

IN THE CIRCUIT COURT "2" HELD AT TAKORADI, WESTERN REGION ON
TUESDAY, 28TH MARCH, 2023 BEFORE HER LADYSHIP JUSTICE MARIAN
AFFOH, HIGH COURT JUDGE SITTING AS AN ADDITIONAL CIRCUIT
COURT JUDGE

SUIT NO. C5: 26/2021

JOHN FORSTER SENOO PETITIONER

VRS.

DEBORAH OGWUNA RESPONDENT

JUDGEMENT

PETITIONER'S COUNSEL: Peter K Baidoo led by Constantine Kudzedzi.

RESPONDENT'S COUNSEL: George Agbottah is absent.

A careful consideration of the instant petition raises issues of whether an alleged unreasonable behaviour on the part of one spouse against the other, irreconcilable differences and the fact of not having lived as man and wife for 5 years can form the basis of a petition for dissolution of marriage and a ground for the grant of an order of divorce?

Following the adoption of proceedings on 18/11/22, which consisted of the evidence in chief and cross-examination of the petitioner by respondent counsel in this matter, I proceeded to hear the evidence of the respondent who was subsequently cross-examined after which she closed her case.

To reiterate, the case of the petitioner is that the parties who previously resided in Italy, have a 20-year marriage which was celebrated on 8th November 1999 in Ghana. Subsequent to that the respondent returned to Italy but came back to Ghana where she has lived with the petitioner till date. The parties who have one issue have not had any proceeding regarding their marriage in any court of competent jurisdiction. That said the petitioner asserts that the marriage has broken down beyond reconciliation owing to three main factors. First unreasonable behaviour on the part of respondent towards the petitioner, irreconcilable differences despite diligent efforts on the part of the petitioner, the parties not having lived as man and wife for five years.

Irked by the current status of the marriage the petitioner filed the instant petition for the dissolution of the marriage on the above stated grounds.

The respondent whom the petitioner described as a business woman, will have none of it, not only did she deny the claims of the petitioner but she also expressed disapproval of the petitioner's prayer for the dissolution of the marriage and cross-petitioned for the following:

First, the settlement of each of one of two houses, and two cars of the parties, a declaration that she is the joint owner of the enterprise Johnny Gill ventures, a declaration that she has an equitable share or interest in the said enterprise which she is entitled.

Other reliefs included an order for the respondent to rent a store with seed capital of GH¢200,000 and finally alimony of GH¢500, 0000.

In a fired-up reply, the petitioner vehemently disputed the respondent's contribution to the acquisition of the said properties and insisted that same had already been acquired before his marriage to the respondent because the respondent left Ghana soon after the marriage and only returned to the country after nine years.

In line with the law governing the dissolution of marriages the petitioner has the duty to establish the fact of unreasonable behaviour on the part of the respondent, also that he or his counsel made diligent efforts towards reconciliation and finally that the parties have not lived as man and wife for five years. Likewise, the respondent has the burden of establishing her entitlement to the properties in question. This is in accordance with the provisions on adducing evidence under sections 10(1), 11(1), and 14 of the Evidence Act of 1975, (Act 323).

Flowing from the above I proceed to analyse the allegation of unreasonable behaviour. Section 2 (1) of the Matrimonial Causes Act 1960, (Act 323) 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:

(b) That the respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent.

According to the Black's Law Dictionary 9th edition at page 625, reasonable is associated with what is fair, proper or moderate under the circumstances thus any behaviour that is contrary to these may be deemed unreasonable.

The learned author of the book 'AT A GLANCE! CONTEMPORARY PRINCIPLES OF FAMILY LAW IN GHANA' PAGE 111", described unreasonable behaviour as "conduct that is grave and weighty and makes living together impossible" it is behaviour that must be serious and higher than the normal wear and tear of married life. (Case Law).

Unreasonable behaviour may consist of a type of behaviour or combination of it as was in the case of Knusden v Knusden [1976] 1 GLR 204. Where the court of appeal granting the respondent's cross petition for the dissolution of marriage stated as follows:

"The behaviour of a party which will lead to this conclusion would range over a wide variety of acts, it may consist of one act if it's of sufficient gravity or of a persistent

course of conduct or of a series of acts or differing kinds none of which by itself may justify a conclusion that the person seeking the divorce cannot reasonably be expected to live with the spouse, but the cumulative effect of all taken together would do so”

In other cases, the fact of cruelty on the part of one spouse towards the other as it was in *Gollins v Gollins* [1964] A. C page number may be deemed to be unreasonable behaviour. For instance, in that case the House of Lords held that:

“If the conduct can be called cruel, it does not matter whether it springs from a desire to hurt or selfishness or sheer indifference.”

At common law the fact of unreasonable behaviour may be established by the petitioner first proving the conduct resulting in unreasonable behaviour on the part of the respondent and the fact that he or she cannot reasonably be expected to live with the respondent as a result of the bad behaviour. [See *Andrews v Andrews* [1974] 3 All ER 643.

The question of whether or not the petitioner cannot reasonably be expected to live with the respondent is a question of fact which must be objectively assessed by the court as it was held in the case of *Happee v Happee and another* [1974] 2 G. L. R. 186 where the unreasonable behaviour on the part of the respondent led the court to conclude that the respondent’s behaviour was unreasonable and ordered a dissolution of the marriage.

In the instant petition, the petitioner enumerated various conduct exhibited by the respondent in the course of the marriage which has made it impossible for him to continue the marriage.

These included the neglect of the respondent to do household chores like cooking and cleaning, the respondent’s habit of insulting and embarrassing the petitioner in the presence of friends and relatives. Insults meted against petitioner’s mother by respondent such as calling her a ‘witch’.

In addition, the quarrelsome and petty habit of respondent that makes her insult the workers and business associates of the petitioner one of such which occurred in petitioner's house on 6th January 2021. Further, the behaviour of the respondent that resulted in the closure of one of the petitioner's business outlets in parts of Takoradi which the respondent was managing.

The constant quarrels by respondent with petitioner's workers and drivers, which resulted in the resignation of one of the drivers. Again, the general lack of communication between the parties owing to the respondent's behaviour. To top it up the neglect by the respondent of the petitioner's the material, emotional, medical and physical needs compelling him to live like a bachelor and the failure by the respondent to cook for the petitioner. The petitioner failed to provide details the alleged material, emotional and physical needs which have been neglected by the respondent to enable the court make an assessment of them.

Other factors alleged, were the respondent's habit of giving cheeky and abusive answers whenever Petitioner asks questions bordering on the relationship of the parties and that of friends and acquaintances thus causing the petitioner embarrassment, anguish and discomfort. To top it up the respondent's general lack respect for the petitioner and her openly daring the petitioner to divorce her so she can "go her way".

That notwithstanding, the petitioner admitted under cross-examination that he stopped eating the respondent's food because it was too spicy and it increased his cholesterol and blood pressure levels. He also admitted the he stopped eating the respondent's food about three to four years ago implying that it was not the respondent who wilfully refused to cook for the petitioner but rather it was the petitioner who stopped eating her food. On that basis I find that the respondent did not wilfully refuse to cook for the petitioner.

That the petitioner admitted that the parties relied on the services of a house help for the performance of household chores both when the respondent was in or outside the country. However, he was unable to produce this house help to testify to that fact. That said, the considered view of the court is that considering the fact that respondent who appears to be advanced in age, inability to perform household chores at that stage of her life cannot amount to unreasonable behaviour. The court holds the view that for the petitioner to continue to demand the performance of household chores from a woman of such age was rather exacting, as the services of a house help could be sought to make up for the inability of the respondent to keep up with the demands of keeping the house at that stage of her life.

On the issue of the insults meted out to the petitioner's mother, workers, business associates and driver by the respondent none of the persons mentioned were called to testify in support of this fact. This did not help the petitioner's claim on the issues as testimonies of these witnesses would have been material in establishing that fact. By failing to call the said witnesses the petitioner failed to prove his claim with regard to that issue. In *Owusu v Tabiri* [1987-88] 1 GLR 287 it was held that where the failure of the defendant to call a material witness was held to be fatal to his allegation.

That notwithstanding, the court is the considered view that other factors such as respondent's the general lack of respect as well as her frequent abusive and cheeky answers to the petitioner amounts to unreasonable behaviour on her part that the petitioner cannot reasonably be expected to live with.

The next issue raised by this petitioner is the fact of parties not having lived as man and wife for 5 years. The provisions of section 2 (1) of Act 367 are clear that the petitioner shall satisfy the court of the fact.

"That the parties to the marriage have not lived as man and wife for a continuous period of at least five years immediately preceding the presentation of this petition" to show that the marriage has broken down beyond reconciliation.

The poignant question this poses is what it means for parties not to have lived together as man and wife for a continuous period of five years. Does not living together refer to a physical separation or the absence of performance or observance of marital obligations between parties in the same physical space?

In i.e., *Ofori v Ofori* [1981] G. L. R. 745 where after commencement of divorce proceedings by the petitioner against the respondent on grounds of unreasonable behaviour, the parties lived together as man and wife for three months before the respondent wife left the home with the kids.

In his submissions to the court counsel for the respondent argued that the three months cohabitation wiped the slate clean and therefore the husband could not rely on previous matters to prove that the marriage had broken down beyond reconciliation. The Court's holding stated that the period of cohabitation was less than six months, therefore petitioner could rely on the past unreasonable conduct.

In the instant petition, the evidence of the petitioner is that the parties have not had sexual relations for the past five years asserting that the last time they had sex was in 2014. According to the petitioner there is generally lack of communication between himself and the respondent as her respondent's does not encourage a conducive atmosphere for the necessary marital conviviality to take place and communication to take place. Further petitioner admitted during cross-examination to have stopped eating the respondent's food about three to four years ago. The lack of communication and a general lack of a congenial atmosphere was confirmed by the respondent.

From the above I find that even though undisputedly the parties live together in the same house there has been absence of conjugal relations and performance of marital duties and obligations towards each other. I further find the petitioner's claim on the issue made out.

The third issue to consider is whether section 8(1) of Act 367 has been complied with as claimed by the petitioner. This provision requires the petitioner or his counsel to

inform the court of all efforts made by and on behalf of the petitioner both before and after commencement of proceeding, to affect a reconciliation.

The requirements of this provision are satisfied when the petitioner or his counsel provides that information in a petition. The evidence of the petitioner is that efforts made by friends and acquaintances aimed at reconciling the parties have proved futile.

On that basis I find that by providing that piece of information the petitioner has satisfied the requirements of section 8(1) of Act 367.

I shall address the cross-petition of the respondent for inter alia settlement of one of the two houses, and the two cars of the parties and a declaration that she is the joint owner of Johnny Gill ventures or has equitable interest in it, seed capital of GH¢200,000 to enable her set up a shop and finally alimony of GH¢500,000.

Under such circumstances the first thing is for the court to determine whether or not the properties in question qualify as spousal property merit sharing of them.

According to the learned author of the book "At A Glance! Contemporary Principles of Family Law in Ghana" by Fredrica Ahwireng Obeng at page 147, "Property that becomes the subject of dispute between parties to marriage need to be clearly defined to enable one deal adequately with it". On that basis the question that arises in this case is whether or not the property for which the respondent is seeking an equal share qualifies as spousal property.

At page 147 of the book, she classified "spousal property for the purposes of distribution into family property, household goods, property acquired before and during marriage."

According to her "It is important that the different kinds are clearly identified before a decision regarding ownership and distribution is determined upon divorce or death intestate of one of the spouses"

From the evidence of the parties as well as petitioner's admissions during cross-examination there is no dispute as to the nature of the properties under contention as the respondent asserts and the petitioner admits in no uncertain terms that the properties with the exception of his enterprise Johnny Gill ventures were acquired during the subsistence of the marriage. This is so because even though the petitioner in his reply to the respondent's answer the petitioner insisted that he single handedly acquired the said properties without any contribution whatsoever from the respondent, his admissions during cross-examination were inconsistent with his claim. I reproduce what transpired during cross-examination as follows:

Q: When did you acquire the vehicles?

A: The Mercedes Benz was 2016 and the other was 2019.

Q: The Anaji property was constructed during the subsistence of your marriage to the respondent?

A: Yes.

Q: The matrimonial home at Assakae was constructed during the subsistence of your marriage?

A: Yes.

Q: When was that (Johnny Gill ventures formed?

A: 1997.

From the above there is evidence that the properties in question qualify a spousal property thus what is in dispute whether or not the respondent is entitled to settlement of them as stated in her answer and cross-petition.

The evidence of the respondent is that she assisted the petitioner to set up the said hard ware shop at Kintampo road, Takoradi and named it Johnny Gill ventures. According to respondent after helping petitioner to manage the shop for a while she

left for France. This was disputed in no small measure by the Petitioner by the respondent who insisted she returned in 2010 and has since been living with the petitioner in the country. The respondent was returning every year to assist petitioner and on one such occasion found that petitioner had transformed the hardware shop into a tile trading venture and also opened another tile business at Sagoe Road. Upon respondent's relocation to Ghana, she was handed the Kintampo branch to manage until two years ago when she was stopped by petitioner who requested that she joined him at the Sagoe branch but while there the petitioner stopped her altogether from working with him.

Further, respondent maintained the parties acquired House No, 33 Akuffo Addo Road which served as the matrimonial home and House No. 7 Ango Street. She added that she and the petitioner together acquired the Mercedes Benz with registration number GR 3688-16 and 4x4 car with customized number J-Gill in 2019. She vigorously maintained under cross-examination that she and the petitioner established the shops and acquired two houses and bought the two cars. She sent monetary contributions to the petitioner for the completion of the first house with No. 33 Akuffo Addo Road.

In outright denial of this assertion the petitioner maintained that the properties in question were all acquired through his sole effort without any contribution from the Respondent. See Paragraphs 11, 12, 13 and 14 of respondent's supplementary witness statement. The petitioner mentioned a lease agreement between petitioner and an entity as well as receipts he obtained for the purchase of certain building materials as his evidence of sole ownership of the houses in question.

During cross-examination, this is what the petitioner said regarding the respondent's involvement with the enterprise Johnny Gill ventures.

Q: During the period of your operation when you were recovering, Respondent managed various branches of Johnny Gill Ventures

A: No, I had three stores and she is occupying one

Q: In what capacity was she occupying the store?

A: She had some goods she owned so she was selling her own goods.

Q: In Your witness statement in Paragraph 13 (C) is that correct

A: Yes, the store I was occupy she was there and had issue with my driver and workers so I asked her to occupy one of the stores.

Q: She was not in the shop just to sell her products

A: The store I was occupying she was there and had issues with my driver and worker so I asked her to occupy one of the shops

Q: At all material times the respondent was managing the store for you

A: Not true she was not playing any role in the shop she was only attending to things sold.

These assertions by the petitioner were in direct contrast to in his evidence on the issue as stated in paragraph 13(e) of his evidence filed on 17/6/21 which I reproduce as follows:

Petitioner: "The respondent's conduct has led to the closure of my business and trading outlets in parts of Takoradi of which the Respondent was in charge and managing...."

It is interesting to note, that in one breath the petitioner claims that the respondent came to the stores in question only to while away the time and to kill the boredom she was experiencing at home and in another breath the petitioner discloses that the respondent occupied one of the shops to sell her own goods, while yet in his evidence he admits the respondent was not only in charge but managed his shops. The apparent

inconsistency in the evidence of the petitioner on the issue for which he did not offer any reasonable explanation offends against the provisions of section 80 of the Evidence Act of 1975, (Act 323) and smacks of lack of credibility.

This court is of the considered view that if respondent occupied one of the shops to ply her own trade there would have been no need for the petitioner to collect his keys and drive her out. Also, if the goods sold in the said shop belonged to only the respondent, then her conduct could not have in any way impacted negatively the business of the petitioner. Again, if it were the case that respondent was allowed into one of the shops to ply her trade where the petitioner's business was also being conducted, it would be unimaginable for the respondent wife to concentrate only on selling her wares to the neglect of the petitioner's whose shop she was occupying and whose evidence indicates he also had goods in both shops. In view of that, I defer to the respondent's evidence on the issue and do not accept the petitioner's as same is lacking in merit.

Further in spite of the petitioner's relentless effort to suppress that piece of information, I accept the respondent's testimony on the issue, that she contributed to the running of petitioner's shops after her relocation to Ghana, and during his surgery and recovery until the petitioner compelled her to vacate the shops, based on the petitioner's admissions on the issue.

From the above there is ample evidence that the respondent performed and continued performing her wifely duties while managing the business of the parties until the petitioner for reasons canvassed before this court stopped her from doing so. And that by managing the petitioner's business the respondent acquired an equitable interest in it. Again, there is evidence that the respondent being a business woman, at the early stages of the marriage shuttled between Ghana and Italy and finally settled in Ghana, a fact which the petitioner acknowledges, therefore her claim of having contributed to the business and acquisition of the properties cannot in doubt.

Having said so, above positions of the parties on the issue, brings to the fore the law on the distribution of marital property upon dissolution of marriage.

Article 22 (2) of the 1992 constitution grants equal access to parties to matrimonial property while Article 22 (3) entitles parties to an equitable share of matrimonial property upon dissolution of marriage.

For this reason, section 20(1) of The Matrimonial Causes Act of 1971, (Act 367) provides that the court may order either party to the marriage to pay to the other a sum of money or convey to the other party movable or immovable property as settlement of property rights or in place of that financial provision that the court thinks just and equitable.

According to Osborn's concise law Dictionary 8th Edition, Page 131 "Equitable" simply means "That which is fair", that which arises from the liberal construction or application of a legal rule or remedy; in particular that which is in accordance with or regulated, recognised or enforced by the rules of equity as opposed to those of common law.

Cases like Mensah v Mensah [2011] SCGLR 350 strongly advocates for the distribution of marital property in equal shares in order to achieve equity with the admonition however for circumstances of any particular case to be taken into consideration.

The principle in the above case which has been applied in a couple of cases seem to suggest that the non-financial contribution of a spouse to the acquisition of marital property is immaterial so long as it is proved that the property being sought to be distributed is marital property. For instance, Bofo v Bofo [2005-2006] SCGLR] 705 reiterated the principles espoused in Mensah v Mensah [2011] SCGLR 350 and held that "

The principle of equality is equity is the preferred principle to be applied in the sharing of joint property unless in the circumstance of a particular case, the equities of the case would demand otherwise"

At page 706 of the report the court made the following remarks

“The principle of equitable sharing of property jointly acquired by married couple would ordinarily entail the equality principle, unless one spouse proves separate proprietorship or agreement or a different proportion of ownership.

As a result a considerable number of propositions emanating from a plethora of cases including *Quartson v Quartson* [2012] 2 SCGLR 1077, *Esseku v Inkoom* [2012] SCGLR] seem to suggest that it matters not whether or not a spouse contributes financially to the acquisition of matrimonial property, contributions in other forms such as the performance of household chores, supervision of the construction of, or the making of additions to the property and other wifely duties ought to be considered in the sharing of property.

In the light of *Fynn v Fynn* [2013-2014] 1 SCGLR 727, which posits that the institution of marriage does not prevent a person from acquiring property by herself, the continuous application of *Mensah v Mensah* on a blanket basis may most likely defeat the course of equity.

In contrast, the recent case of *Peter Adjei v Margaret Adjei* Civil Appeal No. J4/06/2021 Supreme Court hold the view that spouses do not have automatic stake in property acquired during marriage.

The implication is that even though the equal sharing of spousal property may achieve equity it is a rebuttable presumption depending on the circumstances of any particular case. In other words, a spouse can only be entitled to an equal share of spousal property only if the circumstances of the case entitle the said spouse, in the absence of such entitlement the property a spouse laying claim to a share whether equal or otherwise of property upon dissolution of a marriage must prove the spouse’s contribution.

The authorities in consonance with the above recent decision continue to hold that the equity of any particular case demands that a spouse proves his or her contribution to the acquisition of property before being so entitled.

In *Ayishetu Abdul Kadiri v Abudulai Dwamena* [2020] CA10013 the court held that “awarding the first wife Ayishetu 50 percent of the husband’s properties is a slavish application of the old principle in *Mensah v Mensah*”

The court’s considered view is that an evaluation on how the authorities have evolved on the issue over the years suggest a re-echoing of the underlining principles of in section 20 (1) of Act 367 which emphasizes the conveyance of property by the court to any particular spouse where it seems **just** and **convenient** to do so, or in the alternative the payment of financial provision. The emphasis for the purposes of any petition including this one is what is just and convenient for the court to do under the circumstances.

The question one may ask is whether or not it is just and convenient to dispossess the respondent of a place she has called home for twenty years, condemn her to the unpleasantness and inconvenience that comes with dependence on other means of transport after she has driven in the comfort of a car for a considerable number of years or, strip her off her means of livelihood by taking away the shops where she ply’s her business?

Surely the courts of equity would weep at such inequitable treatment of the respondent. As such this court considers, that the plates of equity will be best served by granting the respondent a fair share of the properties herein.

Therefore, considering the circumstances of the marriage, the status of the parties, length of years the marriage has travelled and the fact that the respondent has given the most part of her life to this 20-year-old marriage, the court is of the view that it will be unconscionable, even harsh and a travesty of justice to condemn the

respondent to a life of homelessness upon settlement of a paltry sum of GH¢100,000 such is being as suggested by the petitioner.

In conclusion, the court grants the petition and cross-petition for the dissolution of the marriage and distribution of the spouses' properties respectively and makes the following consequential orders

1. The parties should submit their marriage certificate to the registry of this court for cancellation.
2. That the petitioner conveys house No. 33 Akuffo Addo Road which serves as the matrimonial home to the respondent so she will not be left homeless.
3. That Mercedes Benz car with registration number GR 36688-16 be given to the respondent while the petitioner maintains the 4x4 which is customized in his name.
4. That the petitioner gives to the respondent one of the two shops in question or in the alternative seed capital of GH¢200,000 to enable her carry on a trade in order to sustain a livelihood.
5. That the petitioner pays the respondent a lump sum of GH¢250,000,00 as alimony with costs of the action assessed at GH¢10,000 in favour of the respondent against the petitioner.

SGD

H/L MARIAN AFFOH

JUSTICE OF THE HIGH COURT

ADDITIONAL CIRCUIT COURT JUDGE