IN THE DISTRICT MAGISTRATE COURT, HARBOR AREA, TAKORADI, HELD ON WEDNESDAY 12TH DAY OF JULY, 2023 BEFORE HIS WORSHIP BERNARD DEBRAH BINEY ESQ. - MAGISTRATE

SUIT NO. A4/08/2023

FATIMATU YAHAYA **.....** **PETITIONER**
H/NO. M44-45
ADIEMBRA-SEKONDI
VRS
GODWIN ISREAL **….** **RESPONDENT**
UNKNOWN HSE. NO.
KANSAWORODO

JUDGMENT

By her divorce petition dated 3rd January,2023 and filed in the registry of this court on 11/01/2023 the Petitioner is praying this honorable to grant the reliefs endorsed as follows;

(1) Dissolution of marriage between the parties.

(2) Custody of the only child of the marriage.

On their appearance day in court, the Respondent failed to file his answer to the petition against him and this being proceedings touching on divorce of marriage which is a matrimonial cause and as required by Order 18 rule of C.I. 59, but blamed his inability to do same on lack of financial resources.

On their next day of appearance in court, the court seized the opportunity to introduce the concept of Court Connected ADR to them and admonished them to take advantage of same due to the relationship and the fact that parties have a child between them, which they obliged and met the mediator but unfortunately they could not settle their dispute and had to be referred back to the court for adjudication.

Parties were further ordered and Petitioner accordingly filed her witness statement and served copy on the Respondent who once again failed to file his and gave the same excuse for his failure

ISSUES FOR DETERMINATION

At the close of pleadings, the court set the following issues for determination;

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

2. Whether or not Petitioner is entitled to the dissolution of marriage sought.

3. Whether or not Petitioner is entitled to the grant of custody of the only child in marriage.

EVIDENCE ADDUCED IN COURT

The case of the Petitioner is simply that she got married to the Defendant under the Marriage Act (Cap 127) on 18th November, 2016 at Kweikuma. At the time of their marriage, the Respondent was working with a hotel in Tarkwa so parties stayed at a duty post accommodation provided by respondent employers. When the hotel was sold, Respondent was paid off and parties returned to Sekondi -Takoradi and rented apartment at Kansaworodo where they had been living until Petitioner moved to live with her parent.

According to the Petitioner, their marriage was blessed with a son called Godwin isreal Jnr who is only three years and is currently in the custody of Petitioner. Prior to their marriage, the Respondent did not reveal that he is suffering from erectile dysfunction and when Petitioner got to know it Respondent has never co-operated in finding a cure to it. This medical situation has deprived Petitioner of any happiness in the marriage as the respondent refuses to take any medication that is prescribed for him. Eversince parties moved out of Tarkwa over three years ago Respondent has refused to work despite various job opportunities that came his way and his reason for not working is that his God has revealed to him not to work but be taken care of by his wife. Consequently, the Respondent does not provide anything towards the running of the home, the Petitioner provides all the money for their feeding, taking care of their son, his school fees and all his needs as well as providing chop money for the Respondent. The Petitioner further told the court that she is currently in school at University of Education, Winneba, and have to come down every weekend to prepare enough food for him to eat throughout the week. This situation has caused great inconvenience and plunged petitioner into serious emotional trauma and financial crisis. Family members and pastors have intervened on several occasions to resolve their differences but Respondent never bothered and maintained his stand of not working. The Petitioner concluded that, form the efforts she has put in to make their marriage successful, it is now obvious that they have differences that cannot be reconciled, and the behavior of the Respondent is such that it will be extremely impossible for the two of them to live together as man and wife. The Petitioner therefore prays the court to dissolve the marriage and

grant custody of the only child of the marriage to her as there is no way the Respondent can cater for the upbringing of the child.

FINDINGS OF FACT

The court found as fact that Respondent has since 2019 not worked for any in come to support the Petitioner and their only child. The Petitioner has since 2019 been responsible for the keeping of the family for feeding, health and all necessaries of life for the home. The Respondent has been suffering from erectile dysfunction since 2019 and has refused to take medication which has rendered him impotent and as a result, there has not been any sexual intercourse between Respondent and the Petitioner for the past three years. That parties have not been able to reconcile their differences despite diligent effort by pastors and family members. That parties have separated for sometime before the filing of the suit.

ANALYSIS

In the case of **In re Ashaley Botwe Lands : Adjetey Agbosu & ors v Kotey & ors (2003-2004) SCGLR 420 at 425,** it was held that" A litigant who is a defendant in a civil case does not need to prove anything, the plaintiff who took the defendant to court has to prove what he claims to be entitled from the Defendant. At the same time, if the court has to make determination of a fact or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realize, that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favor, then he has the duty to help his own cause or case by adducing before the court such fact or evidence that will induce the determination to be made in his favour. 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, which may turn out to be only evidence of the Plaintiff. If the court chooses to believe the only evidence on record, the Plaintiff may win, the defendant may lose. Such loss may be brought about by default on the part of the defendant"

It is on the basis of the afore-mention authority that I proceed to decide the instant case. In her testimony before the court, the Petitioner filed her witness statement in support of her petition and called no witness.

On the day fixed for hearing, Petitioner took oath, and identified her signature on the witness statement which was admitted into evidence without objection and same converted to be her evidence

in chief but strangely, when the Respondent was called upon to cross examine her, Respondent refused and just said that he accept whatever the Petitioner has said, so he has no questions to ask but blamed whatever is happening on negative influence on the Petitioner.

It would be observed that Petitioner's relief is all about dissolution of their marriage and custody of the child between them.

It is trite that when an adversary corroborate an issue advantageous to plaintiff's case, as in the instant case, same is deemed to be a proof which relieves the burden on the claimant to further proof his assertions. In all civil cases, the general rule is that the party who in his pleadings or his writ raises issues essential to the success of his case assumes the onus of proof. The same principle applies if the Defendant makes counterclaim. The failure of the Defendant to plead such a vital piece of evidence to convince the court to tilt the scale of justice in his favor spells doom for the success of his case and would have a difficult task carrying the day in court.

The **Evidence Act, 1975 (NRCD 323)** uses the expression "**burden of persuasion**" to describe the duty imposed on a party who makes an assertion to prove his case ,and in section 14 of the Evidence Act supra, that expression has been defined as relating to

"Each fact the existence or non-existence of which is essential to the claim or defence he is asserting"

The onus of proof in a civil case is that the Plaintiff is to prove his case on a balance of probabilities within the meaning of the law.

As stated in this quotation by Ollenu in the case of **Majolagbe v. Larbi [1959] GLR 190** and re-echoed in the case of: **Klah .v. Phoenix Insurance Company Ltd. [2012] 2 SGCLR page 1139 at page 1151**; it was held that:

"Where a party makes an averment capable of proof in some positive way e.g. by producing documents, description of things, reference to some facts. Instances, or circumstances, and 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 witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true"

The Petitioner in this case is therefore required to prove sufficiently her averment against the Respondent to succeed in this action on balance of probabilities.

Relevant Law and Application.

Section 1 of the Matrimonial Causes Act, 1971 (Act 267) with the heading "Petition for Divorce" provides as follows: "*(1) a petition for divorce may be presented to the court by either party of the marriage.*

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

Section 2 of Act 367 with the heading *"Proof of breakdown of Marriage"* provides in subsection (1) (f) as follows:

"(1) *for the purposes of showing that the marriage has broken down beyond reconciliation, the petitioner shall satisfy the court of one or more of the following facts*;

(f) *that the parties to the marriage have after diligent efforts ben unable to reconcile their differences"*

It is now undisputed that parties contracted their marriage under Cap 127 and Petitioner in proof of that has attached their Marriage Certificate Sekondi Takoradi Metropolitan Assembly, Certificate No. 1179/2016 issued on 18th November, 2016 which was admitted into evidence without objection and marked as Exhibit A.

Section 2 of the Matrimonial Causes Act, 1971(Act 367) headed Proof of Breakdown of Marriage.

(1) For the purpose of showing that the marriage has broken down beyond reconciliation the petitioner shall satisfy the court of one or more of the following facts:—

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

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

(2) On a petition for divorce it shall be the duty of the court to inquire, so far as is reasonable, into the facts alleged by the petitioner and the respondent.

On the fact of the instant case, the Petitioner proved that the Respondent has refused to work and for the past three years, Respondent provides or contribute nothing for the maintenance of the home and he has just simply refused to work despite job opportunities that came his way. This unreasonable attitude of the Respondent has caused great inconvenience and plunged Petitioner into serious emotional trauma and financial crisis. Obviously by this behavior of the Respondent, Petitioner cannot reasonably be expected to live with the Respondent. Again on the evidence as provided by the Petitioner which Respondent admitted, parties, especially Petitioner has by diligent effort invited family members and pastors to try and reconcile their differences but all has been in vain due to the intransigence of the Respondent.

The evidence further established that the Respondent has been suffering from erectile dysfunction which has rendered him impotent and Respondent has refused to co-operate in finding cure to it, and this medical situation has deprived the Petitioner of any happiness in the marriage and for this reason parties have not had any sexual intimacy after the birth of their child for over three years now. This is a constructive desertion of the petitioner on the part of the Respondent and it is yet another one of the facts that needs to be proved to show that the marriage has broken down beyond reconciliation.

Section 26 of the **Evidence Decree NRCD 323 OF 1975** provides;

"***except as otherwise provided by law, including a rule of equity, when a party has by his own statement, act, or omission intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest".***

This position has clearly been stated by the Superior Courts in a plethora of cases and one of such cases is the case of **Akotia Oworsika III (substituted by Laryea AyikuIII v. Nikoi Okai Amontia IV Substituted by Tafo Amon II) Chieftanicy Appeal No. 1/2003 delivered on 26th January, 2005 unreported** where the Supreme Court per **Dr. Twum JSC** held that

"In my view this type of proof is a salutary rule of evidence based on common sense and expediency. Where an adversary has admitted fact advantageous to your cause, what better evidence do you need to establish that fact than by relying on his own admission. This is really an

example of estoppel by conduct. It is a rule whereby a party is precluded from denying the existence of some state of facts which he had formerly asserted"

The Respondent in the instant case, was given every opportunity to challenge or dispute the claims of the Petitioner but rather he confirmed same thereby corroborating the claims of the Petitioner and instead blamed it on negative influence on the Petitioner.

Accordingly, on the basis of the above cited authorities, the court can only rely on the evidence of the Petitioner as satisfactory prove that their marriage has broken down beyond reconciliation.

In the circumstance, it is the view of this court that Petitioner has been able to prove her case on the balance of probabilities, against the Respondent that the party's marriage has indeed broken down beyond reconciliation, and I will so hold.

Having come to this conclusion, I will proceed to order dissolution of the marriage celebrated between the parties on 18/11/2016 at Christian Faith Church, Kweikuma.

Since the best interest of the child is of utmost importance to the court, section 45 of the Children' Act, 1998 (Act 560) cannot be glossed over. It is clear from the evidence adduced that the child is a minor and currently in the custody of the Petitioner in Takoradi. The Respondent on the other hand lives in Kansaworodo, Takoradi all alone and without any gainful employment or any meaningful income. And since it is the Court's primary duty to ensure the need for continuity in the care and control of the child, it is desirable that the child remains in the custody of the Petitioner in Takoradi to ensure that there is no disruption in his educational environment. Furthermore, due to his tender age, it is desirable to let the child remain in the Petitioner's custody as the court considers same to be in the best interest of the child.

Consequently, I hereby grant custody of parties only child in the marriage, **Godwin Isreal Jnr ($3^{1}/_{2}$ years)** to the Petitioner with reasonable access to the Respondent, who is encouraged to work and contribute to the maintenance and upkeep of the child. Accordingly, the Respondent is further ordered to contribute Ghc 500.00 monthly towards the upkeep of their child effective end of July 2023.

Cost of Ghc 2000.00 awarded in favor of Petitioner.

SGD
H/W BERNARD D. BINEY
(MAGISTRATE)

COUNSEL

F.F. Faidoo for the Petitioner- Present

References;

1. In re Ashaley Botwe Lands : Adjetey Agbosu & ors v Kotey & ors (2003-2004) SCGLR 420 at 425
2. Section 14 of the Evidence Act, 1975 (NRCD 323).
3. Majolagbe v. Larbi [1959] GLR 190 and re-echoed in the case of: Klah .v. Phoenix Insurance Company Ltd. [2012] 2 SGCLR
4. Section 2 of the Matrimonial Causes Act, 1971(Act 367)
5. Section 26 of the Evidence Decree NRCD 323 OF 1975
6. Akotia Oworsika III (substituted by Laryea AyikuIII v. Nikoi Okai Amontia IV Substituted by Tafo Amon II) Chieftaincy Appeal No. 1/2003 delivered on 26th January, 2005.
7. Section 45 of the Children' Act, 1998 (Act 560)