IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HELD AT CAPE COAST IN THE CENTRAL REGION ON WEDNESDAY,THE 30TH DAY OF NOVEMBER, 2022 BEFORE HIS LORDSHIP JUSTICE BERNARD BENTIL - HIGH COURT JUDGE.

SUIT NO. E6/12/2019

MARTHA MENSAH	**-**	**PETITIONER**
VRS		
BENJAMIN ATO BOHAM	**-**	**RESPONDENT**

JUDGMENT

The Petitioner seeks the dissolution of the marriage contracted between herself and the Respondent under the Marriages Act (CAP 127) on the 14th day of May 1999 by the hand of the Registrar of Marriages, Cape Coast at the Cape Coast Municipal Office. In her petition for the dissolution of the marriage filed on 26 February 2019, she avers that during the pendency of the marriage, the parties cohabited in Ghana and Canada. The marriage is blessed with four 4 issues namely, Frank Boham 40 years, John Boham 38 years, Benjamin Boham 17 and Beatrice Boham 13 years. There have been two previous court proceedings between the parties; one in 2008 and another in 2013 both of which were discontinued at the instance of the Respondent.

The Petitioner avers that the marriage between the parties has broken down beyond reconciliation on account of the Respondent's adultery as a result of which the Petitioner finds it intolerable to remain married to the Respondents well as the Respondent's unreasonable behaviour as a result of which the Petitioner cannot be expected to live with the Respondent. In respect of the claim of adultery on the part

of the Respondent, the Petitioner avers that, the Respondent in the year 2007 impregnated one Francisca Abakah, now deceased. Also, the Respondent, whiles living in Canada, had numerous amorous relationships with other women resulting in the Respondent having three children outside the marriage. The Petitioner further avers that the Respondent is currently cohabiting at the parties' matrimonial home in Elmina with a woman named Janet Lowa whiles the marriage is subsisting.

In respect of the unreasonable behaviour of the Respondent, the Petitioner avers that, the Respondent falsely accused the Petitioner on several occasions which caused so much embarrassment to the Petitioner;the Respondent threatened the Petitioner and other family members of the Petitioner such that none of the family members of the Petitioner can freely visit the matrimonial home in Elmina; the Respondent verbally abuses the Petitioner; The Respondent has removed the Petitioner's belongings locked up safely in the matrimonial home and exposed them to the vagaries of the weather and burglars; the Respondent broke the lock leading to the Petitioner's room and without the Petitioner's consent took away building materials belonging to the Petitioner and a child of the marriage.

The Petitioner further states that the Respondent has for a long time refused and neglected to maintain the Petitioner and home. The Respondent, according to the Petitioner, has caused so much anxiety/distress, embarrassment to the Petitioner by his unreasonable behaviour and the Petitioner finds it intolerable to co-exist harmoniously with the Respondent.In this light, the Petitioner prays the Court for the following reliefs:

a. A dissolution of the marriage between the parties
b. An equal distribution of the matrimonial property including:
    i. A four-bedroom house with four additional plots in front of the bedroom house situate at No.1 Country Side, Nippon Street, Elmina
    ii. Mercedes Benz registered as CR 73-13

c. That an amount of sixty thousand Ghana Cedis (GH₵60,000) lump sum be paid as alimony to the Petitioner
d. That the Petitioner be granted custody of the two younger children of the marriage namely, Benjamin Boham 17 years and Beatrice Boham 13 years.

The Respondent in his answer to the Petition denied the claims of the Petitioner. The Respondent avers that the parties were never married until 1999. Moreover, prior to the Respondent's marriage to the Petitioner, the Respondent already had two children and that he has not committed adultery neither does he have any child out of this marriage to the Petitioner. The Respondent avers that, he met the Petitioner some time in 1978 and developed an amorous relationship, not marriage, which led to two children between the parties and subsequently left for Canada in order to do some work to raise money. Later, he returned to Ghana in 1999 and married the Petitioner, flew her and the children to Canada at his personal expense and subsequently had two more children with her making four in total.

The Respondent says that they lived peacefully, amidst some minor challenges, until 2018 when the latter began exhibiting some strange and unacceptable conducts which the Respondent still finds difficult to comprehend. On one occasion, the Petitioner picked up a quarrel with the Respondent over a very flimsy issue of some missing plastic bags in the house resulting in the Petitioner packing her belongings out of the matrimonial room to join the children in their room. The Respondent says that he expected the Petitioner to return few days after, little did he know it was the beginning of a hatched plan to run away from the country with the children without notice to him and any member of their relations. The Respondent avers that he continued to maintain the Petitioner despite the latter having moved out but the Petitioner refused to perform her conjugal duties until her unilateral departure from the country.

The Respondent avers that, the Petitioner is currently on the wanted list of the Central Regional Police Command for kidnapping of his children without recourse

to him, a situation that has denied him of the fatherly love and care to his children. The Respondent further accused the Petitioner of having committed adultery with a local pastor in Canada which eventually led to a miscarriage, a situation which is very well acknowledged by family relations. The Respondent says the marriage between the parties, in spite of the minor challenges enumerated, has not broken down beyond reconciliation and he is still interested in his wife. However, in the event the Petitioner insists on divorce, then she must adequately compensate him for this needless endeavour which is causing much distress, anxiety and embarrassment to the Respondent.

The Respondent therefore cross petitioned for the following reliefs:

a. An order compelling the Petitioner to return the Children, namely, Benjamin Boham and Beatrice Boham to Ghana at her own expense
b. An order granting custody of the children referred to supra to the Respondent with reasonable access to the Petitioner
c. An order for equal share of all properties acquired by the Petitioner during the subsistence of their marriage including:
    i. Equal share in the Petitioner's investment with Gold Coast Fund Management Limited, Cape Coast.
    ii. Equal share in the Petitioner's investment with GN Bank
    iii. Equal share in a Tipa Truck with Registration Number CR 447/14
d. An order for the payment of alimony of sixty-five thousand Ghana Cedis (GH₵ 65,000) to the Respondent
e. An order for the payment of the cost incidental to this suit.

This Court's sole duty in this case is to determine from the evidence whether or not the marriage has broken down beyond reconciliation. According to section 1(2) of the Matrimonial Causes Act, 1971 (Act 367) (the Matrimonial Causes Act), the sole ground for granting a petition for divorce must be that the marriage has broken down beyond reconciliation. Section 2(1) of the Matrimonial Causes Act specifies

facts, one or more of which a petitioner must prove for the purposes of showing that the marriage has broken down beyond reconciliation. More importantly, section 2(3) of the Matrimonial Causes Act reiterates that the sole condition for granting a petition for divorce is that the Court must be satisfied on all the evidence adduced that the marriage has broken down beyond reconciliation. The import of this provision is that, in spite of the fact that any of the above listed facts in section 2(1) of the Matrimonial Causes Act has been proven, the Court has a discretion to refuse a petition for divorce if it is not satisfied that the marriage has broken down beyond reconciliation.

Regarding the burden of proof, it is trite that he who asserts must prove. The party who raises in his pleadings an issue essential to the success of his case assumes the burden of proving it. When, as in this case, a Respondent cross-petitions, he also bears the burden to proof his case. This is because a cross Petitioner is as good as a Petitioner in respect of the assertions he makes. On this basis, the onus lies squarely on each party to prove their respective claims in satisfaction of the standard of proof, that is, by a preponderance of the probabilities.

I now proceed to evaluate the evidence to satisfy myself whether the marriage has broken down beyond reconciliation. The facts relied on by the Petitioner as proof of the breakdown of the marriage are that, the Respondent has committed adultery and that by reason of the adultery, the Petitioner finds it intolerable to live with the Respondent and; that the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with the Respondent. These grounds are provided for in section 2(1)(a) and (b) of the Matrimonial Causes Act, 1971 (Act 367).

Section 2(1)(a) of the Matrimonial Causes Act 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. The Petitioner in her witness statement

stated that the Respondent is an adulterous man and he does so with impunity. She supports this statement with social media conversations between the Respondent and other women which suggests that the Respondent is in an adulterous relationship with these women, namely, Janet Lowa and one Zita. These conversations reveal a clear disposition and opportunity to commit adultery. The Petitioner further gave evidence to the fact thatthe Respondent in the year 2007 impregnated one Francisca Abaka who is now deceased. This evidence, in my view, has not been controverted in any way.

Another evidence which stands uncontroverted is that fact that during the subsistence of the marriage between the parties, the Respondent married another woman. The Petitioner tendered the marriage certificate to the said marriage. This act clearly constitutes bigamy contrary to section 262 of the Criminal Offences Act, 1960 (Act 29).By reason of the above stated, including the Respondent's subsequent marriage to Janet Marie Evans although same is a nullity, the Respondent has been proved to have been guilty of adultery, which is sufficient to ground the Petitioner's averment that her marriage with the Respondent has broken down beyond reconciliation in terms of section 2(1)(a) of the Matrimonial Causes Act supra.

The Respondent also stated in his witness statement that in order to give a dog a bad name, the Petitioner accused him of adultery when in actual fact it was the Petitioner who has committed adultery in the course of the marriage. I think there is enough evidence which clearly establishes that the Respondent actually committed adultery thus the Petitioner's accusation is well founded not based on malice as the Respondent wants this court to belief. The Respondent further stated that the Petitioner committed adultery with a local pastor in Canada which eventually led to a miscarriage, a situation which is very well acknowledged by family relations. There is no evidence contradicting this statement. The rule is that where a party fails to controvert or challenge material facts testified to on oath, same amounts to an admission by the party. **See Vida Akosua Yeboah v George Ferguson Yeboah (Suit**

No. BDMC 365/2015) dated 4 November 2016. On this account, adultery is established on the part of each party.

Moving on to the Petitioner's second ground, that is, unreasonable behaviour on the part of the Respondent, section 2(1)(b) of the Matrimonial Causes Act provides that "… that the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with the Respondent." It is clear from this provision that a Petitioner must prove the conduct constituting the unreasonable behaviour on the part of the Respondent and the fact that the Petitioner cannot reasonably be expected to live with the Respondent as a result of the unreasonable behaviour of the Respondent.

The behaviour falling within the ambit of section 2(1) (b) of the Matrimonial Causes Act supra range over a wide variety of acts. It may consist of one act if of sufficient gravity or of a persistent course of conduct or a series of acts of differing kinds none of which by itself may justify a conclusion that the person seeking divorce cannot reasonably be expected to live with the spouse but the cumulative effect of all taken together. Moreover, the test to apply in determining whether a petitioner cannot reasonably be expected to live with the respondent is what others may expect from the conduct of the Respondent, that is, an objective assessment of the conduct of the Respondent and the reaction of the Petitioner. **SEE KNUDSEN V KNUDSEN [1976] 1 GLR 204.**

The Petitioner's testimony in support of this fact is that, in 2018, the Respondent left her and the children in the matrimonial home to stay with another woman just adjacent their house. Moreover, the Petitioner states in her witness statement that, before leaving, she packed all her personal belongings and locked them in one of the rooms in their matrimonial home and sent the Respondent a message to that effect. She included in the said message that when she returns from Canada she will come for her belongings.

Moreover, in November 2018, the Petitioner says she was informed by one Emmanuel Nii Ayie that the Respondent has asked him to break the door of the Petitioner's personal room where she had packed her belongings to the outer house where the room served as a store room. It is worth noting that, the Petitioner had to apply to this court for an order of access to the matrimonial home to remove her belongings. When she got hold of her belongings, all her items, including her jewelleries, were not in good condition and she could not recover any good thing from it. In my view, the cumulative effect of the conduct of the Respondent amounts to a behaviour which justified the necessary conclusion that the Petitioner cannot be expected to live with him.

From the above evaluation of evidence adduced by the parties, it is clear that the marriage between the parties has indeed broken down beyond reconciliation on account of the adultery of the parties and the unreasonable behaviour of the Respondent.

With respect to the issue of child custody, section 22(2) of the Matrimonial Causes Act provides that "*The Court may, either on its own initiative or on application by a party to proceedings under this Act, make an order concerning a child of the household which it thinks reasonable and for the* ***benefit of the child****"*. This provision is similar to the welfare principle in section 2 of the Children's Act, 1998 (Act 560). Section 2 of the Act provides that

(1) The best interest of the child shall be paramount in any matter concerning a child.
(2) The best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child.

Therefore, the paramount consideration in determining who is to be awarded custody of the children of the household is the welfare of the children. The court's duty is to protect the children irrespective of the wishes of the parents. All other

considerations are subsidiary. **SEE OPOKU-OWUSU V OPOKU-OWUSU [1973] 2 GLR 349 & HAPPEE V HAPPEE AND ANOTHER [1974] 2 GLR 186.**

It is clear from the testimony of the Petitioner that the two children under consideration, that is, Benjamin Boham and Beatrice Boham, were born in Canada on 12 March 2002 and 13 July 2005 respectively. These children have lived in Ghana since 2005 when the parties return to Ghana till 2019 when the Petitioner took them back to Germany without the knowledge and consent of the Respondent. There are no indications that these children have returned to the jurisdiction. It has been three years since the Petitioner uprooted the children from Ghana to Canada and in my view the children have developed new acquaintances, friends, attachments and sometimes commitments in their new environment. I am therefore of the opinion that the children will not profit from an order which will necessarily subject them to traumatic changes in their settled or stable living condition. **SEE ATTU V ATTU [1984-86] 2 GLR 743**. Custody of the children is therefore given to the Petitioner with unrestricted access to the Respondent.

For the issue of the distribution of spousal property, Article 22(3)(a) & (b) of the 1992 constitution provides that:

3. with a view to achieve the full realisation of the rights referred to in clause (2) of this article,

a. a spouse shall have equal access to **property jointly acquired** during marriage;

b. assets which are **jointly acquired** during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

The operative term in these provisions is **property jointly acquired** during the subsistence of the marriage. The import is that, it not every property acquired single-handedly by any of the spouses during the subsistence of a marriage that can be termed as 'jointly acquired property' to be distributed at all cost on the equality is

equity principle. Rather, it is property that has been shown from the evidence adduced at trial to have been jointly acquired, irrespective of whether or not there was direct, pecuniary or substantial contribution from both spouses in the acquisition. **SEE PETER ADJEI V MARGARET ADJEI (CIVIL APPEAL NO. J4/06/2021) DATED 21 APRIL 2021.**The Supreme Court in this case held that properties acquired during marriage are presumed to be jointly acquired by the parties to the marriage until rebutted by evidence to the contrary.

According to section 20 of the Evidence Act, a rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact. In this present case, the Respondent has this burden.

The Respondent gave evidence to the effect that the four-bedroom house with additional plots situate at No.1 Country Side Nippon Street and any property he as is his self-acquired property and at no point in time did the Petitioner contribute anything whatsoever towards its acquisition. Martin Baidoo, a mason, in his evidence for the Respondent stated that during the period of construction of the said house, all the worker he brought to the site as labourers were paid directly by the Respondent. The project was also fully supervised by the Respondent. He further stated that he was the one the Respondent sent to buy most of the needed building materials for the project since he is the mason for the project and knew which items were of quality. He added that, he never saw any other person supervising, paying workers, inspecting or undertaking any other activity indicating ownership or control of the project except the Respondent.

The Petitioner stated in her witness statement that she helped the Respondent to build the said house, paid for the construction and expenses for the building, single-handedly finished one room for the children, did all the plumbing, tiling and electrical work with the support of her first son. Francis Kobina Annan in his

evidence in favour of the Petitioner categorically stated that some years back, the Petitioner took him to her house to do the plumbing works of one of the washrooms in one of the rooms. He added that, the Petitioner made him bring a tiler to the matrimonial home to do the tiling work in the same washroom as well as the room itself.

Similarly, John Ben Annan in his evidence in favour of the Petitioner stated that some years back, the Petitioner took him to her house to do some electrical works in one of the rooms in the Petitioner's matrimonial home. He specifically fixed a fan, sockets and lights in that room.

On the totality of the evidence adduced supra, I am of the view that the judicially created presumption that properties acquired during marriage are jointly acquired has not been sufficiently proved. To make a case for substantial contribution in a property acquired during a marriage requires close examination to determine both the quantum of the contribution and the intent of either of the parties in making that contribution. In the instant case, the Petitioner undertook electrical and plumbing works in a room in the apartment to improve its utility and also make it comfortable and accommodating for the children. This singular act cannot in anyway be construed as a substantial contribution to the construction of the building, warranting a 50% stake in the property upon the dissolution of the marriage. Any award to the contrary will be completely inequitable and unjustifiable. No facts have been provided nor evidence led in this petition to show that the Petitioner made a substantial contribution to the construction of the building and the Court is convinced that the building indeed belongs to the Respondent. The Petitioner is not entitled to the 50 % stake she seeks in the property.

As already stated, the Respondent also cross petitioned for an order for equal share of all properties acquired by the Petitioner during the subsistence of their marriage. Specifically, the prays for an equal share in the Petitioner's investment with Gold

Coast Fund Management Limited, Cape Coast, equal share in Petitioner's investment with GN Bank and an equal share in a Tipa Truck with Registration Number CR 447/14. The Respondent however, did not lead any evidence to satisfy this court of, at least, the existence of these properties. This notwithstanding, there are situations where, within the marital union, the parties may acquire properties in their individual capacities as envisaged under article 18(1) of the 1992 Constitution which stipulates that "*every person has the right to own properties either alone or in association with others".* **SEE ALSO FYNN V FYNN & OSEI [2013-2014] 1 SCGLR 727.**Therefore, in my view, bank accounts, investment accounts, among others, are clearly personal properties of the Petitioner and cannot be subject to an equitable distribution.

This court is not oblivious of its power under section 20(1) of the Matrimonial Causes Act which provides that *the Court may order either party to the marriage to pay to the other party a sum of money or convey to the other party movable or immovable property as settlement of property rights or lieu thereof or as part of financial provision that the Court thinks just and equitable.* On this authority, the Mercedes Benz registered as CR 73-13 is settled on the Petitioner.

In the light of the above, I am satisfied the marriage between the parties has broken down beyond reconciliation and same is hereby dissolved. The Petitioner is awarded custody of Benjamin Boham and Beatrice Boham with unrestricted access to the Respondent. The Respondent is ordered to convey the Mercedes Benz with registration number CR 73-13 to the Petitioner as same is settled on the Petitioner. Alimony is assessed at GH₵45,000.00 in favour of the Petitioner. No order for costs.

(SGD)

BERNARD BENTIL, J.

(HIGH COURT JUDGE)

COUNSEL

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