CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 20TH JULY, 2023

SUIT NO. C5/48/23

P.O.1 CHRISTIAN KWAO KWADWO - PETITIONER

VRS

ESTHER AMOANI - RESPONDENT

JUDGMENT

On the 18th day of December, 2014, the parties herein desirous of becoming one unit and being legally recognized as such, celebrated their marital union under the ordinance at the Presbyterian Church of Ghana, Kojokrom, Takoradi. There are two issues of the marriage who are minors. Prior to their marriage, the petitioner had a son.

On the 30th day of November, 2022, the petitioner herein, having arrived at the conviction that the union he entered into with the respondent no longer served his purpose to be regarded as one unit, presented the instant petition for the otherwise impenetrable union to be dissolved. He prayed for a dissolution of their marriage on the grounds that same has broken down beyond reconciliation due to the unreasonable behavior of the respondent.

He prayed the court for;

a) Dissolution of the marriage celebrated between the parties at the Presebyterian Church of Ghana, Kojokrom, Takoradi on the 18th day of December, 2014

b) Reasonable access to the children of the marriage during vacations until they are of age.

The respondent in her answer and cross petition said their marriage was celebrated on the 18th day of October not December, 2014. That although there are lapses in their marriage, she has not committed any serious offence which the petitioner can rely on to insist on a divorce.

She prayed the court to grant the petitioner's relief for a divorce and also prayed the court to order the petitioner to pay the maintenance and all educational expenses of the children when due.

The issues for the court to determine are:

1. Whether or not the marriage has broken down beyond reconciliation
2. Whether or not custody of the children should be granted to the respondent with reasonable access to the petitioner.
3. Whether or not the petitioner should be ordered to pay maintenance as well as the educational expenses for the children of the marriage.

THE EVIDENCE OF THE PETITIONER

According to the petitioner, the respondent takes advantage of the fact that he supports her in doing housework to disrespect him as if he was her house boy. That he involved some pastors and respondent's parents to resolve the issue but matters became worse afterwards.

That in the year 2018, he took a loan of Ghs 20,000 for respondent to engage in business. She rather deposited it with Menzgold and same got locked up and he is still repaying the loan. He tendered in evidence EXHIBIT A as the loan documents.

That he again secured a loan of Ghs 20,000 in the year 2020 to establish a shop for the respondent with the understanding that she would use the profits to support the running of the home.

Further that due to work, he does not live with the respondent and the children. That the respondent maltreated his son whom he had brought into the marriage. That the son travelled shirtless and on foot all the way from their home in Tema Newtown to Afariwa Michel camp and begged a driver to take him to his grandmother (petitioner's mother) in Ho.

Also that the respondent has been defrauding him in the payment of the school fees of the children and as a result, he now pays the school fees of the children directly to the school. That upon information that the respondent does not sleep home at night and leaves the children with a neighbor, he came to the house unceremoniously on a number of occasions and confirmed this to be true.

He continued that a routine medical check up revealed that he had contracted a sexually transmitted disease and so he stopped having sexual intercourse with the respondent. That the respondent was impregnated by another man and after he refused paternity, she aborted the pregnancy.

That respondent makes decisions concerning the children without his knowledge and does not welcome his mother into their home. Respondent also makes frivolous

allegations about him to his superiors just to tarnish his image and lead to a possible dismissal.

Finally, that he is a minister of the gospel and most of his rehearsals are done in the house but the respondent makes that difficult and sends messages to his backing vocalists to deter them.

THE EVIDENCE OF THE RESPONDENT

According to respondent, she and the petitioner co habited in Takoradi after the celebration of their marriage until 2019 when they relocated to Tema. That the petitioner is stationed at Agorta near Sogakope in the Volta Region where he has been stationed for more than eight (8) years.

That the petitioner is irresponsible and only pays Ghs 500 each month towards the upkeep of the children. She pays for all school related bills concerning the children. That she took care of respondent's son when he was seven years old until he enrolled in Senior High School and the petitioner came for him due to a misunderstanding.

That they agreed to take a loan and invest in menzgold and also secure a shop. That save for when she goes out to execute decoration jobs, she does not sleep outside the matrimonial home and has never left the children under the care of a neighbor.

That respondent always cheats on her and must have contracted the sexually transmitted disease from his concubines and he is currently dating one of the ladies in his singing group. That she has never been pregnant and aborted same.

That petitioner once caused damages to some items in the matrimonial home and she complained to his boss to advise him. That petitioner is abusive and sometimes pushes her down.

That they have not lived together as husband and wife for the past three years and petitioner has totally lost interest in the marriage. As such, the marriage has broken down beyond reconciliation and same should be dissolved.

That custody of the children be granted to her with reasonable access to the petitioner. Further that an order be directed to the petitioner to maintain the children with Ghs 1,000 per month as well as pay their educational and medical expenses and provide them with accommodation.

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. Thus although the respondent in her answer admits that the marriage has broken down beyond reconciliation and also alleges unreasonable behavior and adultery, the Court through evidence must satisfy itself that the marriage has broken down beyond reconciliation. See the case of ***Ameko vrs. Agbenu [2015] 91 G.M.J.***

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.

Petitioner presented the petition for dissolution of their marriage. As the respondent had also cross petitioned, the burden of proof and persuasion laid on the each of them to establish their case. The respected ***Benin JSC*** in the case of ***John Tagoe v. Accra Brewery Ltd. [2016] 93 G.M.J. 103 @ 123*** *was convicted that: "It is trite law that he who alleges, be he plaintiff or a defendant, assumes the initial burden of producing evidence. It is only when he has succeeded in producing evidence that the other party will be required to lead rebuttal evidence, if need be***."**

The burden on both of them is akin to a double edged sword. Akamba JA (As he then was) in the case of ***Kwaku Mensah Gyan & I Or. v. Madam Mary Armah Amangala Buzuma & 4 Ors. (Unreported) Suit No. LS: 794/92 dated 11th March, 2005*** explained: *"What is required is credible evidence which must satisfy the two fold burdens stipulated by our rules of evidence,* **N.R.C.D. 323***. The first is a burden to produce the required evidence and the second, that of persuasion.* ***Section 10 & 11 of N.R.C.D. 323*** *are the relevant section.*

The petitioner's basis for arriving at the conclusion that his marriage to the respondent has broken down beyond reconciliation is that the respondent has behaved in such an unreasonable manner that he cannot be expected to continue to live with her as husband and wife and further that all attempts made by their families, pastors and friends to reconcile them have failed. Further that the respondent has committed adultery and aborted a pregnancy after he refused same.

The respondent cross petitioned for a dissolution of the marriage on the grounds of adultery, unreasonable behavior, failure to reconcile their differences after diligent efforts and not having lived together as husband and wife for the past three years.

I will first deal with the ground of adultery. Adultery is defined by the ***Blacks Law Dictionary (8th ed. 2004 at page 160)*** as "voluntary sexual intercourse between a married person and someone other than the person's spouse''.

The law recognizes that it is in the nature of a married couple to be protective of each other's attention especially to the opposite sex. It also recognizes that the nature of that protective character may lead one to be suspicious and anxious about the spouse's relationship with the opposite sex.

In order that a multitude of suspicions is not accepted as proof of adultery, the law requires that for conduct to amount to adultery, the spouse must have been found inflagrante delicto in the throes of passion with another or in such circumstances that the only inference that can be made is that they were about to or have just ended a passionate embrace involving their sexual orifices.

Petitioner's evidence falls into the category of a multitude of suspicions and mere assertions. The same goes for the respondent. They each makes assertions of adultery.

On the part of the petitioner, it is a claim that the respondent does not stay home at night and leaves the children with a neighbor. It is also a claim that he has been infected with a sexually transmitted disease and the respondent had aborted a pregnancy after he refused paternity. The respondent denies all these and the petitioner does not provide evidence of further details, circumstances or corroborative evidence by which the court could infer that his claim is more probable than not.

The respondent on her part also makes assertions of adultery by claiming that the respondent commits adultery with several women including one in his singing group. That she had to report his behavior to the elders of this group.

The petitioner denies this and so the burden fell on her to provide sufficient evidence from which the court could arrive at a finding that her claim was probable. She failed to and simply repeated her claims.

It is trite that a repetition of assertions on oath does not constitute evidence; particularly so where the other party disputes the claim. In the case of in the case of ***Emmanuel Osei Amoako v. Standford Edward Osei [2016] DLSC 2830. The venerable*** Appau JSC speaking for the Supreme Court held: *"It is trite learning that a bare assertion by a party of his pleadings in the witness box without more is no proof. Proof in law has been authoritatively defined as the establishment of facts by proper legal means. As the celebrated Ollenu, J (as he then was) stated in his judgment in the case of Khoury and Another v Richter, which he delivered on 8th December 1958 (unreported), on the question of proof, which he repeated in the case of* ***Majolagbe v Larbi & Anor [1959] GLR 190 at 192****; "where a party makes an*

averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true". See also the cases of ***International Rom Ltd. v. Vodafone Ghana Ltd. & Another [2016] DLSC 2791***

On the basis of the above analysis, I hereby find after my enquiry that neither party has been able to lead sufficient evidence in proof of their petition and cross petition for dissolution of their marriage on the grounds of adultery.

In the course of enquiry, both parties led evidence of various attempts by family and elders to reconcile them. Attempts have been made to resolve their differences by the respondent's family, brother in law and sister and by the petitioner's church elders.

They both aver that after each attempted settlement, the other party's conduct worsened. It appears that for the past three years, they have been more at war than in marriage with one issue after the other.

It is a legal known that there is no better proof of a fact than an admission by the opposing side and there can be no objection to a decision made by a court in reliance on such an admission. See the decision of the Supreme Court in the case of ***Opoku &Ors (No.2) vrs. Axes Co Ltd. (No 2) [2012] 2 SCGLR 1214.***

As both of them admit that their differences cannot be resolved, I find that that ground is proven and there is no need for further evidence of same. It is trite that proof of one

of the grounds is sufficient for the court to arrive at a conclusion that the marriage has broken down beyond reconciliation.

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''.

It is my considered opinion that when parties have been married for a reasonably lengthy period and have issues of the marriage, (particularly minors who would need the love and presence of both parents in their everyday lives), when they seek to go their separate ways, a court of competent jurisdiction in making enquiries as to the breakdown of the marriage, must seek to promote cordiality and civility between the parties during and after the court proceedings. That is healthy not only to the parties and their future relationship as co parents but to society as a whole.

To borrow the words of ***Sarkodee J (as he then was)*** in the case of ***Addo v. Addo [1973] 2 GLR 103,*** which he himself quoted from ***The Law Commission Report; Reform of the Grounds of Divorce. The Field of Choice, para. 15. (Cmd. 3123)*** '' For it is better: "When regrettably, a marriage has irretrievably broken down to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."

Upon these considerations, I hereby find after my enquiry that the marriage between the parties has broken down beyond reconciliation due to their inability to reconcile

their differences after diligent efforts. I accordingly issue a decree of dissolution to dissolve the said marriage which was celebrated under the ordinance on the 18th day of October, 2014, at the Presbyterian Church of Ghana, Kojokrom, Takoradi. Their marriage certificate issued to them in recognition of their marriage is hereby cancelled. The registrar is to notify the administrator of the Presbyterian Church of Ghana, Kojokrom, Takoradi of the cancellation to enable them amend their records accordingly.

1. *Whether or not custody of the two issues of the marriage should be granted to the respondent with reasonable access to the petitioner.*

There are two issues of the marriage, two girls who are under ten years of age. Whereas the respondent prays for custody of the said issues, the petitioner prays for reasonable access.

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 the need for continuity in the care and control of the child.

There is no dispute that the children have always lived with the respondent whilst the petitioner has been at his duty post in Sogakope and visits the family periodically. The respondent has been their primary carer and custodian till now.

Although the petitioner indicates that the respondent leaves the children at the mercy of a neighbor, he merely asserted without further evidence of facts, circumstances and events from which the court could infer the truth of his claim. He admits that due to his work, the children have always been in the custody of the petitioner.

Consequently, I find that it is in the best interest of the children to remain in the custody of their mother as this would ensure continuity of care and control as well as keep them together as siblings. Custody of both children is hereby granted to the respondent with reasonable access to the petitioner.

By reasonable access, the children are to stay with the petitioner during school vacations. He may also visit them during school term on weekends and holidays. He is to visit between the

hours of 7:am to 6:pm on such weekends and holidays and may take the children out of the home to recreational centres provided he returns them by 6:pm

2. *Whether or not petitioner should be ordered to provide accommodation, maintenance of Ghs 1,0000 per month as well as pay all educational expenses and of the issue of the marriage*

The respondent is praying for a monthly maintenance for the children of the marriage. Although in her answer and cross petition she did not provide any amount, in her witness statement, she prays the court to order the petitioner to pay the sum of Ghs 1,000 as maintenance per month. She also seeks an order for the petitioner to pay all educational expenses, hospital bills of the issue as they arise as well as provision of accommodation.

Although the respondent save for maintenance did not seek these other reliefs in her answer and cross petition, per section ***Section 22 (2) and (3) of Act 367, a*** court may on its own initiative make an order concerning a child of the household which it thinks reasonable and for the benefit of the child and such orders include provision for the education and maintenance of the child out of the property or income of both parties to the marriage.

From this provision, even if she had not sought for the reliefs in her witness statement, I can suo muto proceed to make such orders concerning the children of the household provided that same are reasonable and for the benefit of such children.

It is common knowledge that parents owe their children an obligation to provide them with the necessaries of health and life. As there is no dispute about the children being that of the parties, it stands to say that both the petitioner and the respondent owe them that duty.

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. See ***Section 49 of Act 560***

In this court, both parties have indicated that they are working. The petitioner is in the navy and the respondent says she is a clearing agent. Respondent also admits that the petitioner took out a loan to obtain a shop for her in the course of the marriage to enable her to trade in same.

As both of them work and earn an income, I hereby make the following orders in respect of maintenance of the children of the marriage:

a) *The petitioner is to pay all school fees and school related bills of the children including but not limited to books, transportation, feeding, school uniforms and extra classes.*
b) *The petitioner is also to provide for the feeding needs of the children by providing a monthly maintenance of Ghs 800 each month commencing from the last working day of July, 2023 and payable on the last working day of each month. The amount is to be paid via Momo to the petitioner or into an account provided by the petitioner to the registrar of this court.*

c) *The respondent is to bear the petty medical bills of the children as at when they fall due. Where they have to be in hospital for treatment, both the respondent and petitioner are to bear the costs involved.*

d) *The respondent is to provide for the clothing needs of the children.*

e) *Both parties are to pay in equal proportions for a suitable accommodation for the children. The accommodation should be at the least, a one bedroom apartment.*

f) *The respondent is to pay the utility bills pertaining to the said accommodation.*

Each party is to bear its own cost in suit.

(SGD)

H/H BERTHA ANIGYEI (MS)

(CIRCUIT COURT JUDGE)