

IN THE DISTRICT COURT HELD AT WEIJA, ACCRA ON TUESDAY THE 25TH DAY OF APRIL, 2023 BEFORE HER WORSHIP RUBY NTIRI OPOKU (MRS), DISTRICT MAGISTRATE

SUIT NO. G/WJ/DG/A4/25/23

ALFRED AKWETTER SACKY

PETITIONER

VRS

MERCY ACQUAYE

RESPONDENT

PETITIONER IS PRESENT AND SELF REPRESENTED

RESPONDENT IS ABSENT

JUDGMENT

The petitioner filed a petition at the registry of this court on 23rd November 2022 against the respondent for the following reliefs:

- a. Dissolution of the marriage between the parties as having broken down beyond reconciliation;
- b. An order that the petitioner is granted custody of the issues of the marriage with reasonable access to the respondent.
- c. An order for the respondent to support in the maintenance of the issues of the marriage.
- d. Any other order the court may deem fit and just.

Respondent was served with the petition and a hearing notice on 23rd November 2022 inviting her to contest the divorce however 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.

When the case was called for hearing, respondent failed to attend court and therefore the matter was heard without her.

Order 25 r 1(2) (a) of the District Court Rules 2009, (C.I.59) 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”

In Ankumah v City Investment Co Ltd [2007-2008] 2 SCGLR 1064, Baffoe Bonnie JSC held at page 1076 as follows;

“A court is entitled to give judgment in default as in the instant case, if the party fails to appear after notice of the proceedings has been given to him. For then, it would be justifiable to assume that he does not wish to be heard.”

THE CASE OF THE PETITIONER

It is the case of the petitioner that parties were married under the ordinance on 15th April, 2005 at the Accra Metropolitan Assembly in Accra. After the celebration of the marriage, parties cohabited at Bortianor and have two issues of the marriage.

It is the further case of the petitioner that respondent has behaved in such a way that he cannot reasonably be expected to live with her as husband and wife.

He particularised the unreasonable behaviour of the respondent as follows;

1. That the respondent has associated and joined other women in the community who are into constant outing and drinking and has refused to yield to the petitioner's request for her to stop.
2. That respondent often goes out to sleep for days without the consent of the petitioner.

3. That the respondent has consistently refused to have sexual intercourse with the petitioner and that the last time the parties had sexual intercourse was in November 2010.
4. That the respondent was impregnated by another man during the subsistence of the marriage and she presently delivered the baby.
5. That the respondent was again impregnated by another man differently from the man mentioned above and also gave birth with him during the subsistence of the marriage.
6. That the respondent has gotten pregnant for another man different from the ones mentioned.

At the end of the trial, the following issues were set down for determination;

- a. Whether or not the marriage contracted between the parties has broken down beyond reconciliation.
- b. Whether or not the petitioner should be granted custody of the issues of the marriage

DETERMINATION OF THE ISSUES AND THE OPINION OF THE COURT

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 11,12 and 13 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.

SHIFTING OF THE BURDEN OF PROOF

The burden of proof 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; Adjetey 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.

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.

His Lordship Dennis Adjei J.A reiterated the position of the law in the case of **CHARLES AKPENE AMEKO V SAPHIRA KYEREMA AGBENU (2015) 99 GMJ 202**, thus;

“The combined effect of sections 1 and 2 of the Matrimonial Causes Act, 1971 (Act 367) is that for a court to dissolve a marriage, the court shall satisfy itself that it has been proven on the preponderance of probabilities that the marriage has broken down beyond reconciliation. That could be achieved after one or more of the grounds in Section 2 of the Act has been proved.”

In **ADJETEY V ADJETEY [1973] 1 GLR 216**, it was held;

“ On a proper construction of the Act, the court can still refuse to grant a divorce even when one or more of the facts set out in section 2(1) has been established. It is therefore incumbent on a court hearing a divorce petition to carefully consider all the evidence before it; for a mere assertion that the marriage has broken down will not be enough.”

From the evidence, the Petitioner based his allegations for the breakdown of the marriage on the unreasonable behaviour of the Respondent.

At page 315 of the book, “The Law on Family Relations in Ghana by William Cornelius Ekow Daniels, the learned author states as follows;

“In cases involving behaviour, the burden of proof will lie on the petitioner to prove that the respondent has behaved in such a way that he cannot reasonably be expected to live with the respondent. It will be a good defence for the respondent to seek to prove that he has not behaved wholly or in the manner alleged. This defence will go to the establishment of the truth of the statement concerning the behaviour. The second defence

will relate to the question whether the extent of respondent's behaviour is that the petitioner cannot reasonably be expected to live with the respondent."

From the evidence, the respondent was not in court to cross examine the respondent on his assertion that she has behaved unreasonably.

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 marriage of the parties has broken down beyond reconciliation by the fact of unreasonable behaviour on the part of the respondent.

I therefore proceed under Section 47 (1)(f) of the Courts Act 1993, (Act 459) to decree that the Ordinance Marriage between Alfred Akwetter Sackey and Mercy Acquaye celebrated at the Accra Metropolitan Assembly on 15th April, 2006 is hereby dissolved.

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

In resolving custody of the children of the dissolved marriage, I find that it is in the interest of the children that custody is granted to the petitioner pursuant to sections 2 and 45 of the Children's Act, 1998 (Act 560).

The court hereby grants custody of the two issues of the marriage to the petitioner with reasonable access to the respondent. The petitioner shall be responsible for the maintenance

of the two issues of the marriage, payment of their school fees and medical bills as well as the provision of their casual and outing clothes.

There will be no order as to costs.

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