. The Registrar of the Court is to notify the Marriage Registrar of the cancellation for their records to be amended accordingly.

2. Whether or not the respondent should be ordered to renew the rent of the petitioner

I would deal with this issue briefly. The petitioner admits that she has moved out of premises rented for her by the respondent. That although the respondent rented the premises for two years, she moved out of same in less than six months and until the institution of this case, she had refused to tell the respondent where she lived. Under cross examination by the respondent at page 20 of the record of proceedings, petitioner had answered;

Q: Do you remember that you asked me to pick our son for the weekend after you relocated and I insisted that I wanted to know where you lived first. It has been a year and eight months now I still do not know where you stay?

A: That is so. But at the time, I was not settled and did not have a proper environment for the kid. Later when I was ready, I communicated with his

mother and she said "they are not ready now because the time they were ready, I was not ready".

Then in her cross examination of the respondent, at page 25 of the record of proceedings, petitioner had asked;

Q: Can you tell the court why you do not want me to come and pick our son for the weekend?

A: You insisted that I rent a house for you to move into which I did and also knew the location so you used to pick our son during the weekends. But you relocated without my knowledge and I did not know where you stayed till I recently found out in court that you stay at Newtown so I insisted to know of where you stay before you can pick our son up for the weekend.

From the evidence, the petitioner has provided accommodation for herself for almost two years now and she does not appear to be in a hurry to let the respondent in on where she leaves. On her own, she abandoned premises which the respondent had rented for her. Indeed, she would rather miss her weekend access to her son, than let the respondent know where she lives. In this court, she has not applied for custody of the child. Thus such accommodation if provided would be for her sole use.

She has admitted in this court that the respondent was solely responsible for the home and does not dispute that after their separation, the respondent has been solely responsible for the maintenance and all other needs of their son. As she works and earns an income, I find that she is in a position to continue providing accommodation for herself. Accordingly, her claim for accommodation is hereby dismissed.

3. *Whether or not custody of the only issue of the marriage should be granted to the respondent with reasonable access to the petitioner.*

There is one issue born to the marriage and the respondent is seeking custody whilst the petitioner wants reasonable access on weekends and vacations. According to **AZU CRABBE CJ** in the case of *Braun v. Mallet* [1975] 1 GLR 81-95 “in questions of custody it was well-settled that the welfare and happiness of the infant was the paramount consideration. In considering matters affecting the welfare of the infant, the court must look at the facts from every angle and give due weight to every relevant material”. See also the case of *Gray v. Gray* [1971] 1 GLR 422.

This provision is referred to as the welfare principle and it has been concretized by Statute in *Section 2 of the Children's Act, 2008 (Act 560)*.

Section 2 – Welfare Principle.

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

(2) The best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child.

A court in arriving at decisions as to custody and access of a child is bound to consider the best interest of the child and the importance of a young child being with his mother. The court must also consider the age of the child; that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents; the views of the child if the views have been independently given; that it is desirable to keep siblings together and the need for continuity in the care and control of the child.

From the evidence on record, the issue has been in the care of the respondent and his mother since the petitioner left the matrimonial home in April 2020. Petitioner, although the mother of the issue is seeking for reasonable access and not custody. The issue is currently four years old. That means the petitioner left him in the care of the respondent and his mother at the age of two years. The petitioner admits that she did so willingly. At page 25 of the record of proceedings, in cross examining the respondent, the petitioner asked:

Q: *Was the fact that our son was with your mother an agreement between you and I or not?*

A: *It was an agreement between you and I as I was working and you also found a job and our timings were not favorable.*

I also take note that in this court, the petitioner has not sought for custody of the issue. She appears to be quite at peace with the issue being with the respondent. Her complaint is that she is not allowed to visit the child or take him away on weekends.

The primary care givers of the young issue are his grandmother and the respondent. There has not been any claim that they maltreat him or engage in any acts that put his safety, happiness and development in danger. For the past two out of his four years on earth, he has been accustomed to receiving care from his grandmother and the respondent. He is used to them and in order to ensure continuity of care, it would be in the best interest of the issue to continue being in the custody of the respondent.

Accordingly, custody of the issue is granted to the respondent with reasonable access to the petitioner. The petitioner is to have access to the issue from Saturday morning and return him by 4:00pm on Sundays. The petitioner is hereby ordered to show the

respondent where she lives to enable him reach the issue in case of an emergency during the times the issue would be with the petitioner. During vacations, subject to agreement between the parties as to who should have the first turn, the issue is to spend a half of the vacation with the respondent.

As both the petitioner and the respondent earn an income, they are both to maintain the child and provide him with the necessities of health and life. There would be no order as to costs.

(SGD)

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUDGE)