

**IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE
HELD IN CAPE COAST ON 27TH JULY, 2023
BEFORE HIS LORDSHIP JUSTICE EMMANUEL A. LODOH**

E6/12/2021

MRS. CHARITY BOADI-DARKWA

PETITIONER

ALIAS MADAM ABA GYAAKYE DARKWA

HOUSE NUMBER BY 95 BROFOYAW

CAPE COAST

VRS.

MR. MICHAEL BOADI- DARKWA

RESPONDENT

HOUSE NUMBER BY 95 BROFOYAW

CAPE COAST

JUDGMENT

The Petitioner on 3rd September, 2021 invoked the court's jurisdiction in a petition for divorce under Section 1 of the Matrimonial Causes Act, 1971 (Act 367) and Order 65 rule 2 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) for the dissolution of her ordinance marriage with Respondent.

The Petitioner also prayed for other reliefs consequent to the dissolution of the marriage. The reliefs are:

- (a) A declaration that the Petitioner has 50% share in the properties acquired during the subsistence of the marriage as sated at paragraphs 42 and 43 of the Petitioner's Petition.
- (b) An order for the recovery of 50% share of the properties acquired during the subsistence of the marriage as stated at paragraph 42 and 43 of the Petitioner's Petition.
- (c) That the Respondent be ordered to pay a lump sum of GH¢40,000.00 to the Petitioner.
- (d) Cost of the suit and any other reliefs as the Honourable Court may deem expedient so to grant the petitioner.

The Respondent did not cross-petition for the non-dissolution of the marriage. However, from the reading of his answer it was clear that even though he did not want the marriage dissolved, he was nevertheless not going to impede the Petitioners desire to bring closure to this chapter of her life. For example in paragraph 33 and 36 of the Respondent's Answer he stated as follows:

- 34. Paragraph 45 is admitted but the Respondent says that the Petitioner is the cause of the inability to resolve the difference. Indeed, the Respondent is completely against the dissolution of the marriage since it is against his Christian religious principles.
- 36. The Respondent will pray the court to refer this matter to appropriate conciliatory forum for the partied to reunite for the sake of the family cohesion and the children.

Undisputed Facts

The undisputed facts in this case are that the party's celebrated their marriage under the Marriages Act, 1884-1985 (CAP 127) on 8th October, 1989 at the Assemblies of God Church, Cape Coast in the Central Region of Ghana. The parties do not also dispute that the marriage begot two children namely Michael Boadi-Darkwa Junior aged 28 years and Maame Afia Boadi-Darkwa aged 31 years, who are by the laws of Ghana all, adults and per the pleadings independently living their lives.

Burden of Proof

An examination of the pleading will disclose that each of the parties published a litany of allegations and counter allegations against each other, which to my mind are issues which are not totalling unexpected in unions such as marriages. What the law requires is that a party who is seeking divorce must essentially put before the court incidents which makes living with the other party intolerable.

A further examination of the Petition will disclose that the petitioner in subsequent paragraphs of her petition hived out the conduct of the Respondent which to her mind constitutes unreasonable behaviour and for which she cannot reasonably be expected to live with the respondent. These particulars of unreasonable behaviour are captured under paragraph 40 of the Petition.

The next question is who bears the burden to establish the particulars of unreasonable behaviour alleged by petitioner. The settled legal position is that it is the Petitioner who bears the burden to put before this court evidence to establish the particulars of unreasonable behaviour. This legal position is expressed in cases such as **Danquah v Danquah [1979] 371** where the court held that:

"The requirements in section 2 (1) of Act 367 that the petitioner must satisfy the court of one or more of those five facts therein specified to prove that the marriage had broken down beyond reconciliation would mean those facts the petitioner had both

pleaded and proved. It would accordingly exclude facts pleaded but not proved or facts proved but not pleaded”

The test to apply in evaluating the evidence as equally stated in holding 1 of the report in the case of **Ansah v Ansah [1982-83] GLR 1127** as follows:

“On the facts, the husband had behaved in such a way towards the wife that she could not reasonably be expected to live with him on application of the Matrimonial Causes Act, 1971 (Act 367), s. 2 (1) (b). The test under the section, was whether the petitioner could reasonably be expected to live with the respondent in spite of the latter’s behaviour. The test was therefore objective. But the answer obviously had to be related to the circumstances of the petition in question. That had to be a question of fact in each case. It followed that the conduct complained of must be sufficiently serious - since mere trivialities would not suffice”

Dissolution of Marriage

Section 1 (2) of the Matrimonial Causes Act, 1971 (Act 367), provides that the sole ground for allowing a petition for divorce shall be upon proof that the marriage has broken down beyond reconciliation. This position of the law was re-echoed in the case of **DANQUAH v. DANQUAH [1979] GLR 371** (see holding 2) as follows:

“The Matrimonial Causes Act, 1971 (Act 367), imposed on the court a species of restriction which was unique. For having established by section 1 (2) that the sole ground for granting a petition should be that the marriage had broken down beyond reconciliation and having by section 2 (1) laid down those facts the proof of which should, prima facie, show that the marriage has so broken down, section 2 (3) authorised the court to grant a petition for divorce only when the court was satisfied, on all the evidence, that there has been an irreconcilable breakdown of the marriage”

The Court's duty therefore as set out under Section 2 (2) and (3) of Act 367 is inquire into two matters provided for as follows:

- (2) On a petition for divorce the Court shall inquire, so far as is reasonable, into the facts alleged by the petitioner and the respondent.**
- (3) Although the Court finds the existence of one or more of the facts specified in subsection (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**

Section 2(1) of Act 367 provides the various circumstances proof of which will ground an order dissolving a marriage. The law provides as follows:

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

Evaluation

As indicated earlier, even though the petitioner set out multiple particulars of unreasonable behaviour against the Respondent, I do not find it necessary to interrogate same because I find from the evidence that the matters alleged in the petition has been overtaken by significant events which to my mind renders the evaluation of the particulars of unreasonable behaviour moot and of no usefulness.

The petitioner testified as follows during her evidence in chief:

Q. Is it your case that due to irreconcilable differences between you and your husband, you have not been living as husband and wife.

A. Yes

Q. Is it also your case that since you are not living together as husband and wife, you have not been having sex with your husband?

A. That is so.

Q. How long have you not been living as husband and wife?

A. Five years

Q. What is your prayer to this court?

A. I want the marriage dissolved.

In his evidence in Chief the Respondent also testified as follows:

Q. It is the Petitioners case that you have not been living as husband and wife in the past.

A. Yes

Q. How long have you not been leaving as husband and wife?

A. She left the matrimonial home two years ago.

Q. You have also not had sex for the past five years.

A. This is so. Because she was denying me sex.

My understanding of the evidence of the petitioner is that she had stopped living with the Respondent as husband for the past five years. The Respondent however testified that they had not lived together for the past two years, because the Petitioner moved out of the home two years ago.

Giving the dispute regarding the number of years the parties have not lived as husband and wife, the question that arises is whether or not the parties have not lived together as husband and wife for the past two or five years.

The resolution of the matter is quite simple. I find the evidence of the petitioner as more probable of belief than the evidence of the Respondent. This is because the Respondent evidence is that they parties have not had sex for the past five years. My understanding is that sexual intercourse unless the contrary is proven, is an integral part of a marriage relationship and accordingly, a withdrawal of same for five years create a presumption that the marriage had ceased to exist in reality.

The record will also show that the Respondent did not challenge the claim of the petitioner that they had not lived as husband and wife for five years prior to this action while leaving apart. In the light of these circumstances I find evidence to ground an inference that the parties have not lived as husband and wife for the past five years.

So the question is given the presence of these indicators that the parties are not living as husband and wife, can the marriage be dissolved without more. Section 2(1) (e) of Act 367 provides a condition precedent for a dissolution of a marriage. Section 2 (1) (e) of Act 367 provides as follows:

- (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;

In the case of **Kotei v Kotei [1974] 2 GLR 172**, Sarkodee J pronounced on the legal consequence of not living as husband and wife for a continuous period of five years. It was stated in holding 4 of the report as follows:

“(4) Where there was proof that the parties had lived apart for a continuous period of five years immediately preceding the presentation of the petition, the court would dissolve the marriage against the will of a spouse who had not committed a matrimonial offence and who could not be blamed for the breakdown of the marriage. But there must be proof that the parties had not lived as man and wife during that period; there must have been a total breakdown of the consortium vitae, mere physical separation was not enough. The petitioner must prove not only the factum of separation but also that he or she had ceased to recognise the marriage as subsisting and intended never to return to the other spouse. The state of mind of the parties was relevant but it did not matter whether or not the state of mind of one of the parties was communicated to the other.”

When the holding in this case is applied in the instant case I find that the petitioner’s state of mind is of a total disinterest in the continuation of the marriage, which was

prior reflected by absence from the matrimonial home for the past five years continuously, accordingly the court is of the view that in order to preserve the well-being and sanity of the parties this marriage ought to be dissolved.

Ancillary Reliefs

During the pendency of this matter, the court was informed that the parties have entered into arrangement regarding the petitioner's ancillary reliefs. They accordingly filed terms of settlement on 18th July, 2023.

It is trite knowledge that the court will always uphold settlements agreed by the parties prior to judgment. Therefore I am of the considered view that having filed terms of settlement, it is not necessary for the court to determine the merits of the prayer for additional reliefs by the Petitioner, since by the very effect of the settlement, the issues before the court has been compromised by the parties. Accordingly this court will adopt the terms of settlement filed by the parties on 18th July, 2023 as the consent judgment.

Conclusion

In conclusion I find sufficient evidence before this court to arrive at a conclusion that the marriage between the parties have broken down beyond reconciliation. Accordingly the court hereby declares that:

1. The ordinance marriage celebrated between the Charity Boadi-Darkwa @ Madam Aba Gyaakye Darkwa and Michael Boadi-Darkwa on 8th October, 1989 at the Assemblies of God Church, Cape Coast in the Central Region of the Republic of Ghana be and is hereby dissolved.
2. It is further ordered that the terms of settlement executed between the parties and filed at the registry of this Court on 18th July, 2023 be and is hereby

adopted by the court and accordingly entered as the consent judgment of the court with the following terms of settlement:

1. That the Petitioner has also agreed with the Respondent that the properties namely House No. BY95 Brafoyaw, House No. N/W44 Akyem near Holy Child Senior High School and lastly House No. CC-071-5881 near Central Regional Hospital, Interbetin should not be shared but used the proceeds from the House No. Akyem near Holy Child Senior High School, Cape Coast and that of House No. CC-071-5881 near the Central Regional Hospital (Interbetin) to defray the debts by the company owned by the both Petitioner and Respondent.
2. That both the Petitioner and Respondent have also agreed that after the payment of the company debts the three properties should be given to the two children of the marriage namely; (1) Maame Afia Boadi Darkwa -31 years and (2) Michael Boadi Darkwa Junior-28 years ad [sic] joint tenant.
3. That the Petitioner and Respondent have appointed their Children namely; (1) Maame Afia Boadi-Darkwa and (2) Michael Boadi-Darkwa Junior as trustees of the said properties to use the proceeds from these properties to pay the just debt of the company namely, Savior God Enterprise.
4. That both the Respondent and Petitioner shall bear the litigation cost themselves.

(SGD)

Emmanuel A. Lodoh

(HIGH COURT JUDGE)

Counsels

1. Roland A.K. Hamilton, Esq. Counsel for the Petitioner
2. Solomon Gyesi, Esq. Counsel for the Respondent