

IN THE FAMILY TRIBUNAL HELD IN THE WESTERN REGION ON TUESDAY
ON THE 4TH OCTOBER 2022 IN AGONA NKWANTA BEFORE HIS WORSHIP
SIDNEY BRAIMAH - DISTRICT MAGISTRATE WITH DANIEL KWAME
HASFORD, ERNESTINA KANGAH AND DORCAS NTIAMOAH AS PANEL
MEMBERS

WR/AA/DC/A6/1/2022

NAFISATU MALIK

VRS:

ABUDU MALIK @ KWESI YAW

J U D G M E N T

The plaintiff herein instituted the present action as per the form for plaintiff seeking the following reliefs: (a) maintenance arrears of Ghc8,000; (b) a maintenance order of Ghc300.00 per month per for the six children between her and the defendant until the children attain majority and (c) an order from the court to compel the defendant to renew the NHIS cards for the children; provide clothing and bear the educational expenses of the children. The defendant contested the reliefs sought by the plaintiff.

It is the case of the plaintiff that a misunderstanding arose between her and the defendant resulting in the defendant refusing to maintain her and the children between them for the past four years. According to the plaintiff, the third, fourth, fifth and sixth child are students and that the first child is currently working as a labourer in Accra. The plaintiff further asserted that the second child completed his senior high school education four years ago. In her evidence, plaintiff contended that the defendant is a

palm wine tapper and that about five years ago, he secured a loan of Ghc3000.00 from PW1 to invest in his palm wine tapping business and that he gave him Ghc1000.00 out of the loan to the plaintiff to use as maintenance for the children and proceeded to Adumbanso to invest the remainder of the money in illegal mining activities (galamsey). Thereafter defendant refused to maintain the plaintiff and the children and accused her of conniving with PW1 to cause his arrest and threatening to kill him. The plaintiff also asserted that defendant is currently cohabiting with another woman and maintaining her to the detriment of her children. Plaintiff implores the court to grant her reliefs as the defendant has completed paying the debt he obtained from PW1 and therefore cannot use it as an excuse to deny them maintenance. Plaintiff denied the assertion by defendant that he is currently not working and contended that defendant has resumed his occupation as a palm wine tapper. Plaintiff urged the court to grant her reliefs.

In his defence, defendant conceded that he had not maintained the plaintiff and their children for two years because he contracted a loan for plaintiff to trade with it and uses part of the proceeds for maintenance. The defendant submitted that he is yet to complete payment of the loan he contracted from PW1 and therefore lacks the ability to pay the loan and maintain plaintiff and the children at the same time. Defendant again submitted that plaintiff implored PW1 to cause his arrest and also threatened to kill him. The defendant further contended that plaintiff prohibited their children from visiting him and urged some of them to insult and assault him. The defendant asserted that his problems with plaintiff and the second child in particular are such that he cannot be reasonably expected to maintain plaintiff and children. The defendant however agreed to provide clothing for the children on festive occasion and renew their NHIS cards.

On the evidence, the following issues are for determination.

1. Whether or not the plaintiff is entitled to Chc8000.00 claimed as maintenance arrears?
2. Whether or not the plaintiff is entitled to Ghc300.00 as maintenance per months for the children?
3. Whether or not the defendant should bear the medical, education and other incidental expenses accruing to him as a parent?
4. Whether or not the plaintiff is entitled to her reliefs?

In civil suits, the plaintiff bears the burden to adduce evidence to a degree of certainty of belief to convince the court that the existence of fact is more probable than not. What is required to prove the case on the preponderance of probabilities is for a reasonable man to conclude that the facts presented by the plaintiff are more likely to have occurred than not. (See section 11(4) and 12 of the Evidence Act, 1975 [NRCD 323]).

In respect of maintenance, the legal obligation on a parent or any person in loco parentis is stated under section 47 of Children's Act, 1998 (Act 560) states the following in respect of maintenance:

Section 47 - Duty to Maintain a Child.

- (1) 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 necessities of health, life, education and reasonable shelter for the child.

The legal duty to maintain a child stated above is owed to the person with custody of the subject child who applies for relief from the Family Tribunal. I refer to section 52 of Act 560.

Section 52—Persons Entitled to Maintenance Order.

- (1) Any person who has custody of a child who is the subject of a maintenance order is entitled to receive and administer the maintenance order of the Family Tribunal.

It can be deduced that the mandatory legal obligation owed to a child by a parent under Act 560 is so sacrosanct that the legislature was compelled to ensure compliance by parents by making it an offence to deny maintenance to children. I refer to the relevant section of Act 560.

“Section 59 - Offences Under this Part.

Any person who-

(b) fails to supply the necessities of health, life, education, and reasonable shelter for a child when legally liable to do so contrary to section 47; or

(c) brings an action maintenance under this Part while an application for maintenance is pending in matrimonial proceedings commits an offence and is liable on summary conviction to fine not exceeding ₦2 million or a term of imprisonment not exceeding six months or to both.”

It is in the light of these stringent legal provisions attached to the provision of maintenance subject to the consideration provided in section 49 of Act 560 that makes the blasé attitude of defendant disconcerting. On the record, the plaintiff submitted that the defendant was maintaining her and the children with GHc300.00 per month four years ago prior to his cessation of the payment of maintenance. The defendant did not deny or adduce any contrary evidence in respect of the amount claimed as maintenance per month expect to contest the period of the alleged non-payment of maintenance from four years to two years in his evidence in chief. The court takes notice that as the

proponent of the action, the burden of producing evidence and the burden of persuasion lies on the plaintiff to establish her case on the balance of probabilities. Accordingly, having challenged the basis of the calculation of the alleged maintenance arrears owed, the evidential burden shifts on the plaintiff to avoid a ruling against her on the issue. In that respect, plaintiff woefully failed. Plaintiff did not adduce sufficient evidence to establish the timeline of the alleged non-payment of maintenance or how she arrived at the amount claimed as maintenance arrears. However, the law is trite that when a party to a suit makes an admission against his or her own interest; same can be used against him. In *Nyamekye Vrs Tawiah & Anor* [1979] GLR 266 C.A it was held that:

“A party could prove his case by admissions from the mouth of his opponent or his adversary’s witness and in holding otherwise the house offended both principle and authority”

Accordingly, the admission by the defendant that he had not maintained the plaintiff and his children for two years is admissible as evidence against him. The court accordingly finds its so.

It would be recalled that the defendant contended that due to his alleged prior agreement with the plaintiff to use Ghc3000.00 loan procured from PW1 to trade and use part of proceeds to maintain the children was misused, and that he currently servicing the loan contracted and therefore he is not liable to maintain the children.

The record is incontrovertible that defendant took the loan in issue from PW1. In her evidence, PW1 was categorical that defendant had completed paying the loan six months from the day she testified in court. That material evidence which is central to the defence of defendant was not challenged by defendant. Again, the admission by defendant under cross-examination that he is cohabiting and maintaining his new wife

is suggestive that he is capable of maintaining plaintiff and his children with her except for his wilful refusal to do so out spite of the plaintiff.

Granted without admitting that defendant concluded the said agreement with plaintiff in respect of the loan contracted; such domestic agreements between husband and wife are presumed not to be legally binding except the parties expressly provided same in the contract. (See *Balfour v Balfour* [1919] 2 KB 571). The evidence on record did not disclose any proviso in the purported agreement allegedly entered into by the parties.

It is not however lost to the court that the parties may be married under customary law; although same is not explicit on the record; and therefore such contract may be enforceable under custom as espoused in *Acheampong v Acheampong* [1967] GLR 34, and therefore may be enforceable by an action for breach of contract by defendant where the circumstance is permissible or applicable.

The court is however of the opinion of that the purported contract for the maintenance under the law or custom is ousted by relevant sections quoted above in Act 560. The mandatory obligations owed by defendant under section 47 of Act 560 cannot be usurped or avoided by any purported domestic agreement between the parties. Section 47 and 59 of Act 560 make it an offence for parents or a person in loco parentis to avoid payment of maintenance subject to the consideration stated in sections 49 and 50 of Act 560. The court accordingly finds as a fact that the legal obligation imposed on a parent or a person in loco parentis cannot be avoid, discharged or ousted by a contract.

The court further finds that it is not provided under Act 560 for a parent to elect not to maintain his child because the child disrespected or assaulted him; failed to visit him or that his wife maliciously caused his arrest or threatened him. The legal remedies for alleged act relating to access are determinable at the Family tribunal. The other alleged acts are remediable by any court of competent jurisdiction or where the allegation is a

crime like the alleged threat of death, by filing a complaint with the police. The afore-stated acts allegedly perpetrated by plaintiff do not afford defendant a defence to the claim of maintenance against him.

Accordingly, on the basis of the admission by the defendant; the court finds that the defendant owes two year maintenance arrears at Ghc300.00 per month totalling Ghc7200.00.

In making orders in respect of maintenance the court takes notice of the following provisions of Act 560.

“Section 53 - Duration of Order.

(1) A maintenance order issued by a Family Tribunal shall expire when the child attains the age of eighteen years or dies before that age.

(2) A maintenance order shall lapse before the child attains the age of eighteen years if before that age the child is gainfully employed.

Section 54 - Continuation of Maintenance Orders in Certain Cases.

(1)Notwithstanding section 53 a Family Tribunal may continue a maintenance order after a child has attained eighteen years if the child is engaged in a course of continuing education or training after that age.”

In respect of the maintenance order, the court takes notice of the evidence on record that the eldest child is working in Accra and therefore not dependent on the parties. The record is also patent that third child is with a relative at Ankyeni Nkwanta. The court again finds that there is no evidence on record to establish that the second child is below 18 years old or is in training except the evidence adduced by plaintiff that he completed SHS four years ago. Accordingly, in the absence of such crucial evidence to

establish the qualification of the second child for maintenance; the court finds as fact that they are not entitled to a decree of maintenance from this court pursuant to section 52 of Act 560.

In respect of the remaining children in issue, the court takes further notice of the conclusive evidence on the record is that the fourth, fifth and sixth child are students. Accordingly, per the provisions stated above the court orders the defendant to contribute GHc300.00 per month as maintenance to the fourth, fifth and sixth children until they attain the age of eighteen, secure gainful employment or complete their education or training whichever occurs first. The court further orders the dependent to vary the monthly maintenance every year in line with the average inflation rate for the year. The court again orders the defendant to contribute to the clothing, educational, medical and any other incidental expenses accruing to him as a parent for the aforementioned children he is liable to maintain. Given the circumstance of the case, the court asks each party to bear their own cost.

(SGD.)

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HIS WORSHIP SIDNEY BRAIMAH

(CHAIRMAN)

(SGD.)

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ERNESTINA KANGAH

(PANEL MEMBER)

(SGD.)

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DANIEL KWAME HASFORD

(PANEL MEMBER)

(SGD.)

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DORCAS NTIAMOAH

(PANEL MEMBER)