

IN THE DISTRICT COURT HELD AT WEIJA, ACCRA ON TUESDAY THE 10TH DAY
OF OCTOBER, 2023 BEFORE HER WORSHIP RUBY NTIRI OPOKU (MRS),
DISTRICT MAGISTRATE

SUIT NO. G/WJ/DG/A4/79/23

GIDEON YAW BANINI SUING PER
HIS LAWFUL ATTORNEY
YUNUSAH IDDRISU GUNU

PETITIONER

VRS

JENNIFER BANINI

RESPONDENT

PETITIONER'S LAWFUL ATTORNEY IS PRESENT AND REPRESENTED BY SIDIQUE
M. LASKAYA ESQ HOLDING BRIEF FOR YVONNE AMEGASHIE ESQ.
RESPONDENT IS ABSENT.

JUDGMENT

The brief facts of the case is that the Parties both citizens of Ghana got married under Part III of the Marriages Act 1884-1985 (Cap 127) on 14th July 2019 at the Lighthouse Chapel Nyanyano Kakraba, Kasoa. Petitioner is ordinarily resident in the United States of America.

After the marriage, parties cohabited at old Weija Barrier and are blessed with three issues of the marriage namely Donald Kafui Banini aged 12 years, Stephanie Eyram Banini aged 10 years and Gideon Mawufemor Banini aged 2 years.

The petitioner filed a petition at the registry of this court on 6th April, 2023 against the respondent for the following reliefs:

- a. An order dissolving the ordinance marriage celebrated between the parties as having broken down beyond reconciliation.

- b. Custody of the issues of the marriage to be granted to the respondent with reasonable access to the petitioner. The children shall visit petitioner at the United States on school vacations whilst petitioner continues to maintain the children.

Respondent was served with the petition and a hearing notice by substituted service on 12th June 2023 as all attempts to serve her personally with the processes failed. It is to be noted that even though respondent was served with all the necessary processes as well as hearing notices, for unexplained reasons, respondent did not file any process to contest the suit or appear in court personally to be heard.

The court therefore proceeded without her pursuant to Order 25 r 1(2) (a) of the District Court Rules 2009, C.I 59 which provides as follows;

“Where an action is called for trial and a party fails to attend, the trial magistrate may where the Plaintiff attends and the Defendant fails to attend, dismiss the counterclaim if any and allow the Plaintiff to prove the claim”

At page 130 of the book, *At a Glance! Contemporary Principles of Family Law in Ghana* by Frederica Ahwireng-Obeng, the learned author cited the case of *Darko v Darko* [2011] GTM 121, and stated that a Judge must listen to the petitioner even if the respondent does not file a reply or answer. She added that even if a respondent does not contest a petition, the petitioner must prove the offences alleged in the petition.

PETITIONER’S CASE

The lawful attorney of the Petitioner pleaded that the parties’ marriage has broken down beyond reconciliation by reason of the adulterous and unreasonable behaviour of the respondent. He pleaded further that respondent informed petitioner that marrying him was the worst decision she had made in her life and that she regretted being involved with him. According to lawful attorney of petitioner, when respondent got pregnant with the parties’ second child, she evinced an intention to abort the pregnancy because she

had been informed by someone from her family that petitioner is a bad and terrible person.

According to him, the respondent refused to grant her consent for the issues of the marriage to visit petitioner in the United States of America. He pleaded further that respondent is disrespectful and abuses petitioner verbally making him go through a lot of emotional pain and imbalance. Petitioner's lawful attorney pleaded that petitioner has set up respondent in business severally but they all ended up in bankruptcy. He added that respondent locks up the issues of the marriage in a room and goes to the beach to hang out with men. He pleaded that there is a particular man who visits respondent whenever petitioner is in the United States and all pieces of advice to respondent to break off the said relationship have fallen on deaf ears.

He pleaded that respondent has moved to an unknown location and all attempts made by petitioner to call her on telephone or visit the children have proven futile.

He pleaded further that respondent informed petitioner in December 2021 that she is no longer interested in the marriage and as a result parties have not lived as husband and wife for two years and all attempts to reconcile parties have failed.

He therefore prayed the court to dissolve parties' marriage and grant petitioner's reliefs as endorsed on the face of the petition.

ISSUES SET DOWN FOR DETERMINATION

The court set down the following issues for determination;

1. Whether or not the marriage between the parties has broken down beyond reconciliation
2. Whether or not custody of the issues of the marriage should be granted to respondent with reasonable access to the petitioner

BURDEN OF PROOF

In all divorce (civil) disputes, the petitioner ought to adduce evidence which must prove on the preponderance of probabilities that the marriage has broken down beyond reconciliation.

A party who asserts assumes the burden of proof. The requirements in sections 10,11 and 12 of the Evidence Act, 1975 (NRCD 323) on the burden to adduce evidence and burden of persuasion which together constitute the burden of proof was explained in **Yorkwa v Duah [1992-93] GBR 272** as follows;

“I am of the view that the expression burden of persuasion should be interpreted to mean the quality, quantum, amount, degree or extent of evidence the litigant is obliged to adduce in order to satisfy the requirement of proving a situation or fact. The burden of persuasion differs from the burden of producing evidence...the burden of producing evidence means the duty or obligation lying on a litigant to lead evidence. In other words, these latter sections cover which of the litigating parties should be the first to lead evidence before the other’s evidence is led.

Therefore it is the plaintiff who will lose first who has the duty or obligation to lead evidence in order to forestall a ruling being made against him.”

The burden of proving the claims lies on the party making the claim.

The burden of producing evidence may shift from the party who bore the primary duty to the other.

Section 14 of the Evidence Act, 1975 (NRCD 323) provides as follows;

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

In the case of **Re Ashalley Botwe Lands; Adjete Agbosu v Kotey [2003-2004] SCGLR 420**, it was held as follows;

“It is trite learning that by the statutory provisions of the Evidence Decree 1975 (NRCD 323) the burden of producing evidence in a given case is not fixed but shifts from party to party at various stages of the trial depending on the issue(s) asserted.

ISSUE ONE

In divorce cases, section 1(2) of the Matrimonial Causes Act, 1971 (Act 367) provides that the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation.

Section 2 (1) of Act 367 again provides that for the purpose of showing that the marriage has broken down beyond reconciliation, the petitioner shall satisfy the court of one or more of the following facts:

- (a) That the Respondent has committed adultery and that by reason of the adultery the petitioner finds it intolerable to live with the Respondent
- (b) That the Respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent
- (c) That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition
- (d) That the parties to the marriage have not lived as husband 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 the consent shall not be unreasonably withheld and where the court is satisfied that it has been withheld the court may grant a petition for divorce under this paragraph despite the refusal
- (e) That the parties to the marriage have not lived as husband and wife for a continuous period of at least five years immediately preceding the presentation of the petition
- (f) That the parties after a diligent effort been unable to reconcile their differences.

Section 2(3) provides that although the court finds the existence of one or more of the facts specified in (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.

From the evidence, the Petitioner based his allegations for the breakdown of the marriage on the unreasonable behaviour of the Respondent pursuant to section 2(1) (b) of Act 367 cited supra.

To succeed under this section, the petitioner must satisfy the court that the respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent as a husband.

From the evidence, the respondent was not in court to cross examine the petitioner on his assertions.

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

I therefore find and hold that the petitioner has been able to prove on a balance of probabilities that the respondent has behaved in a way that he cannot reasonably be expected to live with her and as a result parties have been separated for two years preceding the presentation of this petition.

I therefore proceed under Section 47 (1)(f) of the Courts Act 1993, (Act 459) to decree that the Ordinance Marriage between Gideon Yao Banini and Jennifer Banini celebrated at the Mega Church, Nyanyanor Kakraba on 14th July, 2019 is hereby dissolved.

I hereby order the cancellation of the marriage certificate issued. A certificate of divorce is to be issued accordingly.

ISSUE TWO

In resolving custody of the children of the dissolved marriage, it is uncontroverted that the issues of the marriage have been living with the respondent since the separation of the parties. It will be in the interest of the children to remain in the custody of the respondent with reasonable access to the petitioner pursuant to sections 2 and 45 of the Children's Act, 1998 (Act 560) for continuity in their care and control.

The court hereby grants custody of the three issues of the marriage to the respondent with reasonable access to the petitioner who shall be entitled to travel with them abroad on school vacations and respondent shall not unreasonably withhold her consent.

The petitioner shall continue to be responsible for the maintenance of the three issues of the marriage, payment of their school fees and medical bills as well as the provision of their casual and outing clothes.

DECISION

1. I find that the parties, marriage has broken down beyond reconciliation due to the fact that parties have not lived as husband and wife for well over two years. A certificate of divorce is to issue.
2. Custody of the issues of the marriage is granted to respondent with reasonable access to the petitioner who shall be entitled to travel with them abroad on school vacations.
3. Petitioner is ordered to maintain the issues of the marriage, pay their school fees and medical bills as and when payments fall due.
4. I make no order as to costs.

.....(SGD).....

H/W RUBY NTIRI OPOKU (MRS.)
(DISTRICT MAGISTRATE)

