

IN THE DISTRICT COURT HELD AT WEIJA, ACCRA ON TUESDAY THE 6TH DAY
OF JUNE, 2023 BEFORE HER WORSHIP RUBY NTIRI OPOKU (MRS), DISTRICT
MAGISTRATE

SUIT NO. G/WJ/DG/A4/71/22

JUDY OSEI ACQUAH

PETITIONER

SUING PER HER LAWFUL ATTORNEY

EDNA MAGLO

VRS

GIDEON OTOO ACQUAH

RESPONDENT

PETITIONER'S LAWFUL ATTORNEY IS PRESENT AND SELF REPRESENTED

RESPONDENT IS ABSENT

JUDGMENT

Pursuant to the leave of the court, the petitioner suing per her lawful attorney Edna Maglo filed and served the respondent with a petition for divorce issued out of the registry of this court on 7th July, 2022 against the respondent for the following reliefs:

- a. That the marriage celebrated between the parties be dissolved
- b. That petitioner be granted custody of the issues of the marriage with reasonable access to the respondent

Although there is proof of service of the petition and a hearing notice on the respondent on the court's docket as exhibited by the DHL Track Express dated 31st October 2022, inviting him to contest the divorce, it is to be noted that for unexplained reasons, respondent did not file any process to contest the suit or appear in court personally to be heard.

The court proceeded without him 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”

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.”

At the end of the pleadings, the issues that were set down for determination was whether or not the marriage contracted between the parties has broken down beyond reconciliation and whether custody of the issues of the marriage should be granted with petitioner with reasonable access to the respondent.

THE CASE OF THE PETITIONER AS PER THE TESTIMONY OF HER LAWFUL ATTORNEY

The lawful attorney of the petitioner informed the court that she had been granted a Power of Attorney by the petitioner herein to testify on her behalf.

She tendered the said Power of Attorney filed on 7th July 2022 in evidence and same was admitted and marked as Exhibit A.

According to the attorney, parties got married under the ordinance at the E.P Church (Trinity Parish) at Madina in Accra on 26th October 2013. She tendered the marriage certificate in evidence and same was admitted and marked as Exhibit B. She stated further

that parties cohabited at respondent's family house at East legon and are blessed with two issues namely Adom Otoo Acquah aged 6 years and Ayeyi Otoo Acquah aged 3 years old.

She added that the marriage between the parties has broken down beyond reconciliation as respondent has behaved in an unreasonable manner and the petitioner cannot be expected to live with him as a wife.

She particularised the unreasonable behaviour of the respondent to the extent that petitioner has had to endure verbal abuse from the respondent and his family. Again Respondent's former girlfriend had been visiting the respondent in their matrimonial home with the connivance of respondent's mother which seriously affected the relationship between the parties.

According to the witness, the petitioner travelled outside the jurisdiction and came for the respondent and the children hoping to strengthen the bond between the parties however parties' marriage has rather suffered due to the fact that respondent has become extremely jealous and treats any man she is close to as a rival. She added that although respondent is working, he does not maintain the family and rather sends money to his mother and siblings in Ghana.

She prayed for the dissolution of the parties' marriage.

BURDEN OF PROOF

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.”

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.

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.

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 her allegations for the breakdown of the marriage on the unreasonable behaviour on the part of the Respondent in accordance with section 2(1)(b) of Act 367 and the fact that she cannot reasonably be expected to live with the respondent..

At pages 308 and 309 of the book, “**The Law on Family Relations in Ghana**” by William Cornelius Ekow Daniels, the learned author on test of unreasonable behaviour states that “all that the petitioner is required to do in this context is to give particulars of the extent of the behaviour of the respondent which has necessitated the presentation of the petition. Thereafter she is required to establish that as a result of that particular behaviour, he cannot reasonably be expected to live with the respondent.”

He concluded that “whatever test is applied, justice demands that the court should have regard to all the relevant matters appertaining to the marriage and the individual spouses before it as well as to their individual perceptions of each other in order to determine what is reasonable.”

From the evidence, the respondent was not in court to cross examine the petitioner on her 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 unreasonably and she cannot reasonably be expected to live with him as a wife.

I therefore proceed under Section 47 (1)(f) of the Courts Act 1993, (Act 459) to decree that the Ordinance Marriage between Judy Otoo Acquah and Gideon Otoo Acquah celebrated at the E.P Church (Trinity Parish) on 26th October, 2013 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, I find that the two children are minors aged 6 years and 3 years. I find that as young children, It will be in their best interest

that custody be granted to their mother, the petitioner pursuant to sections 2 and 45 of the Children's Act, 1998 (Act 560) with reasonable access to the respondent.

Accordingly custody of Adom Otoo Acquah and Ayeyi Otoo Acquah is granted to the petitioner with reasonable access to the respondent. Respondent is ordered to maintain the children monthly, pay their medical bills as well as their school fees when the payments fall due.

The court hereby grants custody of the two issues of the marriage to the petitioner with reasonable access to the respondent. The respondent is ordered to maintain the two issues of the marriage monthly in line with the living standards in the United Kingdom, pay their school fees and medical bills as and when payments fall due.

There will be no order as to costs.

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H/W RUBY NTIRI OPOKU (MRS.)

(DISTRICT MAGISTRATE)