IN THE DISTRICT COURT HELD IN THE WESTERN REGION ON WEDNESDAY AT AGONA NKWANTA ON THE 21ST DECEMBER 2022 BEFORE HIS WORSHIP SIDNEY BRAIMAH DISTRICT MAGISTRATE

WR/AA/DC/A4/05/2022

GEORGE NELSON BLAY } **::: ::: PETITIONER**
OF H/NO. E16/01
BEAHU

VRS:

CHARLOTTE CUDJOE } **::: ::: RESPONDENT**
OF H/NO. E16/01
BEAHU

J U D G M E N T

The petitioner herein instituted the present action for dissolution of the ordinance marriage between the parties in compliance to Order 32 rule 2 of the District Court Rules; 2009 [C.I 59]. The undisputed facts in this case are that the parties herein are married under the ordinance marriage on 29th September, 2007 with two children namely Bezalel Blay aged 13 years and Giovanna Blay aged 11 years between

them(See exhibits B series). The evidence again discloses no controversy that the matrimonial home of the parties identified as H/No 16/01 at Beahu was acquired during the pendency of the trial. The parties did not contest the facts that there a two saloon cars and a Music Sound System as properties acquired during the pendency of the marriage and that a plot of land and Urvan vehicle previously acquired had been sold by petitioner prior to the institution of this action.

The case for the petitioner is that the parties cohabited in Takoradi and subsequently at H/no E 16/01, Beahu after their marriage and that the marriage has been afflicted with irreconcilable differences occasioned by the unreasonable behavior exhibited by the respondent. The particulars of the breakdown articulated by the petitioner are that respondent has caused petitioner anxiety, extreme loneliness and abuses petitioner in private and in public at the least opportunity and caused him extreme embarrassment among others such that the petitioner cannot be reasonably expected to live with her and that by her conduct respondent has given up on the marriage. The petitioner asserted that the respondent by her behavior made his family members unwelcome in the house and had severely embarrassed petitioner at his place of work. The petitioner further submitted that respondent abandoned her role and responsibilities as a wife to the extent that petitioner cooks and washes his own cloths and that of his children. The petitioner again stipulated that the respondent regularly denied him sex which drove him to engage in adulterous relationship resulting in the birth of children outside his marriage. The petitioner again advanced that he had regularly cautioned respondent to change her attitude in order to save the marriage but to his chagrin; the respondent is steeped in her unreasonable behavior and reluctant to change her conduct. Petitioner and PW1 contended that the entrenched behavior of respondent has defeated all efforts by members of both families to reconcile the parties and save the marriage. The petitioner accordingly prayed to the court to dissolve the ordinance

marriage between the parties and for the afore-mentioned matrimonial house situate at Beahu be shared equally between them and that the two vehicles acquired during the subsistence of the marriage should also be shared between them. Petitioner tendered the registration and shipping document of one of the two vehicles, Hyundai in evidence as exhibit A. Petitioner again submitted that the Music sound system acquired should be sold and the proceeds shared equally between them and that respondent should be awarded custody of the two children between them with a grant of access to him. The petitioner further assumed the responsibility to contribute to the maintenance of the children; pay their educational, medical, clothing and other incidental expenses accruing to him as a parent. The petitioner prayed for the petition to be granted.

The respondent, in her defence vehemently contested the allegations by the petitioner and countered that contrary to the assertions by the petitioner; she had did not deny him sex and that the breakdown of the marriage commenced by the adulterous behavior exhibited by petitioner which has resulted in the birth of two children with the one Naomi Cobbinah during the pendency of the marriage. The respondent further testified that she continued to have sex with the petitioner during his adultery and continued to be available for sex except that petitioner did not take the opportunity to have sexual intercourse with her after some time. The respondent also denied the assertion by petitioner that she does not welcome his family members from their matrimonial home and advanced that she is friendly to the petitioner's family and that her cordiality with his family was evident when she was called to assist in the cooking during the funeral of the petitioner's aunt. The respondent further denied that she goes out of the house for long periods of time without notice to petitioner or that she went to the petitioner's place of work to embarrass him or that she threatened to poison him and that it was the petitioner who elected not to eat her food and to

sleep outside their matrimonial room. The respondent countered that petitioner physically and emotionally abused her in the presence of her children and her mother when she confronted petitioner about his persistent adulterous relationship with the said Naomi Cobbinah. Respondent again contended that the petitioner has built a house for the said Naomi Cobbinah at New Amanful and that the their matrimonial home should be settled wholly on her and the children and that all attempts by the family members and other to reconcile them failed due to the abstinence of the petitioner to resile from his adulterous relationship with Naomi Cobbinah. The respondent urged the court to grant the relief sought by petitioner with an upward review of the maintenance to reflect the prevailing economic conditions.

On the facts, the following issues are for determination:

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

2. Whether or not the ordinance marriage between the parties should be dissolved?

3. Whether or not the petitioner has built a house at New Amanful during the subsistence of the marriage?

4. Whether or not the matrimonial house situate at Beahu should be entirely settled on the respondent?

5. Whether or not the petitioner is entitled to an equal share of the vehicles and sound system in issue?

6. Whether or not the respondent is entitled to Ghc50,000.00 as alimony or compensation?

7. Whether or not petitioner is entitled to her reliefs?

In civil cases, the plaintiff bears the burden to adduce sufficient evidence to prove their case on the preponderance of probabilities as stated at sections 11(4) and 12(2) of Evidence Act, 1975, NRCD 323. With regard to the burden of proof on the parties to the suit, it is stated in the case of In Re Ashalley Botwe Lands; Adjetey Agbosu & Ors v. Kotey & Ors [2003-2004] SCGLR 420 and Sumaila Bielbiel (No.3) v. Adamu Dramani & Attorney-General [2012] SCGLR 371 by the Supreme Court that in general, the defendant needs not prove anything in a civil case, given that it is the plaintiff who instituted the action against him. In respect of the burden of producing evidence on the issues admitted or denied, the apex court held in the above cases that burden is not fixed but shifts from one party to the other at various stages of the trial, although the legal burden or burden of persuasion remains with the plaintiff. Brobbey JSC puts it succinctly in the case of In Re Ashalley Botwe Lands; Adjetey Agbosu & Ors v. Kotey & Ors [supra] at page 425. I reproduce:

" …If the court has to make a determination of a fact or of an issue and that determination depends on evaluation of facts and evidence, the defendant must realise that the determination cannot be made on nothing…The logical sequel to this is that if he leads no such facts or evidence, the court will be left with no choice but to evaluate the entire case on the basis of the evidence before the court."

In determination as to whether the parties entitled to an order of this court dissolving their marriage on grounds that it is broken down beyond reconciliation; the court takes cognizance of section **1(2)** of the Matrimonial Causes Act, 1971 (Act 367) which emphatically states that the only ground for the grant of a decree of divorce is that the marriage has broken down beyond reconciliation. Section 2(1) of Act 367 sets out the

legal criteria in determining whether a marriage has broken down beyond reconciliation. I reproduce section 2(1) of Act 367:

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

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

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or

(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

(e) that the parties to the marriage have not lived as man and wife for a continuous period of at least five years immediately preceding the presentation of the petition; or

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

On the evidence, the petition is grounded on three reliefs of dissolution of the marriage pursuant to section 2(1)(b) and (f); alleging the marriage had broken down beyond reconciliation due to unreasonable behavior and their failure to reconcile their differences after diligent effort.

The evidence on record in respect of the adultery is unanimous that petitioner engaged in adulterous behavior with the said Naomi Cobbinah and same resulted in the birth of two children to the petitioner. The respondent on notice of the said adulterous relationship and the resulting children therefrom tolerated the conduct of petitioner and remained in the marriage to save it albeit her abhorrence of the pervasive and persistent adultery committed by petitioner with Naomi Cobbinah. The evidence adduced by petitioner to explain his adulterous behavior is that respondent persistently denied him sex and that moved him to seek sexual satisfaction elsewhere.

For the explanation offered by petitioner to be acceptable in law, it must be established by evidence that a denial of sex by a spouse was willful, grave ad that it had the tendency to adversely affect the health of the denied spouse. Holding 1 in Opoku-Wusu v Opoku –Wusu [1973] 2 GLR 349 states the following on the issue.

"(1) a willful refusal by one spouse to have sexual intercourse might entitle the party suffering to leave if in all the circumstances of the case it could properly be regarded as grave and weighty and if it had an adverse effect on the health of the other spouse. Such conduct might also amount to just cause for leaving even though it lacked the element of intent to injure. Whether in a given case the requirement was fulfilled was a question of fact." (See also Addo v Addo [1973] 2 GLR 104)

Contrary to the assertions by petitioner, the evidence on record demonstrated clearly that respondent, prior to the said adultery and on notice of the adultery and the subsequent birth of the children from the adulterous relationship continued to have

sexual intercourse with petitioner until 2021 when petitioner voluntarily moved out of their matrimonial bedroom. I reproduce the relevant cross-examination of petitioner.

Q. I had sex with you even after you had children with Naomi?

A. Yes. I always initiate sex between us. You never initiate sex. Your sexual demands include using my hands and penis to insert your vagina whilst at the same time sucking your breast. I get physically strained.

Q. When you have ejaculated you say that I lie in bed like a yam.

A. No

Q. If I were not having sex with you, how could we have aborted our pregnancy?

A. We aborted it

Q. Is it not because of Naomi that you are using as an excuse to deny me sex?

A. No

The respondent posed these further questions to the petitioner on the issue under cross-examination. I reproduce.

Q. You went for a lover and that created problems in our marriage in 2013.

A. No

Q. In 2013, you started an adulterous relationship with Naomi Cobbinah.

A. No

Q. I saw a naked photograph of her on your mobile phone.

A. Yes. I did not know about it. You drew my attention to it. I confronted the lady and she said she sent it to me by accident,

Q. In 2016, somebody came to warn me that he would hurt you if you do not cease your adulterous relationship with Naomi Cobbinah

A. No

Q. You are aware because I told you and you took the mobile phone number of the person and decided to make a police case. You did not pursue it.

A. You did not tell me. You did not give me any mobile phone number. I did not tell you I refer the matter to the police.

Q. I heard Naomi Cobbinah on the background to a call you made to our children and I confronted you in 2017.

A. Yes

Q. You slapped me when I asked you about you building a house for Naomi Cobbinah

A. It is not correct.

Q. Naomi Cobbinah sent romantic messages to you on your phone.

A. No

Q. When I showed it to you; you slapped me and I nearly died.

A. No

Q. You had to revive me by pouring water on me.

A. I poured water on you but it was not related to this matter. The incident related to a voice call you heard from Naomi Cobbinah on the phone. When I returned home, you were harassing me. You stood in my way and did not let me go around the house, Later I managed to take my bath. Upon completion of my bath and upon sleeping on the bed, you held my singlet and to free myself I pushed you. You fell over packed items and you pretended to faint, so I poured water on your head.

Q. You wanted to send me to the hospital.

A. I did

Q. I reported the matter to your pastor, Mr. Addo

A. Yes

Q. You told me you have ceased your adulterous relationship with Naomi Cobbinah

A. Yes

In further opposition to the evidence adduced by petitioner on the issue, respondent in her witness statement asserted that the parties reconciled after the birth of petitioner's children with Noami Cobbinah and resumed sexual relationship with him; until the petitioner moved out of their bedroom to the living room in 2021. I refer the relevant cross-examination of respondent:

Q. You alleged that I vacated my matrimonial room to another room. Why did I do that?

A. I don't know. You only know the reason why you started sleeping in the living room.

Q. In December 2021, you were aware that I contracted Covid 19

A. I was not aware.

Q. You looked the door to the bedroom when I was sleeping in the living room.

A. Yes. I did not know why you left the room and started sleeping in the living room so I am scared you might hurt me.

Indeed, it is highly improbable that the petitioner expects the court to believe that he was not in adulterous relationship with Naomi Cobbinah as far back as 2013 when respondent saw her naked photographs on petitioner's mobile phone. Again, the court finds the contention by petitioner that respondent's constant interrogation and confrontation of petitioner on his continuous adulterous relationship with the said Naomi Cobbinah as unreasonable behavior is untenable. How did petitioner expect to act on notice of his persistent adulterous relationship with the said Naomi Cobbinah? It is the opinion of the court that every reasonable spouse would interrogate, condemn and berate the other spouse if it is established that he was engaged in adulterous relationship.

On the evidence, it can be deduced that the petitioner is feigning that the respondent denied him sex to justify his pervasive and deliberate adulterous conduct. By his own admission, he was sharing the matrimonial bedroom with respondent until December

2021 when he submitted that he vacated same due to contraction of Covid 19 and not because respondent was denying him sex. Granted without admitting that respondent denied him sex; there is no evidence that respondent willful and gravely denied petitioner sexual intercourse that possibly culminated into adverse health effect on the petitioner to afford him a defence for his adulterous behavior. The court accordingly dismisses the claim by petitioner that the conduct of respondent induced him to commit adultery. The evidence is abound that the gravity that is preventing the parties from true reconciliation is the pervasive adulterous relationship between petitioner and Naomi Cobbinah.

In respect of the evidence adduced by petitioner that the respondent makes his relatives feel unwelcomed in his house is not supported by the evidence. The evidence adduced by PW1, the elder brother of petitioner did not support that assertions by petitioner that respondent does not welcome his family members to the house. In his evidence; PW1 submitted that prior to moving to Beahu; he was involved in settling the marital problems between the parties and that when the petitioner filed the divorce in this court, he went with his younger brother to discuss the issue with respondent's mother but respondent refused to call her with the reason that she was asleep and that respondent refused to call her mother until petitioner arrived from work and woke up his mother-in-law. Nowhere in the evidence did PW1 corroborate the evidence adduced by petitioner that respondent made his relations unwelcome at the house prior to the filing of the divorce proceedings in this court. If that were so; it would have been highly probable that PW1 would have known about it and adduced evidence on the issue to support the petitioner. The reference by PW1 to the alleged insults heaped on him and his younger brother took place after the divorce petition had already been filed in this court and therefore the alleged incident could not have been in the reasonable contemplation of the petitioner when he deposed to the

averments in his pleading and his witness statement as a ground for his petition for divorce.

The evidence on record again discloses that the relationship between the parties has been afflicted assault and battery on the side of the petitioner and abuse and insults on the part of the respondent. In spite of the acrimonious atmosphere in the matrimonial home resultant of the battery, insulting and abusive marriage together with the incessant adultery by petitioner; the respondent continued to cohabitation with the petitioner as his spouse in hope of resuscitating their marriage.

In further corroboration of the case offered by parties; PW1 submitted that he has made multiple interventions by himself to intervene in attempts to resolve the differences between the parties. The parties also refer to meetings before their pastor and their various families convened to resolve their difference over the years and yet to no avail. (See paragraph 7k of petition for divorce; paragraph 22 of respondent's witness statement; paragraphs 4 – 7 of PW1's witness statement and paragraphs 15-17 of petitioner's witness statement).

Clearly, the differences between the parties were deeply entrenched and irreconcilable otherwise the parties would have submitted to the many and more interventions and attempted settlements between them by reconciling their differences rather than occasioning the dissolution of their ordinance marriage. Is it not the same irreconcilable differences with it attendant symptoms of absence of affection and love that motivated respondent to insult her husband in the presence of other and for petitioner pervasive and unrepentant adulterous behavior with Naomi Cobbinah for almost a decade? The court thinks so?

On the totality of the evidence on the record, the court finds that the acrimonious atmosphere surrounding the matrimonial home was such that it will be unreasonable

to expect the parties to live together. Accordingly, on the conduct of the parties, the court is satisfied that the marriage has broken down beyond reconciliation. The court will grant the order for the dissolution of the parties' marriage celebrated under the Marriage Ordinance (Cap 127 on the 29th of September. 2007 by Assemblies of God Church, Aboadi Ahanta not only on grounds of adultery of the petitioner for which the respondent finds it intolerable to live with the petitioner, but also that there has been assault and threats of assault and an acrimonious atmosphere surrounding the matrimonial home.

The principles that offer a guide to a court in determining the matter of presumption of joint ownership of marital property are set out in legion of cases including **Mensah v. Mensah [1998-1999] SCGLR 350, Boafo v. Boafo [2005-6] SCGLR 705, Mensah v. Mensah No 2 [2012] SCGLR 391, Fynn v. Fynn [2013-14]1 SCGLR 727, Quartson v. Quartson [2012]2 SCGLR 1077** , and **Arthur v. Arthur No. 1[2013-14] 1 SCGLR 543** among other based on **Article 22(2) and (3) of 1992 Constitution**

"Article 22(1), (2) and (3) state as follows;

22 (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a Will.

22 (2) Parliament shall as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.

22 (3) With a view to achieving the full realization of the rights referred to in clause (2) of this article

(a) Spouses shall have equal access to property jointly acquired during marriage.

(b). Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage."

It is clear that the provisions in Article 22 (3) (a) and (b) of the 1992 constitution has expounded the principle of having equal access to property jointly acquired during marriage and that of the equitable distribution of such property upon divorce.

Under the law, any property acquired by the spouse during the marriage is presumed to be jointly acquired irrespective of whether the other party made any contribution to the acquisition. This principle of presumptive ownership was espoused and affirmed in Mensah v. Mensah No.2 [supra] and Arthur v. Arther No.1 [supra]. In the Quartson v. Quartson [supra] and Arthur v. Arthur [supra] a spouse was relieved from the burden of proving direct, pecuniary or substantial contribution in acquisition of the property to entitle him or her to a share as long as the property was acquired during the subsistence of the marriage. The reasoning behind this principle by the Supreme Court was that the duties performed by the wife in the home like cooking for the family, cleaning and nurturing the children of the marriage creates enabling atmosphere for the other spouse to work in peace towards the acquisition of the properties concerned, was enough contribution that should merit the wife a share in the said properties.

On the other hand where a spouse alleges that he or she had made substantial contribution to entitle her to a quantifiable or specific share of the property so acquired then she must adduced evidence to establish it on the equity principle. In the same vein, the apex court departed from the core principle in the Mensah v. Mensah No.2 (supra)and Quartson v Quartson (supra) in Fynn v. Fynn (supra) by emphasizing on the right of a spouse to acquire personal properties as individual during subsistence of the marriage as contemplated under Article 18(1) of 1992 Constitution which states that:

"Every person has the right to own property either alone or in association with others".

Again, in Arthur v. Arthur [supra] the Supreme Court decreed that a spouse can acquire properties in their individual capacities through gifts, bequest or devises and succession made to a spouse during the subsistence of the marriage. The properties acquired in such means cannot be described as jointly acquired marital property since they were not acquired by any of the spouses with the support of the other, either financially or in kind or by the provision of marital services.

In the instant case, the petitioner has offered to share their house equally with the respondent. The offer by petitioner is countered the claim by respondent in the Form for Respondent and paragraph (iii) of the Cross Petition contained Answer to Petition for the house to be settled on her and her children. The respondent thereafter accepted the evidence adduced by petitioner to share the house in Beahu with the respondent. To be fair; the court finds no exceptional circumstances on the record to move it to depart from the presumption of joint ownership of marital property are set out in legion of cases cited in this judgment. The court therefore decrees that the respondent is entitled to half share in H/No. E 16/01 located at Beahu and within the jurisdiction of this court and dismisses her claim for the entire house to be settled on her.

The record of evidence does not support the allegation by respondent that petitioner has built a house in New Amanful fo Noami Cobbinah during the subsistence of the marriage. The respondent did offer any cogent evidence to support her assertion. In Ackah v. Pergah Transport Limited and Others (supra), Adinyira JSC succinctly summed up the law, at page 736:

"It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail…It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that, on all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than it's non-existence. This is the requirement of the law on evidence under section 10 (1) and (2) and 11 (1) and (4) of the Evidence Act, 1975 (NRCD 323)."

On the evidence the court finds as fact that petitioner could not establish with sufficient evidence by way of the address of the alleged building; search at Lands Commission to create rebuttable presumption of ownership in Petitioner or Naomi Cobbinah or any other positive evidence to prove her assertion. Again, the respondent failed to call the material witness who allegedly informed her about the house in issue as a witness. The record does not reveal why respondent failed to call such a material witness to support her case o the issue. It is trite that failing to call a material witness may be fatal to the party's case.

By section 20 [1] of the Matrimonial Causes Act, 1971 [Act 367] the court has the discretion to order either party to the marriage to pay to the other a sum of money or convey to the other party movable or immovable property as financial settlement as the court thinks just and equitable. In determining the above, the court takes into consideration of the undisputed evidence on record that the parties were married for fifteen (15) years of which the parties enjoyed consortium for fifteen years during which the petitioner mostly performed her duties as a wife albeit without decorum and amidst verbal alterations. They have two children between them. In the course of the marriage, the respondent set up and improved her business with financial assistance of petitioner. Similarly, the petitioner intimated that he pursued further education to improve himself albeit that the conduct of respondent affected his

studied. The petitioner did not state how he was adversely affected. The court also considers the indignities the parties have exhibited against each other. Taking all these into consideration, the award of GH¢20,000.00 as financial settlement to the respondent is fair and just.

Fortunately, the parties have compromised and agreed on the record that the Musical Sound System shall be sold and the proceeds shared between them. In the spirit of the consensus reached, the court settles Hyundai saloon car with registration number WR 2899- 21 in working condition on respondent. The court further orders petitioner to transfer ownership in the afore-mentioned vehicle to the respondent within 40 days upon the reading of this judgment. Pursuant to the consensus reached; the court awards custody of the two children of the parties to the respondent with access on weekend and half of school vacation to the petitioner. The petitioner voluntary agrees to bear all the educational and medical expenses of the children of the marriage. The court accordingly orders it so. The parties shall however contribute to clothing and any other incidental expenses accruing to the parties as parents. The court orders petitioner to maintain the two children with Ghc1000.00 per month effective December 2022 with yearly upwards review of 15 per cent until the children completes their education or training. Accordingly, the court awards cost of Ghc3000.00 against the petitioner. Interest thereof will be at the prevailing bank rate and same will take effect from today until the entire amount is fully paid.

(SGD.)

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H/W SIDNEY BRAIMAH

(DISTRICT MAGISTRATE)