

CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 8TH JUNE, 2023

SUIT NO. C5/74/22

GLADYS NKIBOARE - PETITIONER

VRS

WINFRED CARROLL NOVIEKU - RESPONDENT

JUDGMENT

On the 22nd day of August, 2009, the parties herein celebrated their marital union under the ordinance at the St. Augustine Catholic Church, Ashaiman. Thereafter they cohabited at Ashaiman and Michel camp. There are three issues of the marriage aged between eleven and four years old.

On the 10th of May, 2022, the Petitioner presented the instant Petition for dissolution of their marriage on the grounds that same has broken down beyond reconciliation due to the unreasonable behavior of the Respondent. Further that all attempts made to reconcile them have failed.

She prayed the court for the following reliefs;

- a) That the marriage celebrated between the parties on the 22nd August, 2009 be dissolved
- b) That the Petitioner be granted custody of the children of the marriage with reasonable access to the Respondent
- c) Any other orders the honourable court may make

d) That either party bears its cost of action.

The Respondent in his Answer and Cross-Petition denied that the marriage had broken down. He contended that the Petitioner has deserted the matrimonial home and proceeded to particularize the unreasonable behavior of the Petitioner. He cross petitioned as follows;

- a) The Respondent says it is not in his interest for the marriage to be dissolved but if the Petitioner still insists on the divorce, the honourable court can proceed with it
- b) An order for the Honourable court to grant the Respondent custody of the children with reasonable access to the Petitioner because she is not always at home.

The issues for the court to determine are;

1. Whether or not the marriage celebrated between the parties has broken down beyond reconciliation
2. Whether or not custody of the three issues of the marriage should be granted to the Petitioner or the Respondent .

THE CASE OF THE PETITIONER

In her evidence-in-chief, Petitioner averred that at the time of their marriage, she was a student. The Respondent's uncle in the course of their marriage gifted them a piece of land and they used her salary and arrears to buy building materials to commence the construction of a two bedroom house.

She moved into the house with their three week old daughter when it was still uncompleted. The Respondent at the time was in Ho and only visited them on holidays.

Petitioner says that when Respondent realized she was continuing with the house, he asked her to stop.

They agreed that she would use her salary to maintain the home and he would use his to continue the building project. She agreed. However, after a year, she had cause to question the Respondent as he was not proceeding with the building project. She thereafter demanded that he maintain the home since he was not honouring his end of the agreement.

He refused and so she changed her job as a teacher to a field worker with cocoa board as same had better terms. The Respondent insisted that she choose between her new job or their marriage. The matter ended up before their pastors and Respondent agreed that she could take the job offer. He even helped her and the children to pack their personal belongings to her post at Asamankese.

After she settled at Asamankese, the Respondent kept insisting that she elects between him and her job. When she refused, he began to falsely accuse her of stealing his money and conniving with doctors to defraud him.

Petitioner says that the Respondent has never lived with her and the children for more than one month at a time. It was only once that the children went to spend the holidays with him at a station in Ho. He left the children on their own and expected the ten year old eldest child to take care of her younger siblings.

Petitioner says that she filed this Petition due to the Respondent's neglect of the family. After she filed the Petition, he began to remit them with an amount of GH¢300.00 per

month. Petitioner says the said amount is inadequate and cannot even cater for the extra classes fees of the children.

Petitioner says that in her absence, Respondent renovated their home and rented it out to tenants without her knowledge. She only found out when she came to the house and saw a stranger occupying her room. All attempts by the Respondent's uncle and some of his family members as well as his pastors to help reconcile their differences had failed.

THE CASE OF THE RESPONDENT

According to the Respondent, after their marriage his uncle gave him a piece of land where they finally moved into as their matrimonial home. He was in Ho and visited the family regularly.

Respondent says that their marriage has not broken down and the Petitioner has deserted the marriage in the name of getting a job. The Petitioner completed a masters degree programme without his knowledge and only informed him when she was about to graduate. Respondent says that he refused when Petitioner asked him to sell his car and use the proceeds for the completion of their building project.

He contended that he maintained the home and continued with the building at his own pace, and that he contributed to the maintenance of the home by giving cash to Petitioner and also buying foodstuffs and sending it to her.

Respondent says that the Petitioner did not discuss with him that she wanted a new job and so when she told him that she had a new job, he objected to her taking up the appointment. She insisted on taking up the job and refused to change her decision even after he had called her before their pastors.

Respondent says that after the Petitioner left for her new post at Asamankese, he visited her and urged that they forgive each other. The Petitioner came to their matrimonial home unannounced after deserting same for three years and tried to sack a tenant from the house. He attached EXHIBIT 1 and 2 as audio recordings of these incidents.

He continued that he has been visiting the Petitioner since she left for Asamankese with the children, and that on one of such visits, he found a sponge belonging to a man in Petitioner's bathroom. The Petitioner informed him in January, 2021 that she was no longer interested in the marriage and asked him not to call her again. She again confirmed her disinterest in the marriage in the presence of her family members when a meeting was convened to reconcile their differences.

Respondent says that the Petitioner always leaves the children with strangers and that does not portend well for the well-being of the children. Respondent also says the Petitioner has since August 2021, refused to allow the children to spend their holidays with him. She has also refused to allow them to speak to him on phone.

Respondent says that he went to visit the children at Asamankese in August 2022 but the Petitioner put up a hostile behavior and refused to allow their son to spend the night with him. He prayed the court to grant him custody of the children of the marriage as he is a teacher and would have more time to take care of them.

EVIDENCE OF R.W.1

Respondent's first witness testified and said he has been friends with Respondent since the year 2000. He was the MC for the marriage ceremony of the parties herein. The parties shared their challenges with him regularly and in 2019, the Petitioner informed him that

she had taken a loan to help the Respondent continue a building project but he refused same and so she used the money to enroll for her master's programme.

EVIDENCE OF R.W.2

R.W.2 is the elder brother of Respondent. He said he was present at a meeting between the families of the parties on the 8th of August, 2021, and that both parties aired out their grievances. The Petitioner had indicated that she was no longer interested in the marriage but they counselled both of them to reconcile for the sake of the children.

EVIDENCE OF R.W.3

RW3 is an uncle of the Respondent. According to him, he was aware that the parties were having some issues for which the families had attempted settlement. However, he was not invited for any settlement meeting. He said that he gave a piece of land to the Respondent prior to his marriage to the Petitioner.

CONSIDERATION BY THE COURT

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 his answer and cross-petition appears to be throwing in the towel that the court can grant the Petition if the Respondent so insists, the court must not simply decree a dissolution based on his acquiescence. The court through evidence must satisfy itself that the marriage has broken down beyond reconciliation before it pronounces a decree of dissolution. See the case of *Ameko v. 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, that is 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’s basis for arriving at the conclusion that their marriage has broken down beyond reconciliation is unreasonable behavior. As the Respondent has 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 sections.

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

The basis of Petitioner's claim that their marriage has broken down beyond reconciliation is the unreasonable behavior of the Respondent. Her evidence in sum is that the Respondent does not maintain the home and the children and she had to do it all by herself. When she took up a better paying job in order to provide for the home and the children, Respondent insisted that she chooses between the said job and the marriage.

Act 367 does not define what constitutes unreasonable behaviour. By virtue of the varied nature of mankind's character and sensibilities, it may very well prove a herculean task if an attempt is made to set in stone what acts constitute unreasonable behaviour. However, the test that is used is whether or not the act committed by one spouse is such that all right thinking men would hold that the act is unfair and unjust and the spouse who has been so offended, cannot be expected to continue to live with the other as husband and wife.

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.”

In the case of *Ansah v. Ansah* [1982-1983] GLR 1127, *Owusu Addo J.* held that “the test under the section, was whether the Petitioner could reasonably be expected to live with the Respondent in spite of the latter’s behavior. The test was therefore objective, but the answer obviously had to be related to the circumstances of the petition in question. That had to be a question of fact in each case. It followed that the conduct complained of must be sufficiently serious since mere trivialities would not suffice”.

The Respondent denies that he does not maintain the home and the children or that he asked the Petitioner to choose between her job and the marriage. Although the Petitioner did not call any witness, she testified of events, facts and circumstances that established the existence of her claim in my mind. She also maintained her grounds under cross-examination and appeared to the court as a witness of truth.

Under cross-examination by the Respondent, she answered;

Q: *Do you pay our children's school fees or not?*

A: *My Lord, he pays part and I pay the rest.*

Q: *I put it to you that save for our first child whose first school fees you paid when she was enrolled in school; I have been responsible for paying the school fees of our children solely.*

A: *My lord, that is not so. Even for this term, the total school fee for all three children is GH¢4,300.00 and the Respondent has paid only GH¢ 1,200.00 as his part.*

Q: *I put it to you that the total bill for the school fees of the children this term is GH¢1,100.00 or thereabout.*

A: *My lord, that is not true, I have the school bill and receipt here and it is not that amount. We have stationery, school fees, transportation and then feeding, and out of all these, he decided to take up the school fees.*

Indeed, the answers provided by the Respondent under cross-examination as to maintenance corroborated some of the claims of the Petitioner. Under cross examination by the Petitioner, Respondent answered;

Q: *Per paragraph 13 of your evidence in chief, you indicated that you contribute to the upkeep of the children and I. Can you quantify this per month?*

A: *My lord, ranging between GH¢500.00 to GH¢700.00*

Q: *Based on your answer, did you give us anything in January 2023?*

A: *Yes, my lord.*

Q: *Through what means?*

A: *I paid school fees of GH¢1,100.00 and GH¢710.00 for book fee.*

Q: *I am talking about upkeep not fees.*

A: *I sent GH¢300.00 in January but in February, because of the fees I paid, I did not send anything.*

Q: *Do you have any proof that you sent me GH¢300.00 in January?*

A: *Yes, my lord. I would check from my phone and see if I still have the record.*

Q: *I suggest to you that you have never sent anything from January to now for any upkeep for the children.*

A: *My lord, I sent money.*

Q: *I put it to you that it is due to your inability to take care of us that I looked for an extra job.*

The Respondent tendered in evidence various audio recordings as proof of interactions with the Petitioner ; particularly about the renting out of the matrimonial home. He had also tendered in evidence a picture of a shirt which he alleged got torn during a quarrel with the Petitioner. Yet, when the onus fell on him to lead evidence to avoid a finding against him on the matter of maintenance of the home and children, he could not tender in evidence even one mobile money transaction indicating remittances to the Petitioner.

Again, he called three witnesses who all but danced around the issue of him not maintaining the children and the home. They were all evasive and appeared suddenly not to remember complaints the Petitioner had made to them about this issue. RW2 was particularly evasive and chose to remember only what supported the case of the Respondent who is his brother.

Although both he and RW1 mentioned challenges between the couple, they could not specifically speak as to the exact challenge. RW2 wants this court to believe that whereas he could remember the litany of complaints that the Respondent who is his brother had made against the Petitioner at a family meeting, he could not entirely remember the

complaints of the Petitioner against the Respondent and the decision the family had taken about that complaint. I found him not to be a credible witness.

Same can be said for RW3. RW3 informed the court prior to being sworn that he had not been to church in a while and so did not wish to swear on the Bible or cross. When asked if he was a traditionalist and wanted to swear by his idol, he answered in the affirmative. He then proceeded to conveniently forget the name of his idol and after sometime, affirmed. His actions paint the picture of a person who had decided not to tell the truth and who did not want to commit himself to telling the truth, particularly so, as he proceeded to conveniently forget issues which were unfavourable to the cause of his nephew; the Respondent.

I am mindful of the admonition by Brobbey JA (as he then was) in the case of *GPRTU V Ntrakwa [1999-2000] 2 GLR 278* where he held that “the evidence of a witness who is a relation is no doubt to be treated with caution for the obvious reason that it is said that blood is thicker than water. It cannot be taken on its face value like the evidence of a witness who is no relation of any parties. It has to be examined to determine whether it is tainted by bias, prejudice, interest, motive etc and it may be rejected for any of these. If none of these can be read into the evidence, it may be considered on the same basis that any other evidence before the court will be equally examined”. See also *Nkaeguo v Konadu [1974] 2 GLR 150*.

After examining the evidence of Respondent’s witnesses who are his bosom friend, his elder brother and his uncle respectively, I reject their evidence on grounds of bias and the fact that it was tilted solely towards the interest of the Respondent. Simply producing witnesses is not sufficient; the witnesses and their evidence must be credible and worthy of belief.

Furthermore, on Petitioner's claim that the Respondent had asked her to elect between her job and the marriage, although the Respondent denied, his evidence in chief is replete with evidence that he had done all he could to prevent the Petitioner from taking up her new post including calling in their pastors to speak to her not to go. This is despite the fact that he was staying in Ho and so they were not staying as a unit and he could just as he did at Kakasunanka, visit the Petitioner and the children in her new station at Asamankese.

His evidence also shows that even after he agreed for the Petitioner to take up the post with the children and assisted them to relocate, he kept up his demand for the Petitioner to quit that job anytime he visited them.

Respondent on his part says the Petitioner deserted the matrimonial home for three years. I cannot see my way clear on this claim because he did not challenge the claim of Petitioner that he assisted her and the children to relocate to Asamankese. Again, his own evidence shows that he used to visit them at Asamankese periodically. Upon his own evidence, it cannot be said that the Petitioner abandoned the matrimonial home.

It is the responsibility of a couple when they both earn an income to provide for their children's basic needs. When the man works and due to work does not live with the family, it means the physical burden of caring for the children falls squarely on the woman. One would expect that the man does his part by providing if not all, then a reasonable part of the financial burden. When he decides not to do so, then the woman becomes burdened both physically and financially.

When due to this burden, the woman takes on a different job and the man does not support it and insists as head of the home that she refuses and/quits that job, many a reasonable man would come to the conclusion that the man is unreasonable. To further get to know that your husband has rented out the matrimonial room without your knowledge and consent and has not utilized any of the rent revenue to provide for the children is enough to lead any reasonable person to a conclusion that their marriage is simply not in their interest.

Upon these findings, I hereby hold that the actions of the Respondent were unreasonable and the Petitioner cannot be expected to continue to live with him as husband and wife. On that basis, I hereby hold that their marriage has broken down beyond reconciliation due to the unreasonable behavior of the Respondent. A decree of dissolution is hereby issued to dissolve the marriage celebrated between them on the 22nd day of August, 2009. Their marriage certificate is accordingly cancelled. The Registrar is to notify the administrator of the St. Augustine Church, Ashaiman of the cancellation to enable them amend their records accordingly.

2. Whether or not custody of the three issues of the marriage should be granted to the Petitioner or the Respondent.

There are three issues of the marriage, two girls and a boy aged between 13 and 6 years old. Both parties are claiming custody of the children.

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 Petitioner. Even when she was in the matrimonial home, she lived in same with the children whilst the Respondent was stationed in Ho. The Respondent visited the family periodically. She left for Asamankese in 2019 with the children and has been their primary care giver and custodian until now.

From their evidence, the children are well settled in Asamankese and are enrolled in school. The eldest child is currently a teenager and she would need the guiding hand of

a female to guide her through her teenage years. The second child is also female and the last is a boy who is about six years old. They have all lived together as siblings with their mother for all of their young lives.

Although the Respondent indicates that the Petitioner leaves the children at the mercy of visitors and friends, 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. Indeed, he was the one who assisted the Petitioner and the children to relocate to Asamankese.

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 all three children is hereby granted to the Petitioner with reasonable access to the Respondent.

Although the Petitioner did not seek the relief of maintenance provision for the children, she sought for the court to grant her any other reliefs as it deems fit. 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.

Dotse JA (as he then was) in the case of Donkor v. Ankrah [2003-2005] GLR 125 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**.

Both parties earn an income. The Petitioner is a field worker with Ghana Cocoa board and the Respondent is a teacher. In the circumstances, I hereby proceed to make the following orders with regard to maintenance of the issues of the marriage;

- a) *The Respondent 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 Respondent is also to provide for the feeding needs of the children by providing a monthly maintenance of GH¢1,200.00 each month commencing from the last working day of June, 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 Petitioner is also to bear the petty medical bills of the children as at when they fall due. Where they have to be in hospital for treatment, the Respondent is to bear the costs involved.*
- d) *The Petitioner is to provide accommodation and pay the utility bills pertaining to the said accommodation.*
- e) *The Petitioner is also to provide for the clothing needs of the children*

Ordinarily, I would have awarded costs in favour of the Petitioner. However, as she prays that each party bears their own costs in suit, it is so ordered.

(SGD)

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