CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 2ND MARCH, 2023

**SUIT NO. C5/66/22**

**CHRISTIANA CHARWAY - PETITIONER**

**VRS**

**SAMUEL ABERKAH - RESPONDENT**

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**JUDGMENT**

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The parties to this action celebrated their marital union under the ordinance at Tema on the 3rd day of December, 2007. There are three (3) issues of the marriage who are all minors. According to the petitioner in her petition presented to this Court on the 14th day of April, 2022, their marriage has broken down beyond reconciliation and she cannot reasonably be expected to continue to live with the respondent.

She prayed the court for the following;

1. A dissolution of the marriage
2. An order directing the respondent to pay a lump sum of twenty thousand Ghana cedis (Ghs 20,000) as compensation.
3. An order of the court granting custody of the three children to the petitioner
4. An order of the court ordering the equitable distribution of the matrimonial properties
5. Another order of the court directing the respondent to maintain the issues of the marriage with one thousand Ghana cedis (Ghs 1,000) per month and pay their school fees, medical bills etc.

The respondent in his answer denied that the marriage has broken down beyond reconciliation. He contended that for the past years, he has invited pastors, family members and friends to resolve their differences but the petitioner has not availed herself.

That if the petitioner is insistent on a dissolution of the marriage, then the court should grant same. He cross petitioned for a dissolution of the marriage and also for custody of the children with reasonable access to the respondent. He averred that the petitioner is not entitled to her other reliefs as she deserted the matrimonial home.

**THE CASE OF THE PETITIONER**

In her evidence in chief, the petitioner averred that the respondent has always been in amorous relationships with several women in the course of their marriage. That her complaints about this behavior led to him abusing her emotionally and physically sometimes. That the respondent did not change his behavior despite advise from their pastors.

Further that the respondent once locked her out of the matrimonial home and it took the intervention of their pastor for him to allow her to sleep in the house. At dawn, the respondent woke her up and asked her to leave the matrimonial home. That prior to this, the respondent once attempted to strangle her.

Petitioner continued that during the pendency of the marriage, they built a house which served as their matrimonial home. That she contributed by way of purchasing blocks, roofing sheets, tiles and also fetching water for the masons to build. That she also dug and carried sand to fill the rooms before the floors were made as well as cooked for the workers.

**THE CASE OF THE RESPONDENT**

The respondent's evidence in chief is that petitioner is lazy, irresponsible, disrespectful and does not perform her duties as a wife even though she is always at home. That it is when he confronts her about this that she claims he verbally assaults her. That petitioner is fond of invoking curses. That she is also unkempt and he has to clean around her shop for her.

Further that petitioner is jealous and accused him unnecessarily of having affairs with women. That he is solely responsible for the maintenance of the home and the petitioner has told him that she would rather use her money to buy land than assist him with same.

That the petitioner deserted the matrimonial home during the Covid -19 lockdown. That he has custody of the first child who is a boy whilst the petitioner's mother has custody of the two girls. That the petitioner herself does not live with the two female children and her mother also sometimes abandons the children alone for about one month.

That the two girls are not doing well in school and the petitioner and her family has denied him access to them. He only visits them in school to pay their school fees. That the Court should grant him custody of the two female children.

**ISSUES**

The issues for the court to determine are;

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

2. Whether or not the petitioner is entitled to twenty thousand Ghana cedis (Ghs 20,000) as financial settlement.
3. Whether or not the petitioner is entitled to an equitable share in the matrimonial property.
4. Whether or not custody of the issues should be granted to the petitioner or to the respondent.
5. Whether or not the respondent should be ordered to maintain the children with one thousand Ghana cedis (Ghs 1,000) a month as maintenance as well as pay their school fees and medical bills when they fall due.

**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 her answer admits that the marriage has broken down beyond reconciliation and also alleges unreasonable behavior and adultery on the part of the petitioner, the Court through evidence must satisfy itself that the marriage has broken down beyond reconciliation. 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 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's basis for arriving at the conclusion that their marriage has broken down beyond reconciliation is unreasonable behavior. 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***."**

Thus the petitioner who is asserting the positive bears the burden of establishing her case on a balance of probabilities. The burden on her 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 her 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 him as husband and wife.

The evidence on record however shows that the parties had not lived together for two (2) years prior to the presentation of this petition. The petitioner avers that the respondent asked her to vacate the matrimonial home whereas the respondent says she deserted the home on her own accord. Although they both do no lead sufficient evidence as to the circumstances leading to the petitioner vacating the matrimonial home, they both agree that she did leave the matrimonial home and they have since been leading separate lives.

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) v. Axes Co Ltd. (No 2) [2012] 2 SCGLR 1214.***

According to the respondent, their cohabitation ceased during the Covid-19 lockdown in the country. I take judicial notice that the lockdown was in March, 2020. The petitioner filed this petition in April, 2020. That means that they had lived apart as husband and wife for more than two (2) years prior to her presentation of the petition.

Both parties agree that before this occurred, they were having issues with their marriage that affected communication. In this court, they have both made it clear that their marriage cannot be salvaged. The court sought to promote reconciliation at the initial stages of this petition but both parties were adamant that their marriage could not in anyway be salvaged.

It is not only manifestly evident that the chords of their heartstrings have sagged towards each other, they have been leading separate lives and have "shared'' the

children such that the eldest child who is male live with the respondent whilst the two others who are female live with the petitioner's mother. They have settled into independent lives and the only remnant of their marriage is their marriage certificate.

***Section 2 (1) (d) of the Matrimonial Causes Act, 1971, (Act 367) provides that;***

2. (1) 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:

> (d) that the parties to the marriage have not lived as man and wife for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the grant of a decree of divorce; provided that such consent shall not be unreasonably withheld, and where the Court is satisfied that it has been so withheld, the Court may grant a petition for divorce under this paragraph notwithstanding the refusal; or

It is my opinion that when parties have been married for a reasonably lengthy period and have issues of the marriage, 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."

The parties have been married since 2007 and have three (3) children. As at the time of the presentation of this petition, they had been married for over fourteen (14) years. There is clear and incontrovertible evidence that their marriage was on the rocks for more than two (2) years prior to the presentation of this petition and each of them have made it clear that they consent to this dissolution.

The two grounds having been met, I hereby hold that the marriage between the parties has broken down beyond reconciliation as the parties had not lived together as husband and wife for a period exceeding two years prior to the filing of this petition and both sides consent to the dissolution of their marriage.

Consequently, I hereby decree a dissolution of their marriage celebrated on the 3rd day of December, 2007 at the Tema Metropolitan Assembly. Their marriage certificate issued to them in recognition of their marriage is hereby cancelled.

2. ***Whether or not the petitioner is entitled to Ghs 20,000 as financial settlement***

On issue two, the petitioner prays for financial provision in the sum of twenty thousand Ghana cedis (Ghs 20,000). In the case of ***Oparebea v. Mensah [1993-94] 1 GLR 61,*** the court held that in order to determine a claim made under ***Section 20 (1) of the Matrimonial Causes Act***, the court must examine the needs of the party making the claim and not the contributions of the parties during the marriage.

The case of ***Riberiro v. Ribeiro [1989-1990] 2 GLR 109*** provides a good guidance to a court when making decisions on financial provision. My consideration should not only be based on the need of the respondent but also on the financial strength of the petitioner as well as the standard of living to which the other spouse was accustomed to during the marriage. See the case of ***Aikins v. Aikins [1979] GLR 223***.

Factors to be considered in arriving at an equitable decision include the earning capacity or income of the parties, property or other financial properties which each of the parties has or is likely to have in the foreseeable future, the financial needs, obligations and responsibilities of each of the parties and the standard of living enjoyed by the family before the breakdown of the marriage.

Both parties work. The petitioner is a caterer whilst the respondent is an electrician. The evidence of the respondent is that although they both worked, he was solely responsible for the maintenance of the home and the children in the course of their marriage. That is an indication that he provided solely for the petitioner as his wife. Now that they are no longer husband and wife, he is not obligated to provide her with her needs and wants any longer.

In order to ensure that the petitioner is cushioned from this sudden change, the respondent is hereby ordered to pay her the sum of ten thousand Ghana cedis (Ghs 10,000) as financial settlement within ninety (90) days from the date of judgment. Failure of which the amount would attract interest at the prevailing commercial bank rate from the date of judgment till the date of final payment.

3. ***Whether or not the petitioner is entitled to an equitable share in the matrimonial property.***

The evidence of the petitioner is that they acquired their matrimonial home in the course of the marriage and she contributed to it by purchasing blocks, roofing sheets as well as tiles. That she also cooked for the workers amidst others.

The respondent denied this and said the petitioner did not contribute in any way towards the construction of the matrimonial home although same was constructed in the course of the marriage. At page 17 of the record of proceedings, the respondent had answered under cross examination by learned counsel for the petitioner;

Q: *Your matrimonial home, when was it built.*

*A: I began to build it in 2013 and I moved to live in it in 2014 before the petitioner and the children came to join me later.*

*Q: So that house was built during the pendency of the marriage.*

*A: Yes, My Lord.*

Clearly, there is no dispute as to the fact that the matrimonial home was acquired in the course of the marriage of the parties. The law as espoused by the Supreme Court in reliance on Article 22 of the 1992 Constitution is that any property acquired by spouses during the course of their marriage is to be presumed (rebuttably) to be jointly acquired. In other words, property acquired by the spouses during marriage is presumed to be marital property unless contrary evidence is led. See the case of ***Arthur (No 1 vrs. Arthur No 1) [ 2013-2014] SCGLR 543, Vol. 1*** **which re-affirmed the decision in the oft cited case of** ***Gladys Mensah v. Stephen Mensah [2012] 1 SCGLR 391*** in which the veritable Dotse JSC in delivering the judgment of the court, gave effect to the provision in ***Article 22 of the Constitution, 1992***.

The principle to be applied in the distribution of marital property is that of equality is equity. See the majority decision in the Supreme Court case *of* ***Peter Adjei v. Margaret Adjei [ Civil Appeal No.J4/06/2021) delivered on the 21st day of April, 2021***. *Pwamang JSC* in reading the majority decision held that "property acquired by spouses during marriage is presumed to be marital property. Upon dissolution of the marriage, the property will be shared in accordance with the "equality is equity" principle except where the spouse who acquired the property can adduce evidence to rebut the presumption''.

The dispute lies with any contribution that the petitioner made. In this court, although the petitioner had sought to put across a claim that she contributed by means of cash and her physical support to the building of the house, her learned counsel in cross examining the respondent appeared to have corroborated the claim of the respondent that the petitioner did not contribute in anyway towards the acquisition of the said home.

The respondent had insisted that petitioner refused to contribute any money to the upkeep of the home and to anything that would be of benefit to the family even when she was working. That even in her own business, when he sought to assist her to move from a kiosk to a container, she refused to contribute any of her earnings and said she would rather use same to buy land.

Learned counsel for the petitioner in cross examining the respondent at page 17 -19 of the record of proceedings;

*Q: Did your wife in any way assist in the putting up of the building.*

*A: No please.*

*Q: You see, your wife fetched water for the workers, contributed roofing sheets, cement blocks for the building of that house.*

*A: No please. I built the house in 2013 and that year was when she and the children were living with her mother. At the time, we had had our second born. The child was young and she was taking care of her at home all the time. They were at Prampram and the house was at Mateheko.*

*Q: I further put it to you that your wife was visiting the building site and also cooking for the workers.*

*A: That is not so.*

*Q: I again put it to you that your wife was cooking for your household without you giving them chop money during the time because you said you were building the house.*

*A: That is not so because in all that time, I was giving her house keeping money, paying the school fees of our son and performing all my responsibilities.*

*Q: So do you want this court to believe the petitioner folded up her arms and you did everything in putting up that building.*

*A: Yes. Because before I even built that house, she told me that for her to assist me with her money, she would rather save it and use it to buy a piece of land. This was when I had decided to change the kiosk I had made for her to trade in into a container. I asked her to give me the little money she had so that I would top up and use it to secure the land where we would put the container for her to trade in. I went ahead to do the container for her and thereafter, I never asked her for any money as assistance.*

*Q: As an electrician, do you have a regular income.*

*A: No. I do not always have a job and so I do not get money every day but I used to do casual work at Nestle and apart from being an electrician, whatever work I find, I do it.*

*Q: You would agree with me that you asked her to help you financially to put up that building and that is when she said she will not add her money to the building.*

*A: That is not so. As earlier said, this was at the time I was to put up the container for her and I asked her for money to secure the land. The container was done by me in 2010 and I began to build the house in 2013 upon the advice of my brother.*

Cross examination serves many purposes, one of which is to put across one's claim. From this line of cross examination, particularly the last question and answer, the petitioner was admitting that she had refused to contribute financially towards the building of the house. That appears to destroy her own case that she had contributed by means of purchasing blocks, roofing sheet and tiles for the construction of the said house.

Both parties did not tender any documentary evidence in proof of their claim. The evidence as one of oath against oath. On this score, I found the respondent more credible than the petitioner. He had not only made an assertion but had remained consistent in his pleadings through to his evidence in chief and under cross examination by learned counsel for the petitioner.

When his evidence was challenged, he had also provided evidence of facts and circumstances from which the court could infer the truth of his assertions. The petitioner on the other hand was wavering in her claims as to contribution.

In ***Majolagbe v Larbi & Anor [1959] GLR 190 at 192***; *the court held that "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.***

The law is that it is not only financial contribution that would qualify as contribution to matrimonial property. Dotse JSC put it succinctly in the ***Mensah v. Mensah case (Supra)*** "a person who is married to another, and performed various household chores for the other partner…must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved''.

From the evidence on record, the petitioner was responsible for maintaining the home in the course of their marriage. As the respondent himself indicated under cross examination, she was at home taking care of the first born and the second one who was only a paper at the time that he was constructing the home.

Caring for children is a joint responsibility of parents and the fact that the petitioner was performing this function meant the respondent had all the time and energy to focus on working in order to acquire the means to build the house. The petitioner must thus not be discriminated against in the sharing of the matrimonial home now that they are divorced.

However, it would not be equitable to order for the said house to be shared equally. This is because although the petitioner was at home taking care of the children, the respondent provided for their maintenance and paid their school fees. Even though the petitioner worked and still works, she appears to have kept more of her income to herself than contributing to the home.

Since the respondent fulfilled his obligations to the home and still saved to build and the petitioner on the other hand, had the full benefit of her income, it would not be equitable that the respondent share in equal proportion the house that was acquired in the course of the marriage with the petitioner.

Accordingly, I hereby hold that the matrimonial home acquired in the course of the marriage be distributed in the proportion of 25: 75. 25% to the petitioner and 75 % to the respondent. Both parties have the first option of refusal.

4. ***Whether or not custody of the issues should be granted to the petitioner or to the respondent.***

On the issue of custody, 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.

The first child according to the respondent would be fifteen (15) years old this month. He is a boy. Per the parties own arrangement. As a teenager, it would be in his best interest to be with a father figure who would be able to guide him through the turbulent years of teenage hood and with whom he can readily share his experiences and receive guidance. On that basis, custody of the eldest issue is granted to the respondent with reasonable access to the petitioner.

The other two children are females between the ages of 10 and 6. The petitioner prays for custody on the basis that as their biological mother, she is the most appropriate person to take care of them. The respondent disputes this and insists that the petitioner has left the children in the care of their grandmother and the children are not being well taken care of.

That the petitioner's mother lives in a different area with the children whilst the petitioner also leaves somewhere else and only goes to see the children on some weekends. Further that the petitioner's mother sometimes leaves the children alone and unattended to in the house for a month to go and attend to her other daughter who has given birth.

From the evidence on record, I have cause to believe that the children indeed do not live with the petitioner but rather with their grandmother at Prampram. However, the respondent does not provide a better alternative. He agrees that he is also seldom at home by virtue of his work and so if the court grants him custody, he would either engage the services of a nanny or have his mother come around to take care of the children.

It appears both parties cannot take care of the children themselves and they would be left at either the mercy of a grandmother or a nanny. As it stands now, the children already live with one grandmother and have been doing so for more than two (2) years. As the respondent himself testified, they are in school at that place. It would not be in the best interest of the children to move them away from an environment which is known to them and from the continuous care of one grandmother only to entrust them to another grandmother if they are in luck or a nanny who would be a total stranger.

On that basis, I hereby grant custody of the two younger children to the petitioner. The petitioner is to take steps to ensure that she plays a more active role in the lives of these children as they are girls and would require her guiding hand. The respondent has reasonable access. He is to have access to the children on all vacations and during mid terms. As the eldest child is with him, in order to ensure that the children grow up knowing each other well, the respondent has access to two youngest children every

fortnight from Friday after close of school to Monday morning when he would return them to school.

5. ***Whether or not the respondent should be ordered to maintain the children with one thousand Ghana cedis (Ghs 1,000) a month as maintenance as well as pay their school fees and medical bills when they fall due.***

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 decisi*on 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".

Both parties work and earn an income. Indeed, the petitioner postulates that her inability to be with the children at all times is because she has to wake up very early to go to work and she returns very late. On the basis that it is the primary duty of parents to provide the necessaries of health and life of their children, I hereby make the following orders;

1. The respondent is to provide for all needs including educational and medical needs of the eldest child who is with him.
2. The respondent is to pay the amount of six hundred Ghana cedis (Ghs 600) each month commencing from the last working day in March, 2023 towards the maintenance of the two younger children. When the children are with him on vacations which are upto a month or more, he is not to pay maintenance to the petitioner for those months.

3. The respondent is also to provide for the school fees and all other school related bills of the two younger children.
4. Both parties are equally responsible for the medical bills of the two issues.
5. The petitioner is to provide for the clothing needs of the children as well as all other bills not expressly mentioned in this judgment.

Each party is to bear their own cost in suit.

**H/H BERTHA ANIAGYEI (MS)**

**(CIRCUIT COURT JUDGE)**

ERIC PONGO FOR THE PETITIONER