IN THE DISTRICT COURT HELD AT DAMBAI BEFORE HIS WORSHIP ALHASSAN DRAMANI ON THURSDAY, 17TH NOVEMBER, 2022.

SUIT NO. A4/01/2020

BORAH MANAA GRACE **PETITIONER**

VRS

BILINGHAM EMMANUEL **RESPONDENT**

PETITIONER PRESENT

RESPONDENT PRESENT

LEGAL REPRESENTATION:

EMMANUEL AWIAGAH FOR PETITIONER ABSENT

ISAAC BORIDOR FOR RESPONDENT ABSENT

JUDGEMENT

The Petitioner herein by leave of this Court instituted the instant action against the respondent herein per petition filed on 19th May, 20220 on grounds that their marriage

has broken down beyond reconciliation and prayed the Court to dissolve same. The Petitioner further prayed the Court for the following reliefs:

a) Sharing of the properties acquired during the marriage.
b) Rented chamber and hall accommodation for petitioner.
c) Recovery of two goats and two boards of Mahogany from Respondent.
d) Recovery of six hundred Ghana cedi (GH¢600.00) with interest.
e) Weekly maintenance of GH¢80.00
f) Maintenance arrears of GH¢2,500.00
g) Recovery of GH¢1,500.00 being money the Respondent obtained from Petitioner to aid in Petitioner's fertility treatment.

The Respondent in his answer and crossed petition filed on 3rd June, 2020 denied all the claims of the respondent with the exception of the claim for the dissolution of the marriage. The respondent therefore prayed for;

1) The dissolution of the marriage.
2) Cost
3) Compensation.

THE CASE OF PETITIONER

The Petitioner said she got married to the Respondent under custom and the parties have been married for twenty four (24) years as at the date this action was instituted (19th May, 2020). According to petitioner she and the respondent are cohabiting in H/No.393 Sikafoabantem, Dambai, in the Oti Region of the Republic of Ghana. Petitioner said there are no issues of the marriage. Petitioner per her witness statement filed on 9th July, 2020 testified that in October, 2019 she brought her brother's five and half years old son to live with them in the matrimonial home but the respondent who was not happy with the move continuously insult and taunt her as being barren in the presents of other community members. According to Petitioner, the respondent told her that his properties

are for his children and not the petitioner who is a barren woman. Petitioner said the respondent also insults her family members without any good reason. According to the petitioner respondent physically and psychologically abuses her; by not given her adequate housekeeping money, not talking to her and/or greeting her anytime he comes back from work. Petitioner said the respondent has taken away the only television set, iron and solar light, as well as refusing to replace dysfunctional bulbs thus intentionally making her stay in darkness and without any form of entertainment. Petitioner's further case is that she is asthmatic but the respondent normally fails to provide money for her to buy her medication anytime she had attack as such exposing her life to danger. Petitioner stated that the respondent intentionally uses body sprays and scented soaps even though he knew very well that the petitioner is allergic to same. Petitioner added that the respondent intentionally litters the house just to cause problem between them. The petitioner again said the respondent does not sleep in the house and sometimes come home very late and when she wakes up at those unholy hours to open the main gate for the respondent she is confronted with insults from the respondent. According to the petitioner the respondent has gone out of the marriage to give birth with two different women without informing the petitioner. Petitioner further told the court that she is always subjected to verbal abuses by the above stated women and other girlfriends of the respondent without any provocation. Petitioner said she has been denied sex by the respondent for nine months. According to petitioner her father and senior brother have made several attempts at reconciliation between the parties but without success. Petitioner further added that the respondent has demonstrated that he is no longer interested in the marriage and that is why he has subjected the petitioner to all manner of abuses to make her voluntarily leave the matrimonial home.

The Petitioner did not call any witness neither did she tender any exhibit and thereafter, closed her case after her evidence.

THE CASE OF THE RESPONDENT

The Respondent's case was that he and the Petitioner started co-habiting in 2002 and formalized their relationship by a customary marriage on 23rd February, 2013 at Saboba in the Northern Region. Respondent has attached to his witness statement as Exhibit BE what he termed as "a confirmation note" of the said customary marriage. Respondent said there is no issue of the marriage despite all efforts made and huge expenses he incurred in his desire to have the petitioner conceived. Respondent said he had two children outside the marriage with two different women following accusation by petitioner that he was the cause of the petitioner's inability to have children. According to Respondent the parties have both visited prayer camps, hospitals, and specialists with the sole aim of resolving petitioner's inability to conceive but without success. Respondent said in all he spent over GH¢70,000.00 in the treatment of petitioner's infertility, he attached to his witness statement Exhibit BE1 series, being some of the receipts of payment he made for petitioner's treatment which amounted to GH13,000.00. He contend that the rest of the receipts are with the petitioner. Respondent testified that as a result of these heavy expenditure on petitioner's treatment his business suffered serious financial challenges and he now have to resort to taking loans to support his business and the situation has not been easy since. Respondent further said petitioner used to assist him in his shop for two days in every week, i.e. during Dambai market days and he used to pay the petitioner GH¢50.00 per week for her services. Respondent contended further that the petitioner used to sell empty rice and sugar bags as well as empty cartons and tins from the shop which mostly amounts to an average of GH¢150.00 and that all petitioner's needs used to be taken care of by proceeds from the shop. According to respondent he used to also send food stuffs to the petitioner's father Samuel Tasun Borah, every two weeks. Respondent sated further that he spent all his income on the treatment of petitioner upon the urge of petitioner and her family and as a result have not been able to acquire any meaningful assets since he got married to the petitioner and

his only car which he bought before getting married to the petitioner has broken down beyond repairs. Respondent said his plight got so worsen that his brother's children had to start a yam farm in order to support his survival. The Respondent added that the petitioner is in the habit of bringing children from her extended family to stay with them without seeking his consent and approval but has blatantly refused to allow respondent's biological children to come and stay with them in the matrimonial home. Respondent further stated that the petitioner suddenly moved out from their common room without good reason and went to live in a different room in the house and refused to assist him in his struggling business (shop). He said the petitioner have been locking him out of the house any time he goes out to attend to his shop. According to respondent he sometimes had to scale the wall in order to have access to the house when he returns from work. Respondent further said some family members and friends have tried to reconcile the parties but the petitioner have refused to cooperate and hence making the attempted settlement unsuccessful. Respondent contended that the petitioner's prayer for the sharing of properties acquired during the marriage is in bad faith since the petitioner is well aware of the quantum of resources he expended on petitioner's fertility treatment which situation has collapse his business thus leaving him poor and unable to acquire any property during the marriage. Respondent says before co-habiting with the petitioner in 2002 and their subsequent marriage in 2013 he was a photographer and out of his photography job he was able to acquire the following properties:

a) In 1995 with the help of his father he acquired the family house, where he currently stays with the petitioner.
b) A Yamaha Motor bike (acquired in 1996)
c) Nissan Datsun car acquired in 1998; and
d) A provision shop established in 2002

Respondent further said the petitioner has secretly acquired properties during the marriage but has failed to disclose same to this Court and hence a character of that nature does not deserve the blessings of this Court. Respondent said he has never abused the petitioner in any manner or form but it was rather the petitioner who constantly accuses him of being the cause of her bareness and it was petitioner's insults and attacks that forced him out of the marriage to prove or justify himself which eventually resulted in the birth of the two children with the other women. Respondent added that he does not owe the petitioner goats, boards of mahogany or any sum of money. Respondent said he consents to the dissolution of the marriage since the petitioner has evinced a clear disinterest in the subsistence of the marriage by her words and conduct.

The Respondent just like the petitioner did not call any witness in support of his case and hence his counsel announced the closure of respondent's case after his evidence.

The legal issues to be determined by this court in my respectful view are:

(i) Whether the marriage between Petitioner and Respondent has broken down beyond reconciliation.

(ii) Whether the parties have been married for twenty four years as at the date this action was instituted (19th May, 2020).

(iii) Whether there were properties acquired during the marriage.

(iv) Whether Petitioner is entitled to an equitable share of properties acquired during the marriage.

In every civil case, the general rule is that the burden of proof rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of his case.

It is provided under section 14 of the Evidence Act, 1975(NRCD 323) that "except as otherwise provided by law, unless it is shifted, a party has the burden of persuasion as to each fact the existence of or non-existence of which is essential to the claim or defence that party is asserting".

Again the law on burden of proof is well settled under section 12 of the Evidence Act, 1975 (NRCD 323), In ADWUBENG V. DOMFEH (1986-87) SCGLR 660, the Supreme Court held among others that "a party who had the burden to prove an assertion must produce sufficient evidence on a preponderance of the probabilities defined in section 12(2) of the Evidence Act, supra as,

"That degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence".

See also Section 11 of NRCD 323. The above quoted position of the law was reiterated in the case of KOFI SARPONG V. JANTUA (2014), 74 GMJ 46 @ 75 per Marful Sau, J.A. (as he then was).

The Learned author, **S. A Brobbey, in his book, Essentials of Ghana Law of Evidence at page 28** posits as follows:

"In the normal run of affairs, since the Plaintiff is the one asking for something from the Defendant, he should be the one who will start the proceedings by giving his testimony. That testimony will show what he wants from the Defendant and why he wants the court to order the defendant to give it to him. If he drags the Defendant to the court but fails to lead evidence to establish his claim and the basis of the claim, he cannot have the assistance of the court to get what he wants. In life, one gets nothing from nothing. So it is in law. If the party does not lead evidence to establish the claim or its basis, the court

will have no grounds or reason or basis for making any order in his favour. If he leads no evidence…"

From the above authorities the petitioner has the legal duty to lead sufficient evidence to first of all prove that the marriage between her and the respondent has broken down beyond reconciliation.

Section **41 of the Matrimonial Causes Act 1971 (Act 367)** creates an exception to the application of the provisions of the Act and allows a party in a customary marriage to petition for divorce under the Matrimonial Causes Act.

The grounds for showing that the marriage has broken down beyond reconciliation have been outline under Section 2(1) of Act 367 and by this law, the petitioner, in this case, is the one who carries the burden of proof and she must satisfy the court of the existence of one or more of the under listed factors:

(a) that the respondent 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 of the petitioner; 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 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 so been 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) the parties to the marriage after diligent effort have been unable to reconcile their differences."

It is further provided that on a petition for divorce it shall be the duty of the court to inquire, so far as it is reasonable, into the fact alleged by the petitioner and the respondent and not withstanding that, if the court finds the existence of one or more of the fact 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.

See Section 2(2) and (3) of Act 367 supra.

The above quoted provisions have been vividly captured in **pages 219 and 220 of the family law in Ghana, by E.O Offei.**

The question that presents its self for an answer at this stage is, whether from the totality of the evidence before this court it can be safely suggested that the petitioner has been able to lead sufficient evidence to the satisfaction of the court that indeed the marriage in the instant matter has broken down beyond reconciliation.

Firstly, the evidence before this court is that there have been several instances where the parties have engaged in verbal and physical abuse of each other. Even though there is no record that any of the parties have ever reported a case of assault against the other to the police, I am satisfied by the testimonies of the parties that the marriage has been turbulent for a while.

Secondly, the evidence on record is that respondent is in the habit of coming home late and is often locked out by the petitioner and this situation has mostly resulted into tension, quarrels, name calling abuses and fights between the parties.

Also a finding of fact was made to the effect that all attempts by the parties and some members of their families to settle their differences fell on rocks on numerous occasions. Also all attempts by this court to convince the parties to reconsider their stands also yielded no positive results.

From the testimonies of the petitioner and respondent both are in absolute agreement that their marriage has broken down beyond reconciliation and thus should be dissolved.

Apart from the above there is also evidence on record that even though the parties lived together in the matrimonial home, they were living in separate rooms and were not in talking terms for several months. The respondent according to the record refused to eat food from the petitioner and had also refused to have sex with the respondent for nine months before the petitioner instituted the instant action.

Consequently in her petition the petitioner asked for a rented accommodation which the respondent duly provided whilst this matter was pending and hence the parties have been leaving in separate houses up till now.

I did not also lose sight of the allegation by the petitioner that the respondent has secretly gone outside the marriage to give birth to two children with two different women and is also keeping other girl friends who per the petitioner's testimony have been abusing her and making mockery of her over her bareness through phone calls. In fact, the respondent with pride have admitted to the fact that he had two children outside the marriage with two different women, so I will not belabour the point.

However, I found in the circumstances of this case not safe to rely on the evidence of the petitioner that the respondent has children outside the marriage to make any determination in this matter, in view of the fact that the marriage between the parties is a customary marriage which is potentially polygamous.

In her witness statement the petitioner testified that she has been the subject of abuse from the two women the respondent has given birth with as well as other girl friends of the respondent. The respondent did not challenge or cross examine the petitioner on this evidence.

In **Kusi V. Bonsu [2010] SCGLR 60** it was held that:

"Where a party made an averment and that averment was not denied, no issue was joined and no evidence is to be led on that averment. Similarly where a party had given evidence of a material fact and was not crossed examined upon it he need not call further evidence of that fact."

Also in the case of **Takoradi Flour Mills V. Samir Faris [2005-2006] 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 Court.

For the foregoing I accept the petitioner's evidence that she was a subject of abuse and taunts by respondent's girlfriends.

On the totality of the evidence and the conduct of the parties, it is my finding of fact that the marriage between the petitioner and respondent has broken down beyond reconciliation. I will grant the order for the dissolution of the parties' customary marriage on the grounds that there have been persistent fights, quarrels, verbal and physical

abuses from both sides as well as an acrimonious atmosphere surrounding the matrimonial home such that it will be unreasonable to expect the petitioner to live with the respondent.

The second issue is whether the petitioner has been married to the respondent for twenty four years as at the date this suit was instituted (19th May, 2020).

On the face of her petition filed on the 19th day of May, 2020 the petitioner stated that she's been married to the Respondent for twenty four (24) years under custom. The Petitioner however did not indicate the exact date on which the said customary marriage was conducted neither did she exhibit any document to confirm her assertion.

The Respondent on his part vehemently denied that they have been married for twenty four years as at 19th May, 2020. In his answer and cross petition filed on 3rd June, 2020, Respondent stated that as at the date this suit was instituted their marriage twenty two (22) years under custom. He, just like petitioner did not also indicate the exact date the marriage was conducted. Interestingly however, at paragraph 5 of Respondent's witness statement filed on 06/08/2020, he stated as follows:

"Myself and Petitioner started co-habiting sometime in 2002. We formalised our relationship by customary marriage on 23rd February, 2013 at Saboba in the Northern Region of the Republic of Ghana. Attached and marked as Exhibit BE is a note confirming the said customary marriage."

For the sake of clarity I shall reproduced Exhibit BE since it is a very short note. It reads as follows:

The Assemblies of God, Ghana
Alpha Assembly-Toma Saboba
Box 32, Saboba N/R

1st July, 2013.

A CONFIRMATION NOTE

On behalf of the Assemblies of God, Ghana. The Saboba/Chereponi District and the Alpha Assembly Saboba. I write to confirm that Brother Belingham Emmanuel and Sister Belingham Manaa Grace perform the engagement ceremony on the 23rd day of February, 2013 at Mr. Tasun Borah's house. I do hereby testify that all the necessary obligations were met.

May who ever concerns accept this as a true confirmation.

Yours in the Master Vineyard.

SGN

Rev. David Waja Kangma

The content of the above exhibit per my basic arithmetic calculation means that as at 19th May, 2020 when this suit was instituted the parties were married for seven years. Clearly this assertion by respondent in my respectful view is not only contradictory but also a departure from his own pleadings. Whilst he indicated in his answer and crossed petition that he has been married to the petitioner for twenty two years he is also now saying in his witness statement that he's been married to the petitioner for seven years.

In the case of **Abowaba V Adeshina [1946-49] 12 WACA 18-20** it was held that when a party deviates from his or her pleadings, he or she is deemed to have forsaken same. "the object of pleadings is to compel the parties to define issues upon which the case is to be contested and to prevent one party taking the other by surprise, by leading evidence on material facts of which the other party has no due warning. The penalty for failing to plead a material fact is the exclusion, upon objection being taken, of evidence to establish it.

Also in **Hammond v. Odoi, (1982-83) 2 GLR 1215,** it was held that: "pleadings are the nucleus around which the whole case revolves" and that one should not be allowed to testify inconsistently to what he has pleaded."

On contradiction and inconsistency the Supreme Court in the case of **Comfort Ofori v. Kwame Appenteng CA No. J4/2017** delivered on 6th December, 2017, Benning JSC stated as follows:

"At the trial the defendant did not appear to be a witness of truth, a fact which should not have been glossed over by the court below. For the credibility of a witness is very critical in assessing and evaluating his evidence and what weight to attach thereto."

In the case of **Iddrisu Tifero Tatali V Alhaji Saaka Yakubu CA No. J4/32/2014** delivered on 9th May, 2018, Baffoe Bonnie JSC held that "where a party in his evidence departed from statement of claim, then the court was duty bound to evaluate the pleadings of the party and the evidence before the court and make its own findings."

From the foregoing I am of the view that exhibit BE is not only self-serving but an afterthought, same will therefore be disregarded. It is too late in the day for the respondent to now contend in his evidence that he got married to the petitioner in February, 2013 when he had already pleaded that he is been married to the petitioner for 22 years at the time this petition was filed.

The evidence on record is that the petitioner and respondent started their love relationship from secondary school in the year 1996. Going by petitioner's account that she has been married to the respondent for twenty four (24) years before this suit was instituted, it suggest that they got married in same year they started the relationship. This in my view even though may be possible in some instances, appears quite inconceivable that Secondary School students whilst still actively in school could get married, especially

within months after they started their relationship. I am therefore not convinced by petitioner's evidence that she's been married to the respondent for 24 years as at 19th May, 2020.

So the big question is when did the parties got married, or how old was the marriage between the petitioner and respondent as at 19th May, 2020?

When the respondent came under cross examination by the petitioner on the 14th July, 2022, the following took place.

Q. How many years did we stay together before you had the children from outside the marriage?

A. We lived together for 22 years and got married about nine years ago.

Q. I put it to you that we lived together for about 19 or 20 years without any problem.

A. That is correct.

From the above encounter the respondent's is basically confirming his earlier statement in his answer to the petition that he's been married to the petitioner for 22 years prior to the petition. I find that the respondent's answer above that "we lived together for twenty two years and got married about nine years ago" is only a veiled attempt to have his answer correspond with the content of his exhibit BE, which exhibit I have already found to be self-serving and afterthought.

If the respondent's position that he lived with the petitioner for 22 years and married her about nine years ago is to be believed, then, it means that he started living with the petitioner from 1998. It is therefore safe to infer, and I hereby infer that this was after they had completed secondary school. This also means that the respondent lived with the petitioner for 15 years before"marrying her in 2013" as he claimed above. The further

question one may be curious to ask is, based on what agreement did the respondent lived with the petitioner for 15 years before marrying her in 2013? Did they live together as father and daughter, brother and sister, cousins or husband and wife?

Both parties have testified that the marriage between them is a customary marriage.

Under the marriages Act 1884-1985, three forms of marriages are recognised in Ghana namely, Customary Marriage (Part one). Marriage of Mohammadans (Part two formerly cap 129) and Christian and other marriages (Part three Cap 127).

Delivering the unanimous judgment of the Court of Appeal in **APOMASU V. BREMAWUO [1980] GLR 278 at 280** Apaloo CJ (as he then was) analysed the nature of marriage in Ghana thus:

"a number of decided cases show that there are, broadly speaking, two types of marriage recognised by law in this country. They are the pure customary union and the monogamous one"

In practical terms therefore customary marriage and marriage under the Mohammadans Ordinance are potentially polygamous, whilst Christian and other marriages are monogamous.

What then constitute a valid customary marriage?

In the case of **Yaotey V. Quaye [1961] GLR 573,** Ollenu J as he then was reiterated the essential features of customary marriage in Ghana regardless of the ethnic grouping as follows:

"The essentials of a valid customary marriage are:

a) agreement by the parties to live together as man and wife;

b) consent of the families of the man and the woman to the marriage. Such consent may be implied from the conduct, e,g. acknowledging the parties as man and wife, or accepting drink from the man or his family;

c) consummation of the marriage, i.e. the parties living together openly as man and wife.

On the evidence before me all the above essentials were fully satisfied in the relationship between the petitioner and the respondent in the instant matter. The petitioner was therefore a customary wife of the respondent for at least 15 years before February, 2013.

I am convinced and I so hold that the parties got married customarily in 1998, after they had completed secondary school that is 22 years before this suit was instituted. This resonates with respondent's answer that he got married to the petitioner 22 years before the suit was instituted.

I shall now proceed to deal with the third issue that is the issue of whether there were any properties acquired during the marriage.

The petitioner in his petition as well as witness statement did not indicate any specific properties that were acquired during the marriage.

For the petitioner to succeed in this direction she has the duty to point out and give particulars of the specific properties she believe were acquired during the marriage. This would have afforded the respondent the opportunity to appropriately respond to same.

With regards to the above issue I have scanned through the record to see whether any particulars of such properties were provided but none was found. Having failed to provide any pleadings on this for the respondent's reaction, I tried to find out whether she gave any evidence on the claim.

When the respondent came under cross examination on 14/07/2022 by the petitioner, below were the excerpts of the encounter on the question of some properties the petitioner claim were acquired during the marriage.

Q. I again put it to you that we jointly acquired a house at Anyabor which has been roofed and is yet to be plastered.

A. That is not true.

Q. The said property is a joint property because you ever made me send a tractor there with load of sand.

A. That is not true.

Q. I further put it to you that we have jointly acquired two plots of land at Dambai Wankayaw.

A. That is not true.

Q. I put it to you that the said land was sold to you by Nana Wankayaw.

A. That is not true I don't have land at Wankayaw.

Q. I further put it to you that we have a Nissan pick-up which I am entitle to a share.

A. I acquired the said pick-up before I got married to you

Q. We bought the pick-up from one Mr.Sadiku of Krachi at a cost of GH¢ 600.00

A. That is not true I bought the said vehicle in 1998 before I got married to you.

Q. We have a bank account at GCB.

A. That is not true. We don't have a GCB account.

Q. I put it to you that we have a yam farm at Abongo.

A. I don't have any farm at Abongo.

Q. I again put it to you that we have a big yam farm at Kokoku Ayramu.

A. What you just said is not true. I don't have any yam farm at Ayramu.

Q. We also jointly acquired a Haogine Motor bike.

A. The said motor bike doesn't belong to me.

Q. I again put it to you that we have jointly acquired a tricycle

A. That is not correct.

Q. I also put it to you that we jointly acquired two deep freezers during the marriage.

A. That is not correct, I do not have even a single deep freezer.

From the above encounter the respondent has flatly denied knowledge of the existence of almost all the properties stated by the petitioner with the exception of the Nissan pick-up which the respondent claimed he acquired before he got married to the petitioner and the Haogine motor bike which he said does not belong to him. In the circumstances it was therefore incumbent on the petitioner to produce convincing evidence for the satisfaction of the court that her assertion was indeed true.

In **Fordjour V. Kaakyire [2015] 85 GMJ 61, Ayebi J.A at page 93** enunciated as follows:

"It has to be noted that the Court determines the merit of every case based on legally proven evidence at the trial and not mere allegations or assertions in the pleadings. A bare assertion without adducing evidence in support of that assertion is not evidence to require denial in cross-examination by the opponent."

Again in the case of **Majolagbe v. Larbi and others [1959] GLR 190 at page 192,** Ollenu J. (as he then was) stated as follows:

"… Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way e.g. by the production of documents, description of things, references to other facts, incidents or circumstances. Where 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 witnesses. He proves it by producing evidence of other facts and circumstances from which the court can be satisfied that what he avers is true."

From the evidence, it is obvious that the petitioner has not pleaded or even stated anywhere in his witness statement about the existence of the above stated properties she cataloged neither has she presented the court with evidence of same. In my considered view the petitioner has failed to prove that the above stated properties exist or were acquired during the marriage.

This notwithstanding, on the question of the Haogine motor bike it is my considered view that the respondent could have explained further as to who it belongs to since he admitted its existence but said it does not belong to him. Similarly the respondent denied the existence of an account at the GCB. But at paragraph 11 of his witness statement he stated as follows:

"As a result of the huge sums of money spent on the treatment of the petitioner, my business suffered serious financial challenges. I had to take a loan of GH¢20,000.00 from GCB bank, Dambai in 2018 to salvage my business from total collapse.

I have no justifiable reason to doubt that the respondent indeed took a loan of GH¢ 20,000.00 from the Ghana Commercial Bank (GCB) in 2018.

However the question I will like to ask is, how was the loan disbursed after it was approved by the bank? Was it paid to the respondent over the counter in cash or it was first paid into an account belonging to him or it was paid to him through another person's account.

In my respectful view it is most improbable for a bank like the GCB to grant a colossal sum of GH¢ 20,000.00 to someone who does not own an existing account with the bank or is not a known customer of the bank.

From the foregoing I find that the respondent has a bank account at the Dambai branch of the GCB and it was through this account that he applied for and was granted the loan supra in 2018. I further find that both the Haogine motor bike and the GCB account were procured during the marriage and hence falls under the spousal property.

A further consideration of the evidence on record on this claim of properties acquired during the marriage convinces me that the petitioner cannot be denied everything only because she did not provide some specific information.

In her petition the petitioner provided her address as H/no 393 Sikafoabantem, Dambai. Undoubtedly, the respondent also uses same address in this suit. The petitioner at paragraph 8 of her witness statement described the said house as the matrimonial home.

Again at paragraph 15 of her witness statement the petitioner stated as follows:

"The respondent has demonstrated that he is no longer interested in the marriage that is why he is subjecting me to all manner of abuses to make me voluntarily move/leave my matrimonial home."

Apart from the above some interesting revelations were made during cross examination of the respondent.

Below are excerpts of what transpired during cross examination of the respondent by the petitioner on 29th June, 2022.

Q. Who bought the land at Sikafoabantem?

A. My late father.

Q. I put it to you that you and I bought the land together at GH¢ 5. We were still in school at the time.

A. That is not correct. How did we get money to buy a plot of land whilst in school, at any rate we were not even married at the time?

Q. Do you remember that whilst in school we were trading in sugar and flour?

A. That is not true.

Q. I put it to you that we were doing business together and that was around 1996-1997.

A. That is not true. I was doing photography whilst in school and that was the money I used in buying my books.

Q In which year did you establish the provision store.

A. In the year 2002

Q. I put it to you that we established the provision store in the year 2000.

A. That is not true. It is rather in 2002.

Q. Do you agree with me that I use to help you at the store on daily basis?

A. That is true but you do so only on Mondays and Tuesdays.

Q. I put it to you that I do help you at the shop throughout the week until you asked me to rather come into the market to be helping you there instead of the other store.

A. That is correct.

Again when the respondent came under cross examination on 14th July, 2022 by the petitioner, the following transpired

Q. Where did you pay my bride price?

A. I paid your bride price at Saboba in the Northern Region at Opanyin Samuel Borah's house.

Q. I put it to you that we acquired house no. 393 Sikafoabantem, Dambai together.

A. This is not true the said house is my family house.

Q. I further put it to you that what you just told the court is not true. Your family house is at Dambai lake side.

A. That is not true.

Further at paragraph 6 of his witness statement filed on 06/08/2020 the respondent stated as follows.

"Before co-habiting with the Petitioner in 2002. I had acquired, among others, the under listed properties.

a) The family house (with the help of my late father) where we currently stay. This was sometime in 1995

b) A Yamaha motor bike in 1996

c) A Nissan Datsun car acquired in 1998 and

d) The provision shop, established in 2002.

I will quickly deal with the issue of the provision stores and pretty shortly come back to house no. 393.

The evidence on record is that the provision store supra has a warehouse attached to it whilst there is another market store and a warehouse at the Dambai market.

I have already made a finding of fact in issue two supra that the customary marriage between the petitioner and respondent was held 22 years prior to the institution of this suit by the petitioner. This therefore means that even if we accept respondent's contention that the first provision shop above stated was established in 2002, it means that it was established four clear years after the marriage between the parties whilst the Nissan Datsun car was acquired in the same year the marriage was held. It further means and I so hold that both shops were acquired during the marriage.

Having dealt with matters relating to the stores I now proceed to touch on H/no. 393.

It is obvious that the respondent's explanation at paragraph 6 of his witness statement of how H/no. 393 was acquired was a direct attempt to defuse any intention by the petitioner to classify the above stated house as a spousal property. In fact, respondent clearly stated at paragraph 31 of his witness statement that there are no properties to be shared at the dissolution of the marriage.

In the case of **Lamptey alias Nkpa v. Fanyie & Others [1989-90] 1 GLR 286,** the Supreme Court held that:

"On general principles, it was the duty of a plaintiff to prove his case. However, when on a particular issue he had led some evidence, then the burden will shift to the defendant to lead sufficient evidence to tip the scale in his favour".

The petitioner has testified that H/no. 393 Sikafoabantem was acquired by the petitioner and respondent from one Mr. Seth at the cost of GHC5 around the 1996-97 out of proceeds of business the parties were engaged in. The respondent has however vehemently rejected plaintiff's assertion contending that the said house was acquired before he got married to the petitioner and also that the house is his family house.

It is my respectful view that there was a burden on the respondent to prove that H/no. 393 Sikafoabantem, was acquired before he got married to the petitioner and secondly that the said house is respondent's family house.

Apart from testifying that the said property was acquired by him with the help of his father in 1995 and that same was a family house, the respondent did not produce a shred of evidence to prove this further. Even though respondent's father is late, he could have called any family member to corroborate his position. Aside this, the respondent did not exhibit any document whether receipt of purchase, indenture, property rate or even receipts of utility bills to justify his assertion that the said house was indeed a family house and not a spousal property.

It is also interesting that the respondent is arguing forcefully that as at 1996-97 both he and petitioner were in school and could not have raised GH¢5 at the time to buy a plot of land yet he the respondent was able to partner his father in 1995 to buy a plot of land whilst he was still in school. In fact, from the evidence, the respondent asserted that he was a photographer whilst in school and it was monies from his photography job that he was using to buy his books and yet on the basis of this same logic the respondent wants this court to believe that the petitioner could not also have raised money or do business whilst in school?

Furthermore, at page 2 paragraph 6 of respondent's answer to the petition, the following questions were asked on the form on which the responded submitted his answer and as part of his answer to the petition the respondent stated as follows:

(6) (a) Are you living with the petitioner as at the date of the suit or living elsewhere

Living with Petitioner

(b) If elsewhere state whether it is Respondent's or petitioner's family house or rented accommodation? **N/A**

(c) If rented accommodation state how much rent is payable **N/A**

On the above form, the respondent clearly had the opportunity to state whether at the time this suit was instituted he and the petitioner were living in his family house or the petitioner's family house and he stated unambiguously that they were neither living in his family house nor the petitioner's family house. It is therefore quite intriguing that the respondent has suddenly made a "U" in his witness statement and during the hearing to contend that the house in which he had lived with the petitioner for several years was a family house.

One may argue that the respondent inadvertently or mistakenly did not state that the above house was a family house. But assuming without admitting that the respondent had committed a genuine mistake, by not properly stating the character of the house in his answer to the petitioner's petition, he could have easily amended his answer or seek leave of the court to amend his answer any time before judgment, to do the needful but he failed to do so.

From the respondent's own answer and conduct, it is safe to infer that if H/No. 393 Sikafoabantem, was not a family house, nor rented accommodation, nor government property then it most probably will be a self-acquired property of the parties.

In the circumstances I find from the record that house no. 393 Sikafoabantem, Dambai is the self-acquired property of the petitioner and the respondent.

In Re Krah (decd): Yankyeraah and others v. Osei Tutu and Another [1989-90] 1 GLR 638 Waku JSC held that:

"There is no principle of law that the plaintiff in a civil suit to succeed must make a cast iron case, and the defendant can say anything and get away with it whether true or false."

From the evidence before me I am convince that the petitioner has been able to prove that H/no. 393 Sikafoabantem forms part of the spousal property and I so hold.

The petitioner's claims 3, 4, 5, 6, 7 and 8 are for rented accommodation, two goats and two boards of mahogany wood, recovery of GH¢600.00, weekly maintenance of GH¢80.00, maintenance arrears of GH¢2,500.00 and recovery of GH¢1,500.00 being loan the respondent took from the petitioner to pay for the fertility treatment of the petitioner respectively.

The third claim of the petition i.e. the rented accommodation was taken care of by the respondent in the course of the hearing so I will not waste precious time on that. On petitioner's fourth claim which is for recovery of two goats and two boards of mahogany wood, there is no evidence on record to the effect that the respondent is owing petitioner such things. Same will therefore be refused.

Again on the recovery of GH¢600.00 the petitioner has failed to produce any evidence to convince this court that the respondent is owing her such amount of money.

There is also the issue of weekly maintenance and maintenance arrears. This vex matter was trashed out just before the close of hearing. The petitioner owed the respondent some accumulated costs from this suit, accordingly the parties came into an amicable

agreement to have a set off and same was adopted by the court. So as it stands, the respondent does not owe the petitioner weekly maintenance nor maintenance arrears.

The final claim of the petitioner was for recovery of GH¢1,500 being a loan the respondent took from petitioner to aid in the treatment of the petitioner's fertility challenge. The respondent has denied this claim. But assuming without admitting that it was even true that the respondent borrowed money from the petitioner for the petitioner's treatment, I find it difficult to accept petitioner's argument that the respondent be made to pay back such money.

The health challenge is directly related to the petitioner, so if the respondent has no enough money at a point in time during the treatment and the petitioner decides to support him, why should that be come a debt on the respondent. At any rate the petitioner has not produce any evidence to support this claim. In the circumstances the claim for the recovery of GH¢1,500.00 is hereby dismissed.

At paragraph 32 of respondent's witness statement he stated that the petitioner has secretly acquired some properties during the marriage but has failed to disclose same to the court. In my estimation the respondent would have produce sufficient evidence to back this claim. But unfortunately there is no evidence on record that confirms this claim. The court will therefore not belabour this point.

The respondent's claim for compensation is refused as the claim lack any basis.

The finally issue is whether the petitioner is entitled to an equitable share of the properties acquired during the marriage.

The petitioner indicated that she and the respondent used to trade in sugar and flour and later during the marriage she use to sell pure water but the respondent stopped her from

selling the water due to high electricity bills. Her assertions were however sharply denied by the respondent. The undisputed evidence on record however is that the respondent operates two separate shops, one by the main Dambai road whilst the other is situate within the Dambai market and petitioner until the quarrels and misunderstanding used to help the respondent at shops where the respondent was operating from.

There is also evidence on record that the respondent's mother due to ill health had lived with the parties in the matrimonial home for four years under the care of the petitioner and respondent. The petitioner in her evidence also testified that she has nurtured about five children from respondent's family and particular among them was a nephew of the respondent by name Nkebu, from infancy till he completed Senior High School and that Nkebu is the one now managing respondent's shop. There is also evidence on record that petitioner in the course of the marriage brought in members of her family who lived with the parties at varied periods.

Even though respondent denied knowing anyone by name Nkebu, under cross examination of the respondent it came to light that the said Nkebu was the same person the respondent described as Wisdom Belingham who the respondent also said was his brother's son.

The evidence on record also has it that all petitioner's needs were catered for by proceeds from the shops. Aside that the respondent testified that he used to send food stuffs to petitioner's father every two weeks. There is also incontrovertible evidence on record that the petitioner whilst leaving with the respondent was into rearing of goats. However the evidence did not disclose how many of the goats are still there at present.

The evidence on record is that the problems between the parties got to the pick in 2019 which resulted in the respondent refusing to eat food prepared by the petitioner and also

refusing to have sex with her whilst the petitioner also stopped handling the laundry of the respondent.

Additionally there is sufficient evidence on record based on which I have already made a finding of fact that the parties had lived together for twenty two years before this suit was instituted.

So, for over two decades, the compound, backyard, kitchen, sitting room and all other parts of the matrimonial home was maintained and sustained by the petitioner satisfactorily. The respondent during cross examination also admitted that the petitioner never denied him of his conjugal rights during the marriage.

I find that the petitioner was performing the role of the wife as any other woman will do in a marriage for the period of the marriage, the question is what value do I place on the wifely duties of the petitioner, as I have set out above? I must say that the guidelines for such award now appear quite certain from some of the decided cases I will soon enumerate.

Before I go into those cases section 20 (1) of Act 367 provides:

(i) "The Court may order either party to the marriage to pay to the other party such sum or money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof as part of financial provision as the Court thinks just and equitable.

(ii) Payment and conveyances under this section may be ordered to be made in gross or by installment."

In determining whether or not to make a property or financial settlement to a party within the context of section 20 (1) of Act 367, the Court is enjoined to be just and equitable and in determining what is just and equitable, the Court is to take due regard of all the

circumstances of the case. The income, future earning capacities of the parties, property and resources of the parties, their standard of living, ages of the parties and duration of the marriage, and contribution of each of the parties are some of the factors which are taken into consideration in determining what is just and equitable.

See **Obeng v. Obeng (2013) 63 GMJ 158 CA.** Similarly in the case of **Gladys Mensah v. Mensah (2012) SCGLR 391** where the Supreme Court applied Article 22 (3) of the 1992 Constitution and concluded that property acquired during the marriage is to be distributed equitably on dissolution of the marriage and that financial contribution should not be the only yardstick to determine whether or not a party can benefit from property acquired during the subsistence of a marriage, on the dissolution of same.

In the case of **Arthur (NO.1) v. Arthur (NO.1) (2013-2014) 1 SCGLR 543 at 560.** The Supreme Court emphasized that matrimonial property is property acquired by the spouses during the marriage, irrespective of whether the other spouse has made a contribution to its acquisition. Cocking cleaning, taking care of the children of the household, doing laundry and generally performing household chores will be taken into consideration in the distribution of property acquired during the marriage. It is based on similar reasons that in the case of **Mensah v. Mensah** (supra), the Supreme Court held that:

"The wife's contribution even as a housewife, in maintaining the house and creating a congenial atmosphere for the husband to create the economic empire he has built are enough to earn her an equal share in the matrimonial properties on offer for distribution upon a grant of a decree of divorce."

It is significant to state that in all these cases the decision of the courts is that distribution of marital property on divorce should be guided by equitable principles on a case by case basis. It is for this reason that in the case of **Boafo v. Boafo [2005-6] SCGLR 705,** the court

held that "what was equitable" in essence, is what was just, reasonable and accorded with common sense and fair play, and was a pure question of fact, dependent purely on the particular circumstance of each case. The proportions would therefore, be fixed in accordance with the equities of each case."

Now let me deal with this nagging issue that the respondent raised in his witness statement and during the hearing. His point was that he has spent huge resources on the petitioner's fertility treatment at the detriment of his business and the opportunity to acquire other properties. As such the petitioner does not deserve to be granted any of her reliefs except the dissolution of the marriage.

In my view as far as the parties were married, the health challenge of any of them was necessarily the problem of all of them. As the saying goes "for better and for worse". Even if it was the case that some huge resources were expended on the petitioner's medical condition, the respondent was not to be understood as doing the petitioner a favour. It was encumbered on the respondent to take steps to ensure that the petitioner's health needs were catered for.

If after all these efforts there are still properties in the marriage at the dissolution of the marriage, the petitioner cannot be denied settlement on the basis that resources were expended in treating her fertility issues. In my respectful opinion, property settlement on a party under this kind of situation is purely based on the cumulative works or contribution of the party during the subsistence of the marriage.

What has been the general contribution of the petitioner in whatever form or shape to the marriage? That should be the main consideration. I am not in agreement with the respondent that the petitioner be denied completely of any settlement. The petitioner cannot be denied every contribution that she made to the success of the respondent for the over two decades.

The petitioner no doubt came into the marriage with high hopes and have spent the best years of her life with the respondent and cannot be stripped necked on her quest to peacefully walk away from the troubled marriage. The petitioner is far advance in age and most likely will have to now single handed, live and deal with the embarrassment and social pressures of childlessness. The evidence on record shows that apart from her fertility challenges, the petitioner is also asthmatic and requires regular health care and attention. She is also currently jobless and will therefore needs a stable job that will not necessarily endanger her health condition.

I have critically examined the entire evidence as best as I can and I am settled in my mind that the petitioner should have a permanent shelter over her head. Additionally she may have to reorganise her live and start a business of her own and the capital or seed money will have to be met by this suit.

These are my major considerations in the award I have settled on. I have considered the two stores and the two warehouses as well as the matrimonial home which per the evidence is made up of a two bed room self-contain and other rooms detached from the self-contain. I have not also lost sight of the Haogine motor bike and the GCB account at the Dambai branch of the Ghana Commercial bank PLC.

With all these considerations, my distribution is as follows:

(1) I settle the store on the Dambai main road on the petitioner.

(2) I award petitioner GH¢ 15,000.00 as financial settlement.

(3) I settle the two bed room self-contain in house number 393 Sikafoabantem, Dambai on the petitioner.

(i) The respondent is to convey the two bed room self-contain in house no. 393 Sikafoabantem to the petitioner within 60 days failing which the registrar of this court is mandated to execute the conveyance.

(4) Perpetual injunction restraining the respondent, his privies, assigns, successors, agents, workmen or whosoever claiming tittle through him from dealing with and/or interfering with the quiet enjoyment of the petitioner of the two bed room self-contain in house no. 393 Sikafoabantem and the store above stated.

(5) I settle all the other rooms in house no. 393 Sikafoabantem on the respondent in addition to the warehouse on the main Dambai road as well as the second store and warehouse in the Dambai market.

(6) I also settle the Haogine motor bike and the GCB account on the respondent.

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H/W ALHASSAN DRAMANI

DISTRICT MAGISTRATE

17TH NOVEMBER, 2022.