IN THE DISTRICT MAGISTRATE COURT HELD AT NSAWAM N.A.M.A. ON 23RD NOVEMBER 2022 BEFORE HER WORSHIP SARAH NYARKOA

SUIT NO. A4/19/22

ANNOR VERA GYAMFUA …… PETITIONER
NSAWAM

VRS

ANDY-REAGAN NAEROH ……. RESPONDENT
ST. MARYS SECONDARY SCHOOL
ACCRA

PARTIES: PETITIONER PRESENT. RESPONDENT ABSENT.

NO LEGAL REPRESENTATION

JUDGEMENT

The Petitioner commenced this instant divorce petition praying the Court for the following reliefs:

a. An order for dissolution of Ordinance marriage between Petitioner and Respondent dated 30th November 2019.

b. An order granting the custody of the child to the Petitioner with reasonable access to the Respondent.

c. Monthly maintenance order of five hundred Ghana cedis (GHS500) against respondent including payment of school fees, medicals and other necessities of the child.

Throughout the pendency of the suit, Respondent appeared in Court only once. On the day that the Respondent attended Court, which was on the 29/06/2022, the Court ordered the Respondent to file his Answer to the Petition and also ordered both parties to file their Witness Statements. The Respondent did not file the processes as ordered by the Court and also failed to attend Court thereafter. Hearing notices were served on him and yet he

failed to appear. The Court in pursuance of Order 25 of the District Court Rules, C.I. 59, proceeded with the trial in the absence of the Respondent.

Order 25 r 1(2) (a) provides;
"*Where an action is called for trial and a party fails to attend, the trial magistrate may where the Plaintiff attends and the Defendant fails to attend, dismiss the counterclaim if any and allow the Plaintiff to prove the claim*"

PETITIONER'S CASE

The Petitioner averred that, she has been married to the Respondent since 30th November 2019 with a two (2) year old issue from the marriage. The Petitioner continued that, in January 2021, she noticed that, the Respondent has having an amorous relationship with Petitioner's younger sister and all efforts made by both families to resolve the matter have proved futile. The Petitioner maintained that, due to Respondent's abominable relationship with her sister, the marriage has broken down beyond reconciliation and the parties have been separated for the past one year without sexual intercourse nor effective communication. The Petitioner added that, the marriage has been traditionally dissolved by both families. The Petitioner therefore prayed the Court for the grant of the reliefs endorsed on her Petition. The Petitioner closed her case without calling any witness.

In the case of ***Nartey v. Mechanical Lloyd Assembly Press Ltd [1987-1988] 2GLR pg 314 Adade JSC*** stated that:

"*A person who comes to Court, no matter what the claim is, must be able to make a good case for the Court to consider, otherwise he must fail*."

In the circumstance the issues that fall for determination are:

a. *Whether or not the Respondent committed adultery such that Petitioner finds it intolerable to live with him.*

b. *Whether or not the Respondent has acted unreasonably.*

c. *Whether or not the marriage has broken down beyond reconciliation.*

d. *Whether or not the respondent is liable to maintain the child.*

e. *Whether to grant custody of the children to the Petitioner.*

Section 14 of the Evidence Act, 1975 (NRCD 323) which regulates the reception and evaluation of evidence provides as follows:

"Except as otherwise provided by law, unless and until it is shifted, a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting".

The law on dissolution of ordinance marriages is laid out in the Matrimonial Causes Act, 1971 (Act 367). Sections 1(2), 2(1)(a)(b)(f) and (3) of Act 367 provides as follows:

"1(2) the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation.

"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:
(a) that the respondent has committed adultery and that by reason of the adultery the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent;

(f) that the parties to the marriage have, after diligent effort, been unable to reconcile their differences.

(3) Although the Court finds the existence of one or more of the facts specified in subsection (1), the Court shall not grant a petition for divorce unless it is satisfied, on all the evidence, that the marriage has broken down beyond reconciliation."

At paragraphs 6,7,8,10,11 &13 of Petitioner's Witness Statement, Petitioner states as follows:

"6. I and Respondent were living together as husband and wife harmoniously and without any provocation, until somewhere in January 2021, when I noticed that Respondent was having an amorous relationship with my own younger sister thereby neglecting his conjugal duties with me.

7. In the bid to save my marriage, I made efforts by involving both family members to resolve the matters between us and to stop Respondent from dating my biological sister which act is an abomination, intolerable and a disrespect to our marriage, but all attempts to settle the issue resulted to nothing.

8. I was formerly stationed at Dunkwa-On-Offin and opted to join my husband, but he refused to allows me into the marriage home an act by Respondent intended for me not to block his illegal relationship with my sister.

10. The marriage between me and Respondent has been dissolved by both families traditionally, after several failed attempts by both families to resolve the issue.

11. The marriage has broken down beyond reconciliation with each part living separately for the past one (1) year without any effective communication.

13. The Respondent has caused me much anxiety, anguish, mental torture and above all, a customary taboo for which I cannot be expected to live under the same roof with Respondent as my Husband."

The Witness Statement of the Petitioner is a representation of the evidence adduced at the trial.

I have stated earlier that, the Respondent was not present to cross-examine the Petitioner.

In ***Quagraine v. Adams [1981] GLR 599*** it was held that:
"in a situation where a witness testifies and his opponent fails to cross-examine him, the Court may consider the witness's testimony as admitted by his opponent."

I accordingly consider the testimony of the Petitioner as admitted by the Respondent.

In the case of ***Takoradi Flour Mills vrs Samir Faris [2005-06] SCGLR 882***, the Supreme Court held that *"where the evidence led by a party is not challenged by his opponent in cross examination and the opponent does not tender evidence to the contrary, the facts deposed to in that evidence are deemed to have been admitted by the opponent and must be accepted by the trial Court."*

Upon examining the relevant portions of Petitioner's evidence as reproduced supra. The Court makes the following findings of facts:

a. *That the Respondent had engaged in an amorous relationship with Petitioner's biological sister and Petitioner finds it intolerable to continue living with Respondent as man and wife.*

b. *That the Respondent has caused the Petitioner much anxiety, anguish and mental torture.*

c. *That several attempts to resolve the issues between the parties by both families of the parties have failed.*

In resolving whether or not Respondent committed adultery such that Petitioner finds it intolerable to live with him. The Court shall consider the position of the law as follows;

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

For the Court to find adultery on the part of the Respondent, the Respondent ought to have had consensual sexual intercourse with a woman other than the Petitioner.

It is trite learning that, direct evidence of adultery is rare.

In the case of ***Adjetey & anor Vs Adjetey 1973 GLR216***, the Court made a relevant pronouncement as follows;

"*Adultery must be proved to the satisfaction of the Court and even though the evidence need not reach certainty as required in criminal proceedings it must carry a high degree of probability. Direct evidence of adultery was rare. In nearly every case the fact of adultery was inferred from*

circumstances which by fair and necessary inference would lead to that conclusion. There must be proof of disposition and opportunity for committing adultery, but the conjunction of strong inclination with evidence of opportunity would not lead to an irrebuttable presumption that adultery had been committed, and likewise the Court was not bound to infer adultery from evidence of opportunity alone."

Having found that the Respondent is an amorous relationship with Petitioner's biological sister indicates a disposition and opportunity for adultery. I accordingly hold that, Petitioner has proved adultery on the part of the Respondent. The Petitioner has also stated in paragraph 13 of her evidence to the Court that, she cannot be expected to live under the same roof with Respondent as her husband. This means that Petitioner finds it intolerable to live with Respondent as husband and wife.

For Respondent to have engaged in an amorous relationship with Petitioner's sister, the Court is of the opinion that, such an action amounts to unreasonable behaviour on the part of the Respondent.
In ***GOLLINS V GOLLINS [1964] A.C 644*** the Court held that:

"The principle of law is that, the bad conduct complained of must be grave and weighty and must make living together impossible. It must also be serious and higher than the normal wear and tear of married life."

Again, the Petitioner has adduced per her evidence that, both families of the parties have failed at settling the issues between the parties and that the marriage has broken down beyond reconciliation.
In ***Mensah v. Mensah [1972] 2 GLR 198, Hayfron-Benjamin J***. (as he then was) held that:

"… it is therefore incumbent upon a Court hearing a divorce petition to carefully consider all the evidence before it; for a mere assertion by one of the parties that the marriage has broken down will not be enough…".

Having considered the whole of the evidence adduced at the trial it is my considered opinion that, the marriage of the parties herein has indeed broken down beyond reconciliation.

In resolving whether or not the Respondent is liable to maintain the child of the parties the Court shall refer to the Children's Act.

Section 6 of the children's Act, 1998 (Act 560) provides that
"*no parent shall deprive a child his welfare whether the parents of the child are married or not or whether they continue to live together or not.*"

Section 47 of the children's Act, 1998 (Act 560) also provides that:
"a parent or any other person who is legally liable to maintain a child or contribute towards the maintenance of the child is under a duty to supply the necessaries of health, life, education and reasonable shelter for the child."

It is not in doubt that, the Respondent is the father of the child for whom the Petitioner is seeking maintenance orders from the Court.

The Respondent is accordingly required by law to contribute towards the maintenance of the child. In view of same I hold that, the Respondent is liable to contribute towards the maintenance of the child.

On the issue of custody, the Courts have consistently held that, on the award of custody of a child, the welfare of the child must be the paramount determining factor. This principle has been given statutory force by ***Section 2 of the Children's Act, 1998 (Act 560)*** which states:
"The best interest of the child shall be paramount in any matter concerning a child."

This principle of the law was stated in ***OPOKU-OWUSU V OPOKU-OWUSU [1973] 2 GLR 349-354*** where it was held as follows**;**
"*in such an application, the paramount consideration is the welfare of the children. The Court's duty is to protect the children irrespective of the wishes of the parents.*"

The considerations for custody or access have been provided for in Section 45 of Act 560 as follows;

"A family tribunal shall consider the best interest of a child and the importance of a young child being with his mother when making an order for custody or access. Subject to subsection (1), the

tribunal shall consider the age of the child that it is preferable for the child to be with his parents except where his rights are persistently abused by his parents the views of the child if the views have been independently given that it is desirable to keep siblings together the need for continuity in the care and control of the child Any other matter that the Family tribunal finds relevant."

There is no doubt that, the child of the marriage has been living with the Petitioner. I consider continuity in her care to be in the best interest of the child. I find it necessary to grant custody of the child to the Respondent. I accordingly find and hold that; it is in the best interest of the young child that custody be granted to the Petitioner and also to ensure continuity in her care and control.

As noted supra, the Respondent despite having been served with hearing notices yet failed to attend Court for the trial. It was in view of same that, the Court proceeded to hear the Petition as prescribed by law.

In ***Ankumah v City Investment Co Ltd [2007-2008] 2 SCGLR 1064***, *Baffoe Bonnie JSC* held at page 1076 as follows;
"A Court is entitled to give judgment in default as in the instant case, if the party fails to appear after notice of the proceedings has been given to him. For then, it would be justifiable to assume that he does not wish to be heard."

On the totality of the evidence before me, I have found adultery and unreasonable behaviour on the part of the Respondent. The Court also finds that, the parties have irreconcilable differences.
In view of same, I conclude that, the marriage has broken down beyond reconciliation.

For the foregoing reasons, I hereby enter judgement as follows:

i. The marriage celebrated between the parties on the 30th November, 2019 is hereby dissolved.

ii. The Respondent shall maintain the child of the marriage with an amount of GH¢500.00 per month.

iii. The Respondent shall pay the school fees and medical bills of the child of the marriage.

iv. The Petitioner shall register the child of the marriage under the National Health Insurance Scheme and renew same at all material times.

v. The Petitioner shall provide adequate clothing for the child at all material times.

vi. The Respondent to pay the sum of GH¢20,000.00 as financial settlement to the Petitioner.

vii. No order as to costs.

……..…….

H/W SARAH NYARKOA NKANSAH
MAGISTRATE
23/11/2022