

CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 13TH JULY, 2023

SUIT NO. C5/65/23

DORIS MISSAH NKANSAH - PETITIONER

VRS

ALBERT ANKOMAH - RESPONDENT

JUDGMENT

On the 10th day of January, 2023, the petitioner presented the instant petition to this court for a dissolution of the marriage celebrated between she and the respondent under the ordinance at the Tema Metropolitan Assembly on the 27th day of March, 2014. There are two issues of the marriage; both female aged fourteen and nine years.

The basis for her petition is that the marriage has broken down beyond reconciliation due to the unreasonable behavior of the respondent. Further that due to the respondent's constant physical abuse, she was forced to abandon the matrimonial home four years ago and the parties had since then not lived together as husband and wife.

She prayed the court to:

- a) Dissolve the marriage contracted at the Tema Metropolitan Assembly on the 27th day of March, 2014 under the ordinance
- b) Monthly maintenance of Ghs 1,000 for the two children of the marriage.

The respondent was served with the divorce petition and notice to appear. He failed to enter appearance and file an answer. He however appeared in Court on the return day and after explaining that he was a novice to court proceedings, the court explained the procedure of entering appearance and filing an answer to him and suo muto granted him leave to file out of time. He failed to file any process even after several adjournment and extension of time to do so.

His actions clearly exhibited that of a person who did not want to be heard by the court and who did not want to take the opportunity of cross examining his accuser in court. He also did not wish for the Court to hear his side of the story before deciding on the matter. Consequently, proceedings continued without him.

Dotse JSC speaking for the Supreme Court in the case of *Julius Sylvester Bortey Alabi v. Paresh & 2 Others* [2018] 120 GMJ 1 at p. 11 held: “We are therefore of the view that, if a party voluntarily and deliberately fails and or refuses to attend a court of competent jurisdiction, (such as the High Court which determined this case) to prosecute a claim against him, he cannot complain that he was not given a fair hearing or that there was a breach of natural justice. The Defendants must be respected for making such a choice, but they must not be allowed to get away with it”.

The Court of Appeal also in the case of *Ghana Consolidated Diamonds Ltd. v. Tantuo* [2001-2002] 2 GLR 150 held at holding 4: “A party who was aware of the hearing of a case but chose to stay away out of his own decision could not, if the judgment went against him complain that he was not given a hearing”. See also the case of *Accra Hearts of Oak Sporting Club v. Ghana Football Association* [1982-83] GLR 111 at page 117.

Order 36 rule 2 (a) of C.I.47 provides in unambiguous terms that the proceedings at a trial where the defendant fails to attend is for the court to strike out the counterclaim if any and allow the plaintiff to prove his claim. As this is a matrimonial matter, and proceedings are to be by enquiry, the Court set the matter down for the petitioner to prove her claim.

The relevant issues for the court to determine are;

1. Whether or not the marriage has broken down beyond reconciliation.
2. Whether or not the respondent should be ordered to pay a monthly maintenance of Ghs 1,000 for the children of the marriage,

THE CASE OF THE PETITIONER

In her evidence in chief, the petitioner said that the respondent behaves unreasonably and has committed adultery. That he is a violent person and physically abuses her at the least provocation. His actions ensured that there was no peace in the matrimonial home.

Further that the respondent is a womanizer and when she caught wind of his affair with another woman and confronted him, he almost beat her to death. That due to his constant assault she had to leave with the children to her parents' home. That was four years ago and she has since then continued to live with her parents.

Also that she attempted reconciliation for the sake of the children but the respondent warned her off and told her that he no longer had any interest in the marriage. Respondent is currently living with another woman and they are planning on getting married. He had shirked his responsibilities towards the children and the marriage.

Finally, that the unreasonable actions of the respondent towards her and the children of the marriage has caused her so much anxiety, psychological grief and trauma in the course of their marriage.

CONSIDERATION BY COURT

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

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 decides 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 divorce just like in all civil cases, the degree of proof required by law is that of a balance or preponderance of probabilities. See *section 12 (1) and (2) of the Evidence Act, 1975 (Act 323)*. In the case of *Adwubeng V. Domfeh [1996-97] SCGLR 660, the Supreme Court held that 'sections 11 (4) and 12 of the Evidence Decree, 1975 (NRCD 323) have clearly provided that the standard of proof in all civil actions was proof by a preponderance of probabilities – no exceptions were made''*. It is he who asserts who bears the burden of proof and so the burden of persuasion lies on him/her to lead cogent and positive evidence to establish the existence of his/her claim in the mind of the court. See the case of *Abbey & Ors v. Antwi [2010] SCGLR*

In Ghana, when a couple decides to marry under the Ordinance, then they can only obtain a divorce through the Courts. The court must enquire as far as is reasonable into

the reasons for the divorce and may either grant or refuse to decree a divorce after hearing. 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 which the offended party finds intolerable to live with; 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.

The contention of petitioner is that the respondent has behaved in such an unreasonable manner that she cannot be expected to continue to live with him. In determining what constitutes unreasonable behavior, the test to be applied is an objective one.

Hayfron Benjamin J (as he then was) held in the case of *Mensah v. Mensah (1972] 2 G.L.R. 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 behaviour 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 Cassanova's Charter. The test is objective".

This test was relied on by the Court of Appeal in the case of *Knusden v. Knusden [1976] 1 GLR 204-216* where the court held that "The cross-petition was based on *Act 367*,

Section 2 (1) (b) under which the test to be applied in determining whether a particular petitioner could or could not reasonably be expected to live with the particular respondent was an objective one, and not a subjective assessment of the conduct and the reaction of the petitioner.

In assessing such conduct, the court had to take into account the character, personality, disposition and behaviour of the petitioner as well as the behaviour of the respondent as alleged and established in the evidence. The conduct might consist of one act if of sufficient gravity or of a persistent course of conduct or series of acts of differing kinds, none of which by itself might be sufficient but the cumulative effect of all taken together would be so.”

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. Thus although the respondent has not presented his side of the story to the Court, the Court must through evidence of the petitioner, satisfy itself that the marriage has broken down beyond reconciliation. See the case of *Ameko vrs. Agbenu [2015] 91 G.M.J.*

The evidence of the petitioner is that the respondent is of a violent disposition and constantly abused her in the course of the marriage. That he is a philanderer and chose to assault her when she confronted him about his philandering ways.

His persistent assault led her to vacate the matrimonial home to her parents. When she tried to reconcile with the respondent, he refused on the basis that he was no longer interested in the marriage. That she is solely responsible for the maintenance of the children. Respondent is planning marriage with another woman that he currently co habits with.

Although the petitioner testified alone and did not rely on any documentary evidence, I found her to be a credible witness. Her evidence is borne out of issues that she had experienced in the marriage and she generally gave a good account of herself as a witness. I found her to be a witness worthy of credit.

In the case of *Ntim vrs. Essien [2001-2002] SCGLR 451*, it was held that in determining the credibility of a witness, the court must take into account *the demeanour of the witness, the substance of the testimony, the existence or non existence of any fact testified to by the witness, a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial, the statement of the witness admitting to untruthfulness or asserting truthfulness among others''*.

When a husband takes it upon himself to constantly abuse his wife physically, many would consider his actions as appearing to be unreasonable. This is because marriage is not considered to be a death trap and assault is not considered to be a regular incidence of marriage. When the said husband resorts to this violence and assault even when he is in the wrong to the extent that the wife has to move out of the matrimonial, then his actions would move from an appearance of unreasonableness to a definite finding of unreasonable behavior.

This is because it would be considered that his actions are so bizarre that it has forced the wife to desert the matrimonial home in order to save her life. That would be considered constructive desertion on the part of the husband. When the wife in consideration of the children, decides to attempt reconciliation and same is rebuffed by the husband who has behaved unreasonably, then the conclusion would be that the marriage has broken down beyond reconciliation.

Upon these findings, I hereby find that the marriage celebrated by the parties on the 27th day of March, 2014 at the Tema Metropolitan Assembly has broken down beyond reconciliation due to the unreasonable behavior of the respondent. I accordingly decree a dissolution of the said marriage and cancel their marriage certificate. The registrar of the Court is to notify the marriage registrar of the Tema Metropolitan Assembly of the said dissolution to enable them amend their records accordingly.

2. *Whether or not the respondent should be ordered to pay a monthly maintenance of Ghs 1,000 towards the maintenance of the children.*

The duty to maintain a child according to *Section 47 of the Children's Act, 1998 (Act 560)* falls on the parents of that child. It is settled that it is the duty of parents, where they each earn an income to provide for their children. See *Section 49 of Act 560* and the decision of *Dotse JA (as he then was) in the case of Donkor v. Ankrah [2003-2005] GLR 125* where he stated "where both parents of a child are earning an income, it must be the joint responsibility of both parents to maintain the child. The tendency for women to look up to only men for the upkeep of children is gone".

Maintenance of children involves providing them with the necessities of health and life; shelter by means of accommodation, food, clothing, education and medical care being the basic needs of every child.

The petitioner says she is a beautician whilst the respondent is a commercial driver. Both of them are workers who in the ordinary scheme of affairs, should earn an income. In the circumstances, it behoves on both of them to ensure that their children, to the best of the financial abilities of both parties, are maintained.

Again, *per section 22 of the Matrimonial Causes Act*, a court in proceedings under the Act, may on its own initiative make an order concerning a child of the marriage. The orders may include custody, right of access and the provision of education and maintenance of the child out of the property or income of either or both parties to the marriage.

Accordingly, on the basis that it is the primary duty of parents to provide the necessities of health and life of their children, it is hereby ordered that:

- a) Commencing from the last working day of July, 2023 and every month thereafter, the respondent is to pay the sum of one thousand Ghana cedis (Ghs 1,000) to petitioner as maintenance for the issues until they each turn twenty one years or complete their education or skill training. The amount is to be increased by 20% each year to account for the economic fluctuations.
- b) As these are growing children and one is already in her teenage years, their food consumption is expected to be on the high side and so the petitioner is to top up the maintenance provided by the respondent with whatever amount would be necessary to ensure that the children are adequately maintained.
- c) The respondent is also to provide a two bedroom apartment as accommodation for the children until the youngest turns twenty one years or the petitioner remarries; whichever is earliest in time. He is to do this within ninety days from the date of judgment.
- d) The petitioner is to pay for the utility and general maintenance by way of repairs of any broken amenities in the said home in order to keep it in a tenable condition.

- e) Respondent is also to pay for the school fees and all other school related bills of the issues. He is to pay directly to the school within the first one month of each school term and hand over the receipts or other evidence of payment to the petitioner.
- f) The petitioner and respondent is to provide for the medical needs of the children by paying all of their medical bills as at when same arises.
- g) The petitioner is to provide for all the clothing needs of the children.

Again, on the basis that the issues of the marriage are all female and have been living with the petitioner; their biological mother for the past four years, I find that it would be in the best interest of the children to continue to live with the petitioner.

They are used to her care and control and as females, it is best that they grow up with a female guiding hand to see them through the various stages of their development into adulthood, particularly so as the eldest is in her teenage years. The grant of custody to petitioner would also ensure that the children continue to live and grow together as siblings. The respondent is to have access during weekends of their vacation provided that he gives reasonable notice to the petitioner; a minimum of 48 hours.

Cost of five thousand Ghana cedis (Ghs 5,000) is hereby awarded to the petitioner against the respondent as costs incurred in prosecuting this action.

(SGD)

H/H BERTHA ANIAGYEI (MS)
(CIRCUIT COURT JUDGE)