CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 9TH MARCH, 2023

SUIT NO. C5/8/23

MATILDA ACQUAH MENSAH - PETITIONER

VRS

CAPTAIN EMMANUEL PAINTSIL DJABAH - RESPONDENT

JUDGMENT

The parties to this action celebrated their marriage on the 16th day of May, 2015. There are two (2) issues of the marriage aged between seven (7) and four (4) years. The basis of her petition is that the marriage has broken down beyond reconciliation on the grounds that they have been separated and have not lived as husband and wife since December, 2017.

That the respondent has behaved in such an unreasonable manner that she cannot continue to live with him as husband and wife as he has refused to communicate with her without just cause since December, 2017; a few weeks after the birth of their second child. That the respondent also packed her things out of his place of abode and had same sent to her.

She prayed the Court to:

1. Dissolution of the marriage celebrated between the parties at the Tema Municipal Assembly on the 16th day of May, 2015

2. Custody of the two children of the marriage
3. Respondent to maintain the children with at one thousand Ghana cedis (Ghs 1,000) per month and be responsible for their educational and medical needs when they arise till they are of age.

The respondent in his answer and cross petition denied having behaved in an unreasonable manner and said it is rather the petitioner who has behaved unreasonably. That he came across Whatsapp messages between the petitioner and one Peter which were suggestive of an amorous relationship.

That he presented the evidence to petitioner and her family and stated his decision to be separated from the petitioner. That it was petitioner who came to pack the bulk of her belongings out of his residence. He admitted that the marriage has broken down beyond reconciliation and said it is due to the sexual indiscretions of the petitioner.

He cross petitioned for a dissolution of the marriage on the grounds that they have not lived together as husband and wife since December, 2017, that the petitioner has committed adultery and also that petitioner has behaved in such an unreasonable manner that he cannot be expected to continue the marriage. He also prayed the court to grant him reasonable access to visit and spend time with the children.

In the course of proceedings, the parties filed terms of settlement with respect to the ancillary reliefs on the 5th of December, 2022. That left the only issue to be determined by the court to be whether or not their marriage has broken down beyond reconciliation.

THE CASE OF THE PETITIONER

In her evidence in chief, the petitioner testified that they cohabited at Koforidua in the Eastern Region after their marriage. That whilst pregnant with their second child, respondent told her he would have a conversation with her after the birth. However, he refused to have the said conversation with her after birth even though she prompted him.

That respondent packed her belongings and had them sent to her without prior notice or just cause. That he also refused to give her parents any reason for his actions and he also blocked her from contacting him. That she went to his residence on two occasions but he was absent. That respondent unblocked her and after several messages from her, he responded "can't you see that I am no more interested in the marriage?"

That this was in December, 2017 and they have since been separated. That all attempts by family and friends to reconcile them has failed and in light of all that has happened, they cannot continue to live together as husband and wife.

THE CASE OF THE RESPONDENT

According to respondent, he is an anaethetist. That he was transferred to Nsawam and then to Kade on relieving duties after their marriage. It was during this period that he came across evidence by way of WhatsApp messages between the petitioner and one Peter indicative of an amorous relationship between them. He tendered the said messages in evidence as EXHIBIT 1.

That he communicated his decision to separate from the petitioner to her and her family. That they have since December, 2017 not lived as husband and wife and the petitioner's family have taken steps to customarily dissolve the marriage. That the petitioner has caused him irreparable heartbreak and misery by her actions with the said Peter and he cannot be expected to continue with the marriage.

CONSIDERATION BY 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***."**

I would first consider respondent's claim of adultery on the part of the petitioner with one Peter. 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''.

Section 43 of Act 367 also defines divorce as the "voluntary sexual intercourse of a married person with one of the opposite sex other than his or her 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.

Again, the incident of an adulterous relationship can be the evidence used to prove same. Thus there can be no better proof of adultery than a pregnancy and/or the child emanating from the adulterous relationship.

Petitioner in proof of his claim of adultery, tendered in evidence EXHIBIT 1. It is a series of WhatsApp conversation between the petitioner and one Peter. The petitioner does not deny same. She also did not challenge these claims under cross examination as she asked no questions of the respondent.

It is a hallowed principle of law that when evidence of a fact is led and the opposing party fails to cross examine on same, he is deemed to have accepted same. See the case of ***Vanguard Assurance Co. Ltd v. JM Addo & Sons Ltd [2016] 93 G.MJ. 160*** where the court held that "where a witness testified on oath on certain vital matters and the opposing side was silent in his cross examination of those matters, he would be taken to have admitted those matters''.

By not challenging this piece of evidence, petitioner was agreeing to its veracity. Her silence or failure to cross examine amounts to an admission. In the case of ***In Re Presidential Election Petition: Akufo-Addo & 2 Ors. (No. 4) v. Mahama & 2 Ors. (No. 4) [2013] SCGLR (Special Edition) 73***, Anin Yeboah JSC (as he then was) held at page 425: *"I accept the proposition of law that when evidence led against a party is unchallenged under cross-examination, the court is bound to accept that evidence"*

The conversations are dated the 4th of January, 2017 and 4th September, 2017. They are explicit conversations involving sexual contents with the petitioner and the said Peter both making declarations of being horny for each other and making declarations of having missed each other sexually. In the course of the conversation, the petitioner asked the said Peter to get a divorce from his wife so they could get married.

The conversation is quite explicit and is manifestly clear that the petitioner and the said Peter have had sexual contact. It also indicates that the status of petitioner being a

married woman was known to the said Peter and his status of being a married man was also known to the petitioner.

However, the conversation is not manifestly clear as to when the parties had sexual intercourse and as the respondent indicated in his evidence in chief, the said conversation is suggestive of an amorous relationship but does not indicate with certainty without this was in the course of the marriage. This is particularly so as the petitioner had at the tail end of the conversation refused an invitation to visit the said Peter so they could have sex.

Although the actions of the petitioner are not a clear indication of adultery, the fact that the respondent did not live with her as husband and wife after she delivered in December, 2017 is indicative that he found her act to be of sufficient gravity such that he could not continue to live with her as husband and wife. He says she behaved unreasonably and he cannot be expected to live with her as husband and wife.

Act 367 does not define what constitutes unreasonable behaviour. By virtue of the varied nature of mankind 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."

The parties both indicate that petitioner delivered their second baby in 2017 and the petitioner says the said child was three weeks in December, 2017 when the respondent came only for the first child for a visit. That means that all things being equal, at the time the petitioner was engaged in the explicit conversation with the said Peter in September, 2017, she was heavily pregnant with the second child.

The history of their marriage shows that they celebrated their marriage in May, 2015 and had one child prior to the petitioner's conversations with the said Peter. Their marriage was a young marriage of about two (2) years and the respondent per the

nature of his job had been transferred to Nsawam and then to Kade. That means he was not stationed in the matrimonial home.

In the circumstances, to find out that your wife who was heavily pregnant was engaged in conversations with another man which clearly showed that they had had sexual intercourse, for your wife to express how much she missed the man and the sex and further suggest that the man divorces his wife and come to marry her, would be quite heartbreaking for any reasonable man.

The respondent showed great restraint by holding on to the information till after the birth of their second child. However, his reaction from then has evinced a clear intention not to continue with the marriage. He cut off all communication with the petitioner, notified her and her family after she gave birth of his intention to separate from her and has remained separated from her since then. There has not been any attempt at salvaging their marriage after the birth of the second child.

Indeed, the petitioner does not appear remorseful. She appeared in this court heavily pregnant during proceedings and upon enquiry by the court, submitted that she was seven months pregnant. Clearly, she has come to terms with the fact that the respondent does not intend to continue with the marriage and has taken steps to move her life in a different direction even before the dissolution of the marriage.

To borrow the words of Edusei J. in the case of ***Happee v. Happee [1974] 2 GLR 186***, "I must confess that no man, no matter how large his heart, can pull along with such a wife…….And no man, however conciliatory he may be can, even with the patience of the biblical Job, tolerate a woman of the calibre of the respondent''.

On the available evidence, I hereby find after my enquiry that the marriage between the parties has broken down beyond reconciliation due to the unreasonable behavior of the petitioner.

Consequently, I hereby decree a dissolution of their marriage celebrated on the 16th day of May, 2015 at the Marriage Registry of the Tema Municipal Assembly. Their marriage certificate issued to them in recognition of their marriage is hereby cancelled. The Registrar is to notify the Registrar of Marriages of the said cancellation to enable them amend their records accordingly.

Let the terms of settlement in respect of the ancillary reliefs filed in this court on the 5th day of December, 2022 at 10:41am and which is duly signed by the parties and respondent's lawyer be and same is hereby adopted as consent judgment. The usual default clause applies.

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUGDE)

FLORENCE MIREKUAH AKUMOAH FOR ALPHANCY DARAMY FOR THE RESPONDENT PRESENT