

IN THE DISTRICT COURT
AGONA SWEDRU - A.D. 2023
BEFORE HIS HONOUR ISAAC APEATU

Civil Suit No A4/96/2023

13th February, 2023

AGNES PEGGY ODOOM

... Petitioner

VERSUS

REV. EMMANUEL BAAH BOISON

..... Respondent

JUDGMENT

It is clear that the petition which originated this action was filed by the petitioner-wife of the marriage for dissolution of the marriage among other reliefs. The petition was filed on 19th October, 2022 and same was served on the respondent. From a brief look at the petition, it is stated that the marriage was celebrated on the 23rd day of April 2014 at the Bethesda Methodist Church, Agona Swedru. There appears to be no issue in the marriage. The petitioner claims that the marriage has broken down beyond reconciliation. She thus filed this suit seeking an order for dissolution of the marriage.

In accordance with Order 18 rule 1(3) of the District Court rules, C.I. 59, the Petitioner attached the grounds of her petition for dissolution of the marriage to her petition. The Petitioner deposed in her petition that the marriage between her and the

Respondent has broken down beyond reconciliation. She averred that she customarily got married to the Respondent when she was 31 years of age then and with the consent of her parents the said marriage was witnessed by a host of family members from both sides at Agona Swedru on the 23rd day of April, 2014 and thereafter celebrated the said marriage at the Bethesda Methodist Church, Agona Swedru where a valid Marriage Certificate was issued in respect of the said marriage. That shortly after the said marriage, the Petitioner expected the said marriage should be consumed to seal their marriage but to her surprise, the Respondent for several attempts to rouse in order to consummate the marriage failed which made the petitioner to come to a conclusion that the Respondent was fully aware that he was impotent and for that matter could not perform but went ahead to marry her. That due to that situation, both parties could not have any child out of their said marriage which is now almost nine (9) years now which has given the Petitioner psychological and mental trauma especially taking her age into consideration as a woman who is now 39 years advancing in age. That when the situation was not seeing light, both parties visited various Herbal Clinics like the Champion Divine Clinic, Lucky Herbal Clinic, and later Grace Herbal Clinic but nothing fruitfully came out of those places as such, the situation gives sleepless and mental torture to her as relatives and friends started thinking that it was her who is not fruitful.

Petitioner averred that when those places failed to produce expected results, they visited other prayer camps for intervention but those efforts have also failed.

Petitioner averred that the situation is having a deep effect on her especially when she is reaching womanhood and may very soon not be able to bring forth to any child or children in future if she remains with him.

Petitioner averred that during the course of their marriage, both parties purchased a landed property which is situate, lying and being at the Sawmill, Agona Swedru.

Petitioner further averred that this situation came about as a result of complying with

the ethics of the Biblical Teachings not to know themselves carnally before marriage especially when the Respondent is a Reverend Minister. Petitioner averred that the happiness expected in the marriage has since vanished as she is now at the 8th year of their marriage not carrying any baby. Petitioner avers that the marriage now looks bleak as such, she has relocated to her parents at Agona Swedru. That as at now, both parties are living apart and there is no way both parties can reconcile as man and wife. That it is very clear that the said marriage has since broken down beyond reconciliation and therefore irretrievable therefore Petitioner cannot live with the Respondent any longer as the future of the marriage looks nebulous and cloudy with no hope of coming together as man and wife. She therefore prayed for the following reliefs:

1. That the Honourable Court makes an Order for Divorce or otherwise dissolution of the Customary Marriage between both parties.
2. An Order by this Honourable Court for equal share of the landed property both parties purchased which said land is at the New Sawmills, Agona Swedru.
3. A further Judicial Order directed at the Respondent to return the Marriage Certificate issued in respect of the said marriage at the Bethesda Methodist Church, Agona Swedru.
4. GH¢50,000 alimony for psychological and mental torture in the hands of the Respondent herein

The petition together with attached documents was duly served on the Respondent as mandated by procedure. On receipt of the processes, the respondent filed an Answer to the petition. He denied most the averments made by the petitioner in her petition. He denied the assertion that he was impotent and could not consummate the marriage insisting that he is very potent and had consumed his marriage with the petitioner. That they have had sexual intercourse on several occasions ever since they got married at 8 years. Respondent averred that he the petitioner was a virgin at the time he got married to her and it was he who broke her virginity through sexual

intercourse. The respondent averred that it is not the petitioner alone who has gone through psychological and mental agony due to inability to have a child. That he has also gone through the same situation but he cannot be blamed for it. Respondent averred that he knows that petitioner is happy in the marriage but if she says she is not happy, then it was petitioner's decision to choose not to be happy in the marriage because happiness does not lie solely on having children or not.

Respondent averred that he is not the one who asked the petitioner to leave the matrimonial home. Petitioner was flirting with another man and had committed adultery with that man. This resulted in a misunderstanding between the parties concerning the adultery the petitioner committed.

Respondent averred that he discovered that the petitioner was having an affair with one Richard Atreku, the Commercial Bank Manager and he confronted the petitioner. That he discovered the petitioner is having affairs with the said Richard by reading their whatsapp messages from petitioner's mobile phone. That after seeing the truth about the petitioner and the said Richard, petitioner threatened that if respondent confronted Richard, she would leave the matrimonial home and divorce the respondent. The respondent avers that he confronted Richard by calling him on phone to warn him to desist from his wife and based upon that the petitioner became angry and left the matrimonial home.

Respondent averred that in August, 2022, Richard invited petitioner to Cape Coast for a funeral and petitioner upon her return changed her character totally by going to the road side to make calls, chatting on phone at mid-night with Richard, placing password on her phone etc. Respondent averred that it took him weeks to unlock the petitioner's phone to enable him read the messages. Respondent averred that he has evidence indicating that petitioner has actually committed adultery and will strictly prove to the petitioner when the need arises.

The general rule of law is that the court before whom a matrimonial case is brought was under a duty to inquire so far as it reasonably could, into the charges and counter charges alleged by parties in a divorce suit as this one. But the onus of proof is on the petitioner to prove all allegations made against any such respondent and where a respondent made a counter allegation, he/she in accordance with section 14 of NRCD 323, bears the onus of proof to establish those allegations. And in discharging the onus on the petitioner, it was immaterial that the respondent had not contested the petition; he/she must prove the charges and, flowing from all the evidence before the court, the court must be satisfied that the marriage had irretrievably broken down. See **Danquah v. Danquah [1979] G.L.R. 371; Donkor v Donkor [1982-83] GLR 1158.**

The onus therefore, of producing evidence that the marriage has broken down beyond reconciliation, as in all matrimonial causes, is on the party against whom a finding of fact would be made in the absence of further proof i.e. the petitioner: see Section 17(a) and (b) of NRCD 323. In the task of proving breakdown of the marriage, it is important to underscore the authority that matters that are capable of proof must be proved by producing sufficient evidence so that, on all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence. This is the requirement of the law on evidence under sections 10 (1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323).

The burden of producing evidence has thus been defined in Section 11 (1) of NRCD 323 as follows;

“11 (1) For the purpose of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party”.

And it bears stating that the burden of proof is also not static but could shift from party to party at various stages of the trial depending on the obligation that is put on

that party on an issue. This provision on the shifting of the burden of proof is contained in Section 14 of NRCD 323 as follows:

“14 Except as otherwise provided by law, unless 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 that party is asserting”.

In accordance with the general rule of procedure as stated above, the Petitioner had the burden of proving all the averments she made against the respondent on the standard of preponderance of probabilities. If she succeeds in establishing her averments by evidence, the onus will then shift to the Respondent to lead some evidence to rebut same.

As is trite knowledge, the Matrimonial Causes Act, 1971 (Act 367) regulates divorces and other matrimonial causes in this country. Under section 1(2) of Act 367, a Court shall not grant a petition for divorce unless the marriage is proven to have broken down beyond reconciliation. As I have established above, the onus of such proof is on the party who alleges that the marriage has broken down beyond reconciliation. But under Section 2(1) of Act 367, for the purposes of showing that the marriage has broken down beyond reconciliation, a petitioner for divorce 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;

- 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; or
- f. that the parties to the marriage have, after diligent effort, been unable to reconcile their differences.

It has been held in a line of cases including **Donkor v Donkor [supra]** that the Matrimonial Causes Act, 1971 (Act 367), did not permit spouses married under the Marriage Ordinance, Cap. 127 (1951 Rev.), to come to court and pray for the dissolution of their marriage just for the asking. And that the petitioner in such a case for dissolution of marriage must first satisfy the court of any one or more of those facts set out in section 2 (1) of the Act (above), not only by pleading them but also by proof for the purpose of showing that the marriage had broken down beyond reconciliation. The court explained further that Section 2 (3) of the Act, provided that even if the court found the existence of one or more of those facts it should not grant a petition for divorce unless it was satisfied that the marriage had broken down beyond reconciliation.

Having stated the principles of law above, what did the petitioner do to prove that the marriage has broken down beyond reconciliation? The Petitioner gave evidence in a bid to prove break down of the marriage. She however did not call any witnesses in proof of her case. The nub of petitioner's case is to the effect that she got married to the respondent on 26th April 2016 at Agona Swedru. That they have not been able to give birth since our co-habitation Eight (8) years ago. That they have been able to visit various health facilities, including Champion Divine Clinic, Lucky Herbal Clinic and Grace Herbal Clinic in search of healing, but nothing fruitful has come out. That the situation has given her sleepless nights and mental torture as relatives and friends are pointing accusing fingers at her. That apart from the health facilities, they have tried Prayer Camps, but all have proved futile. That it is obvious that very soon she will be

reaching menopause and may not be able to give birth to any child, hence the need for a pragmatic efforts to disengage. That during the subsistence of the marriage they were able to acquire a landed property which is situate, lying and being at New Sawmill, Agona Swedru. That that joy, peace and happiness expected of a marriage has eluded them since they are in their 8th year of marriage without a child. That she has since relocated to Agona Swedru to live with her parents for consolation. That they have lived apart for the past three (3) months with mutual consent and there is no hope that they can reconcile as man and wife.

After the petitioner closed her case, the Respondent was called to give evidence in accordance with procedure. Respondent gave evidence but called no witnesses in proof of his claims. The nub of respondent who described himself as a Minister of the Assemblies of God, Agona Kwanyako's case is that the petitioner is his wife and they have been married for 8 years now. That he is very potent and had consumed the marriage with the petitioner. That they have had sexual intercourse on several occasions ever since they got married about 8 years ago. He claimed that the petitioner was a virgin at the time he got married to her and he was the one who broke her virginity through sexual intercourse. He stated that if he was impotent and did not inform the petitioner before they got married, he could not see why she did not leave the marriage but chose to stay for 8 years. That it was not the petitioner alone who has gone through psychological and mental agony due to their inability to have a child. That he has have also gone through the same situation but he cannot be blamed for it. That he knows that petitioner was happy in the marriage but if she says she was not happy, then it was petitioner's decision to choose not to be happy in the marriage because happiness does not lie solely on having children or not. That he was not the one who asked the petitioner to leave the matrimonial home. He alleged that the Petitioner was flirting with another man and had committed adultery with that man. This resulted in a misunderstanding between them concerning the adultery the petitioner committed. That he discovered that the petitioner was having an affair with

one Richard Atreku, the Commercial Bank Manager and he confronted the petitioner. That he discovered the petitioner's relationship with the said Richard by reading their whatsapp messages from petitioner's mobile phone.

That in July, 2022, he went to GCB Bank for some transactions and petitioner directed him to the Manager of the Bank. Petitioner later called him on phone and warned him not to disclose his relationship with her to the Manager. He claimed he did not understand but did not say anything to her. That in August, 2022, petitioner asked permission to attend a friend's relative's funeral at Cape Coast. Unknown to him, it was Richard who had invited the petitioner. Upon her return, her character and behaviour changed dramatically. She no longer received calls in his presence; and went to the road side to make calls. She also placed password on her phone and she would also chat until 11:30pm to 12 midnight.

Respondent stated that he did not understand the sudden change in the petitioner so he began to figure out what exactly was going on with his wife. He said he had access to her phone and got to know that his wife was having an affair with another man called Richard Atreku and he has even been sending petitioner money. He claimed also that he had access to whatsapp messages containing the vivid discussions and descriptions of sexual relations his wife had had with the said boyfriend. He attached marked as Exhibit EBB "1", the alleged whatsapp chats between petitioner and her boyfriend. That he confronted the petitioner over the communications she had had with the said Richard. That petitioner threatened to leave the matrimonial home and divorce him if he dared to confront the said Richard. That he ignore petitioner's threat and confronted the said Richard and warned him to desist from having affair with his wife. That upon knowing that petitioner was having an affair with another man and because he is a pastor, I even begged petitioner to stop all that she was doing for them to stay in peace as husband and wife but she refused. That petitioner stood by her words and left the matrimonial home and later filed a petition for divorce. Respondent stated that he is

opposed to the prayer for dissolution of the marriage. He claimed to still love his wife despite the fact she committed adultery. However, if she insists that she wants divorce, then he does not think that she deserves any compensation/alimony because of her adulterous behaviour and her unilateral decision to pack out.

The parties have made their cases before the court. Having established the respective cases and responses put before the court, my next task in this judgment is to find out the issue(s) emanating therefrom. Upon a careful scrutiny of the pleadings and the respective cases, I am of the opinion that the only issue which needs to be determined in this case is whether or not the marriage between the parties has broken down beyond reconciliation. But as has been stated above, to arrive at this finding, the court ought to determine whether any of the grounds as above stated were relied on and proved. I shall therefore determine whether the petitioner's assertions fit into any of the grounds stated under section 2(1) (a) to (f) of Act 367. If not, I shall find out if any of respondent's assertions against the petitioner were also proved. This is because, the law is settled that in a petition for divorce, any other established fact has to support a finding that the marriage has broken down beyond reconciliation. And any of the grounds upon which divorce is founded as laid down under section 2(1) of Act 367 must only go to prove breakdown beyond reconciliation. So was the evidence led by the petitioner able to establish the omnibus ground i.e. that the marriage has broken down beyond reconciliation?

From the petition and the evidence on record, the petitioner's main ground based on which she seeks a dissolution of this marriage is that they have been married for 8 years without a child. That their childlessness is mainly due to the respondent's impotence. That the respondent has not been able to consummate the marriage for 8 years. She thus appear to have grounded her petition on the fact of unreasonable behaviour on the part of the respondent. The respondent denied that he was impotent. He stated that he has had sexual intercourse with the petitioner on a number of

occasions during the marriage. In my evaluation of the evidence, I find that the parties got married in April 2014, a period of eight years. There is no child of the marriage.

Now, even though the petitioner made the above allegations, the respondent denied them. As already stated above, he denied being impotent and claimed to have broken the virginity of the petitioner during the marriage. However, petitioner did not lead further evidence in proof of her allegations which had been denied. Moreover, the fact that parties have been unable to give birth for 8 years in marriage is no ground to seek for dissolution of the marriage. A court may not grant a petition for dissolution of marriage on the sole ground that the parties have been unable to give birth in the marriage or that one of the parties has not been able to perform sex. You take your partner as you find them. The respondent made allegations of adultery and unchastity against the petitioner. He exhibited chat messages between the petitioner and an alleged boyfriend. These on their own weigh a lot in terms of proof of adultery. However, the respondent failed to cross-petition for dissolution of the marriage so as to support his claim with the exhibits. He vehemently insisted that he was opposed to the dissolution. So, the court had little use of the exhibits.

Be that as it may, there is an abundance of evidence to show that the parties did not gel well as married couples. It is clear to see that all was not well in the marriage. As I have stated above, the petitioner thinks that her inability to have a child is the cause of the respondent because he is impotent. The respondent also came up with his own allegations. He also alleged that the petitioner has committed adultery. He made a lot of allegations himself against the petitioner.

Despite the fact that the petitioner failed to lead further evidence in proof of her allegations that the respondent was impotent and has not been able to consummate the marriage, what clearly appears from the facts in evidence is that there are irreconcilable differences that exist between the parties to this marriage to such an

extent that it is more likely than not that they cannot continue to live as husband and wife. As I stated above, the parties have been married for just over eight (8) years. However, I find that there are real differences between the parties which from the pieces of evidence, appear to have started right from the onset. These differences which I find from the evidence, has led to persistent quarrels, suspicions and fighting between them leading to the petitioner packing out of the matrimonial home. Third parties are suspected to have trespassed onto the marriage turf making the respondent feel insecure. Both parties admit that there have been misunderstandings between them. Clearly, both of them do not trust each other.

As I have already stated above, a party could ground a petition for dissolution of marriage by proving the fact that there exist irreconcilable differences between them and that the parties to the marriage have, after diligent effort, been unable to reconcile their differences as provided in section 2 (1) (f) of the Act. It was held in the case of **Mensah v Mensah [1972] 2 GLR 198** that in order to establish this head or guide line three things are requisite:

- (a) There should exist differences between the parties.
- (b) They should have made diligent efforts to reconcile these differences,
- (c) They should have been unable to effect the reconciliation of the differences.

It was further held by the court that section 2 (1) (f) of the Act did not require that there should be disputes between the parties; it only required that there should be differences. It explained that a dispute is a difference but not all differences are disputes and that the inability of a spouse to have an issue is not a difference even though there may be a difference between the spouses as to how to remedy the situation. The court went on to state that the differences must be between the parties and that a litigation between the wife's family and the husband's family would not be a difference between the wife and the husband, although it may lead to one. The fact that the husband belonged to the Justice Party while the wife supported the Progress

Party did not mean that there were irreconcilable differences. It again stated that the differences should be such as would make it impossible for the marriage to subsist.

It should be remembered, that evidence of the differences is being proffered to show the breakdown of the marriage. Differences which cannot possibly affect the subsistence of the marriage are not sufficient. Evidence of petty quarrels and minor bickering which are but evidence of that frailty which all humanity is heir to is not sufficient. The differences must be real and not imaginary; they should be so deep as to make it impossible for the parties to continue a normal marital relationship with each other.

In this case, I find that there are serious differences between the parties in the marriage. There is the general admission that the atmosphere that existed in the home was not too cozy. They fought a lot. And as I stated, the petitioner has relocated from the matrimonial home since three months ago to find what she termed as "consolation" with her family. In such a situation of mistrust, chaos and rancor, I do not think that the court ought to attempt to reconcile what cannot be reconciled. It is not worth the effort to want to reconcile these parties as husband and wife. There is no love between the two. I think that the parties should not be condemned into going back into the marriage. It will certainly not work again. Any attempt to want to reconcile them will be to promoting further quarrels and animosity between the two. Looking at the situation between the parties, I cannot make a decree for them to go and stay under one roof.

The upshot of the above is that the differences between the Respondent and the petitioner have been widened the more that the parties to the marriage have, after diligent effort, been unable to reconcile their differences. And that is a valid ground to grant their request for dissolution of the marriage. I have read carefully the evidence as presented by the parties. I am of the firm conviction that the Petitioner was able to

prove breakdown of the marriage based on section 2(1) (f) of Act 367. There are irreconcilable differences between the respondent and the petitioner which militate against any thought of reconciling the two. On the totality of the evidence on record, I am satisfied that the marriage has broken down beyond reconciliation. I will therefore grant the prayer for dissolution on account of the petitioner and pronounce a dissolution of the marriage between the respondent and the petitioner. The marriage between the parties is hereby dissolved.

As I stated above, in the course of the trial, the parties filed terms of settlement which terms were adopted as consent judgment in respect of the ancillary reliefs. I therefore enter the terms of settlement filed on the 19th day of December, 2022 as consent judgment of the parties as follows:

The parties agree to and have settled the reliefs as follows:

1. That the parties mutually consent that the marriage between them be dissolved.

There are no joint properties between the parties herein. There are also no children in the marriage. In the result, and based on the available evidence assessed on a balance of probabilities and the relevant law, the Petitioner succeeds in terms as follows:

The marriage between the Petitioner and the Respondent contracted under the Marriages Act, 1884-1985, Cap 127 is dissolved and the marriage certificate cancelled accordingly.

Given the circumstances under which the parties lived in the marriage and how the marriage came to an end as is borne out by the evidence on record, I am not inclined to make any order for cost. Parties shall bear their own costs.

(SGD)

HIS HONOUR ISAAC APEATU

DISTRICT MAGISTRATE