

**CORAM: HER WORSHIP (MRS.) ROSEMARY EDITH HAYFORD, SITTING AS
DISTRICT MAGISTRATE, DISTRICT COURT "B", SEKONDI ON THE 6TH OF
FEBRUARY, 2023**

SUIT NUMBER A4/3/2022

JENNIFER NYANIBA ESSIEN - PETITIONER

V

PAUL KOBINA MENSAH - RESPONDENT

TIME: 12.53 PM

PETITIONER - PRESENT

RESPONDENT - PRESENT

JUDGMENT

By a Petition filed by the Petitioner on the 22nd of July, 2021 against the Respondent, the Petitioner claims the marriage celebrated between the parties on the 20th of March, 2010 at the Metropolitan Offices Sekondi has broken down beyond reconciliation as a result of the unreasonable behaviour of the Respondent and claims the following reliefs:

1. *That the said marriage be dissolved forthwith.*

2. *Custody of the children of the marriage be granted to the Petitioner with reasonable access to the Respondent*
3. *The Respondent to provide shelter, educational and medical needs of the children, clothing, and maintenance*
4. *Petitioner seeks compensation and to restrain the Respondent from taking their children to his ex-wife.*

In an answer filed on 2/11/2021, the Respondent denies any form of unreasonable behaviour from him and says that it is rather the Petitioner who has behaved unreasonably as he has efficiently taken care of the Petitioner and the children of the marriage. He cross-petitions as follows:

1. *Respondent does not consent to the dissolution but if Petitioner insists, she can be granted same while custody should be granted to the Respondent*
2. *Respondent seeks to retrieve the loan facility used in setting up the provision store and hand (sic) an Accord Saloon Car with Registration No. 1095 -17 in (sic) the petitioner.*

Both parties testified in court and none of them called any witnesses.

It is the case of the Petitioner that the parties co-habited at Nkroful, Sekondi after their marriage on the 20th of March, 2010. There are four (4) issues of the said marriage. Petitioner says that unknown to her the Respondent had been married under the ordinance to another woman and had two children before coming to contract marriage with her. Petitioner only got to know after their marriage. Petitioner further avers that the Respondent has left the matrimonial home for the past two years and lives in Accra thereby abandoning the Petitioner. However, the Respondent is responsible towards the children of the marriage. It is further the case of the Petitioner that there is no effective

communication between the parties. The Respondent is rude, disrespectful, and arrogant and has denied her sex for the past two years. Petitioner says that the Respondent is currently having a serious relationship with his former wife and intentionally wants to break Petitioner's heart. He does not show any sign of love and care towards the Petitioner. The Respondent refuses to pick up Petitioner's calls and when he does, he always puts the phone on speaker to the hearing of his friends. Petitioner says Respondent has put her under so much stress, anxiety, trauma, and embarrassment that she cannot bear them any longer, hence the petition.

The Respondent on the other hand denies being unreasonable. It is his case that he has been responsible towards the Petitioner and the children. He denies being married to another woman outside the marriage and also denies the fact that he has abandoned the matrimonial home for the past two years. He says that it is work that takes him to Accra and any time he is in Takoradi he stays in the matrimonial home. In respect of not having sex with the Petitioner for the past 2 years, Respondent says that the Petitioner has been living with her mother thereby making it difficult for the parties to have sex. Respondent avers further that he had secured a loan facility and established a restaurant for the Petitioner in 2017 however, the business collapsed just after a year because of poor management on the part of the Petitioner. Again, he contracted another loan facility and established a provision store for the Petitioner in 2021. Respondent avers he detected that funds from the business were placed directly into Petitioner's account and so he called for an audit. It is the case of the Respondent that it was as a result of the said audit that the petitioner is praying for the divorce, hence Respondent's counterclaim.

At the end of the trial, the determinable issues included the following:

1. Whether the marriage has broken down beyond reconciliation

2. **Whether or not the Respondent deserted the matrimonial home**
3. **Whether or not the Respondent was still married before his marriage to the Petitioner**
4. **Who is entitled to the custody of the four children of the marriage?**
5. **Whether the Petitioner is entitled to any compensation**

The sole ground for the grant of divorce per **Section 1** of the **Matrimonial Causes Act (M.C.A.) 1971 (Act 367)** is that the Marriage has broken down beyond reconciliation. For the court to be persuaded that the marriage has indeed broken down beyond reconciliation, the petitioner must lead evidence to establish any one or more of the six facts enumerated in section 2 (1) of the Act., namely *adultery; unreasonable behavior; desertion for a period of two years; consent of both parties where they have not lived together as husband and wife for a period of two years; not having lived together as husband and wife for a period of five years; and finally, inability to reconcile differences after diligent effort*. See: **Section 2(1) of Act 367**

As in any civil case, the standard of proof is proof on the preponderance of probabilities per section 12 of the Evidence Act 1975 (NRCD 323).

Per **section 2(3)** of the Act, although the Court finds the existence of one or more of the facts specified under section 2(1), the court shall not grant a petition for divorce unless it is satisfied on all evidence that the marriage had been broken down beyond reconciliation.

The court will at this juncture look at the other issues to determine whether or not the marriage between the parties has broken down.

Whether or not the Respondent deserted the matrimonial home

It is Petitioner's case that the Respondent has deserted the matrimonial home and now lives in Accra. Respondent on the other hand maintains that it is the nature of his work that takes him to Accra and that any time that he is back in Takoradi he stays in the matrimonial home and not that he has deserted the matrimonial home. I notice from the evidence that the Respondent is a Freight Forwarder and has some of his companies in Accra. The evidence further shows that the Petitioner herself is aware of the Respondent's job and the parties themselves have put in some sort of arrangement. Further that the Petitioner has moved out of the matrimonial home and is staying with her mother. During the cross-examination of the Petitioner on the 8th of December, 2021, the following ensued:

Q. *In your evidence in paragraph 5, you stated that I left the matrimonial home 2 years ago and live in Accra, can you tell the court when you left the matrimonial home and how long you stayed away?*

A. *The time I left the matrimonial home was when I gave birth to my fourth child. At the time the Respondent was working in Accra and was moving from Accra to Takoradi. (emphasis mine). I left there in 2020, it's only about one year.*

Q. *I am putting it to you that what you have just said is not true*

A. *It is the truth what I am saying is the truth. Where we were living was very far (at Nkroful) and where the children go to school was quite a distance, so when the Respondent is not around, I have to go and live with my mother at Bankyease to enable me send the children to school. Whenever he is travelling, he the Respondent even takes us to my mum's place when he is about to leave for work in Accra and when he returns, he picks us up to the matrimonial home."*

From the Petitioner's own averment above, she admits that the Respondent travels to Accra to work. In other words, there is a reason why the Respondent travels to Accra. Obviously, it would not be wise to be commuting between Accra and Takoradi looking at the distance between the two cities. From the above also, it seems the Petitioner accepted the situation and even agreed on an arrangement as to how they would go to her mother's house and back to their matrimonial home when the Respondent was in town. How then does the Petitioner now turn round and accuse the Respondent of desertion? To my mind, it is the nature of Respondent's work that took him to Accra, a fact which the Petitioner was fully aware of. It cannot, therefore, be said that the Respondent left the matrimonial home. In any case, the Petitioner is also currently not living in the matrimonial but with her mother. I can only infer from the evidence that that was an arrangement that suited both parties and not that the Respondent deserted the matrimonial home, I so hold.

Whether or not the Respondent was still married before his marriage to the Petitioner

The Petitioner avers that the Respondent was married at the time he married the Petitioner. This was denied by the Respondent who tendered **Exhibit 1** as proof that he did divorce his other wife before marrying the Petitioner. **Exhibit 1** is a Certificate of Divorce between the Respondent and one Theresa Mensah. It is dated 21st December 2009. Meanwhile, the marriage between the Petitioner and Respondent was contracted on the 20th of March, 2010. Which is three clear months after the divorce of the Respondent. I find from the above that the Respondent was not in a subsisting marriage before his marriage to the Petitioner.

In respect of the Respondent having a relationship with his ex-wife, Counsel for the Petitioner in his address indicated the Respondent had committed adultery with her

without leading any evidence to prove same. In **Adjetei V Adjetei [1973] 1 GLR 216** it was decided that

“Adultery must be proved to the satisfaction of the court and even though the evidence need not reach certainty as required in criminal proceedings, it must carry a high degree of probability”

The evidence, however, is that they have two children between them. I do not want to believe that the petitioner is alluding that because they are divorced, they should not talk. It is my view that in the interest of the two children involved the parties would definitely have to be civil towards each other for the sake of the two children and that would equally affect their relationship with the children of the Petitioner. Much as the Petitioner is praying for a restraining order to prevent the Respondent from taking the parties’ children to his ex-wife, there should be room for all the siblings to grow and bond together and so in the circumstance I refrain from making such an order.

What I rather find quite unfortunate and unreasonable is the utterance by the Respondent captured under paragraph 6 of his witness statement which was also not denied by the Respondent. Same is quoted below

“6. Respondent has at all material time be(sic) arrogant and rude to Petitioner such that at one time he boldly said to Petitioner that his ex-wife is even wiser than Petitioner”

For whatever reasons that necessitated the insult above, it is my view that one cannot compare his ex-wife to his current wife by insulting or using words that demean her and for that reason I find the behaviour of the respondent unreasonable.

It is further the Petitioner’s case that the Respondent has denied her sex for over two years. The Respondent denies this claim but says that it was as a result of the Petitioner

staying with her mother that made it difficult for the parties to have sex. But must this be an excuse for not being intimate? Sexual relationship is part of married life and it must be enjoyed. Petitioner stated in paragraph 6 of her witness statement some of the utterances made by the Respondent which made her believe that Respondent deliberately refused her sex. I quote same below

“At one time, he told Petitioner that even when she goes naked, he does not have the feel of having sex with Petitioner”.

This statement was never denied or challenged by the Respondent. A clear indication of an admission. In **Quagraine V Adams [1981] GLR 599, CA**, it was held that

“where a party makes an averment and his opponent fails to cross-examine on it, the opponent will be deemed to have acknowledged, sub silentio, that averment by the failure to cross-examine”. See also **Browne V Dunn (1894) 6 R 67, HLK.**

It is my humble view, therefore that the statement purportedly made by the Respondent lends credence to the Petitioner’s assertion that the Respondent just refused to have sex with her. To my mind, it is depriving the Petitioner of her conjugal right.

The learned Jurist **William E. Offei**, in his book **“Family Law in Ghana”, 3rd Edition @ page 229** states that

“Refusal of sexual intercoursemay be unreasonable where there is no good reason for the conduct complained of.”

Relating the above authority to the facts of the case, the reason the respondent gave for not having any sexual relationship with the Petitioner for over 2 years is that she was with her mother. This to my mind is not a good reason, and thus I find his conduct unreasonable.

The learned **William Ekow Daniels** in his book **“The Law on Family Relations in Ghana, 2019 @ page312** states that

“The test to determine whether or not the parties are not living as husband and wife has no relation to the physical state of things such as houses or households, but rather it is to be considered from the point of view of whether there is absence of consortium or cessation of cohabitation”.(emphasis mine)

Darling J stated in **Rex V Creamer [1919] 1 KB 564** that

“In determining whether a husband and wife are living together the law has to have regard to what is called consortium of the husband and wife. A husband and wife are living together, not only when they are residing together in the same house, but also when they are living in different places, even if they are separated by the high seas, provided the consortium has not been determined”

It is trite law that the court will only dissolve a marriage on the above ground (that is, the parties having not lived together as husband and wife continuously for two years) only when there is consent from the Respondent.

Section 1 (2) (d) of the Matrimonial Causes Act 1971, Act 367 provides that for the purpose of showing that the marriage has broken down beyond reconciliation, the petitioner shall satisfy the court

*“(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*

so withheld, the Court may grant a petition for divorce under this paragraph despite the refusal;

In respect of the instant petition, the undeniable evidence by both parties is that they have not lived as husband and wife for over 2 years and the Petitioner currently lives with her mother. In respect of the consent on the part of the Respondent as mandated by the law, even though in his answer he stated emphatically that he did not want the marriage dissolved, in his evidence to the court at paragraph 11 of his witness statement below is what he stated

“11. ...Respondent has respected the freedom of the Petitioner since they got married and as such if Petitioner insists on the dissolution of the marriage the court can grant her wish”.

This statement clearly shows that the Respondent is not withholding his consent. In the circumstance, having analyzed the facts and evidence, it is my view that the marriage celebrated between the parties on the 20th of March, 2010 at the Metropolitan Offices, Sekondi has broken down beyond reconciliation as a result of the unreasonable behaviour of the respondent.

At this juncture, I wish to touch on the property distribution or acquisition that seems to have cropped up during the cross-examination of the Respondent.

First of all, it is trite that matrimonial matters are instituted on pleadings. Throughout the pleadings filed by the parties, neither the Petitioner nor the Respondent ever raised any issue on properties acquired during the subsistence of the marriage for which reason in the addresses filed by both counsel for the parties, the ways as to how properties acquired during a marriage must be shared seemed to have featured strongly.

Secondly, I have perused the reliefs sought by the Petitioner, and nowhere did she claim half share or equitable share of properties acquired during the subsistence of the marriage. It is trite that a plaintiff may obtain any equitable relief which the facts stated and proved in the suit entitles that plaintiff even if that relief has not been specifically asked for. See **Order 15 rule 1 of CI 59 and also the case of Hanna Assi (No. 2) v Gihoc Refrigeration & Household Products Ltd. (2007 -2008) SCGLR.** This leads me to my third point which is that assuming there were even properties, it is my view that the Petitioner did not lead any cogent evidence to establish this fact. There is no evidence before this court regarding any property that was acquired during the subsistence of the marriage. Except in paragraph 12 of the Petitioner's witness statement where she stated as follows:

"12. The Respondent has always been saying that the house in which we both occupied shall be granted to his two (2) children from another woman. I, therefore, wish to pray to the honourable court that my children should also be given a fair share of the house in question when the marriage is dissolved."

It can be seen from the above that the Petitioner is not praying for same for herself but for her children.

In response, the Respondent stated that the uncompleted house that both the couple and children are staying in is for ALL the children. My understanding is that the Petitioner wants a share of the house for her children (not herself) and the Respondent emphatically states that it is for ALL the children (including the children of the Petitioner). To my mind, this is exactly what the Petitioner is praying for and the Respondent agrees to same. In the circumstances, I hereby order that the uncompleted house that the parties share with their children should be registered in ALL the names of the children, (including Petitioner's four children).

Respondent in his cross-petition is praying to the court for the Petitioner to refund a loan which according to him he contracted to set up a restaurant for the Petitioner. I find from the Respondent's own evidence that the business he claims he set up for the Petitioner collapsed. That being the case how does he expect to retrieve money that does not exist or is not available since the business collapsed? Besides, the Respondent did not lead any evidence to support his claim of contracting a loan apart from that mere averment. There is no evidence of how much loan was even contracted to set up the said business for which a refund is being claimed. Assuming without admitting that the Respondent even contracted a loan, this transaction can be termed to be a domestic one between a husband and wife and there is no legal obligation or otherwise on the Petitioner to repay that loan. It is trite that transactions between a husband and wife are not seen as commercial transactions for the same to be documented and receipted. **Brobbey J.** (as he then was) held in **ANANG v TAGOE (1975) 2GLR 347**, on page 280, that *"In the normal run of affairs, transactions between a man and his wife cannot be viewed with the same scrutiny which is associated with commercial transactions pertaining to normal business people for purchases, payments and such like matters to be formally documented or receipted"*.

In the circumstances of the above, I fail to make any such order.

CUSTODY

Both parties are seeking custody of the children (*Kathy Ofeibea Mensah (11 years), Jesuit Mensah (9 years), Japhet Mensah 7 years) and Beverlyn Mensah (3 years)* of the marriage with reasonable access to the other.

Section 2(1) of the Children's Act 1998 (Act 560) provides that

"The best interest of the child shall be paramount in a matter

concerning a child."

In ***Aikins v Aikins*** [1979] GLR 223 -233, the court held

"Whilst the welfare of the child was the first and paramount consideration the claims of justice could not be overlooked. Therefore, in deciding what was in the best interest of the children, the conduct of the parents and the pattern of life set up by them during cohabitation were some of the most important matters to be considered and the wishes of an unimpeachable parent should stand high"

Also in ***In Re G (Children)*** (2006) 4 ALL ER 241, the court held:

"The fact of parentage was to be regarded as an important and significant factor in considering which proposal better advanced the welfare of the child."

Lord Nichollis of Birkenhead stated

"as in all cases concerning the upbringing of children, the court seeks to identify the course which is in the best interest of the children. Their welfare is the court's paramount consideration."

In the instant case, all four children are minors (under 11 years) and in seeking their welfare, it would not be in the best interest of the children to separate them.

Section 45 (2)(a) and (f) of the Children's Act 1998 (Act 560) enjoins the court in considering custody of children to consider the ages of the children and also the fact that it is desirable to keep siblings together. Siblings are to live and grow together. I glean from the evidence that the nature of the Respondent's job makes him not available as he is in Accra most of the time as he testified. The Petitioner, on the other hand, is at home most of the time as a caterer. This means that of the two parties, it is

the Petitioner who would be available to be with the children as and when frequently needed.

Section 45(1) of Act 560 (supra) further enjoins the court in considering the importance of the child to being with the mother. The said section stipulates as follows:

“A family Tribunal shall consider the best interest of the child and the importance of a young child being with his mother when making an order for custody or access”

Having considered the totality of the evidence it is my humble opinion that it would be in the best interest of the children to be with the Petitioner. I, therefore, grant custody of the four children *Kathy Ofeibea Mensah (11 years), Jesuit Mensah (9 years), Japhet Mensah 7 years) and Beverlyn Mensah (3 years)* to the Petitioner. The Respondent is to have reasonable access to the children.

The Petitioner further seeks compensation. Compensation has been defined in “**Black’s Law Dictionary, Ninth Edition**” as “*Payment of damages, or any other act that a court orders to be done by a person who has caused injury to another. In theory, compensation makes the injured person whole.*” I am of the humble opinion that this is not a case for financial compensation as no liability has been established. I, however, believe under the circumstances that the Petitioner may be referring to financial provision. **Section 43 of Act 367** defines financial provision as including all forms of financial support provided by one spouse to the other or to a child of the household. The court is enjoined in awarding this to consider the standard of living of the parties and their circumstances. The Petitioner is a caterer and the Respondent is a freight forwarder and the parties have been married for over eleven (11) years, the evidence shows that the Petitioner has been dependent on the Respondent. Having considered all the circumstances of the petition, I shall award an amount of GHC20,000.00 as financial provision to the

Petitioner. Having regard to all the circumstances of this case, the Respondent is ordered to pay maintenance of GH¢2,000.00 per month for the four (4) children. (Five Hundred Ghana Cedis per child per month). In addition, the Respondent is ordered to pay for the medical and educational expenses of the four issues of the marriage as and when they fall due. Respondent is ordered to repair the Honda Saloon Car with Registration No. WR 1095 – 17 to enable the Petitioner convey the children to school. The Respondent shall also transfer ownership of the said car to the Petitioner within three (3) months from the date of this judgment. This order is to be carried out by the Driver and Vehicle licensing office (DVLA). The Respondent is ordered to provide suitable accommodation for the Children of the marriage. While the Petitioner is also to provide clothing and snacks for the children.

DECISION

1. *The marriage contracted between the parties herein on the 20th of March, 2010 at the Metropolitan Offices, Sekondi has broken down beyond reconciliation and the same be and is hereby dissolved. It is ordered that a decree of divorce be granted; the marriage certificate with registration number 126/2010 pursuant to licence No. STMA/126/2005 is hereby cancelled.*
2. *Custody of the four (4) minor children of the marriage is hereby granted to the Petitioner with reasonable access to the Respondent. Respondent shall have access to the children during holidays and partly for two days during Christmas and Easter holidays. It is further ordered that the Respondent shall return the children at least one clear day before school re-opens*
3. *The Respondent is hereby ordered to pay an amount of GH¢2,000.00 per month as maintenance for the four (4) children (GH¢500.00 per child per month)*

4. *The Respondent is ordered to pay the Petitioner financial provision of GH¢20,000.00 (Twenty Thousand Ghana Cedis)*
5. *The Respondent is ordered to pay for the medical and educational expenses of the four issues of the marriage as and when they fall due.*
6. *Respondent is ordered to repair the Honda Saloon Car with Registration No. WR 1095 – 17 to enable the Petitioner convey the children to school. The Respondent shall also transfer ownership of the said car to the Petitioner within three (3) months from the date of this judgment. This order is to be carried out by the Driver and Vehicle licensing office (DVLA).*
7. *The Respondent is ordered to provide suitable accommodation for the Children of the marriage.*
8. *It is further ordered that the uncompleted house that the parties share with their children should be registered in ALL the names of the children of the Respondent (including Petitioner's four children). Same is to be done within four (4) of this judgment.*
9. *The Petitioner is ordered to provide clothing and snacks for the children*
10. *Parties to bear their own legal costs.*

(SGD)

H/W ROSEMARY EDITH HAYFORD (MRS)

MAGISTRATE

COUNSEL

PHILIP FIIFI BUCKMAN FOR THE PETITIONER

JONATHAN KOFI MENSAH ASEMPAH FOR THE RESPONDENT