

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE,
WESTERN REGION, SEKONDI HELD IN SEKONDI ON MONDAY THE 16TH DAY
OF OCTOBER, 2023

CORAM: G.K. GYAN-KONTOH 'J'

JUSTICE OF THE HIGH COURT

SUIT NO: E6/17/23

BETWEEN:

ASHLEY E. KODJO

:::

PETITIONER

40 RICCHMAN PLZ 22K BRONX NY 10453, U.S.A

SUING PER HER LAWFUL ATTORNEY, YAW BOATENG

ASANTE-ASARE OF CH 127, SOUTH CHAPEL HILL,

TAKORADI

vs

NEPHI DAD-ORLEANS

:::

RESPONDENT

CH 46, CHAPEL HILL OF TAKORADI

JUDGMENT:

THE PETITIONER herein on 4/5/2023 filed the instant process at the Divorce Registry for the NULLITY IN RESPECT OF THEIR MARRIAGE as same is VOID in law.

The Petition was a 11 paragraphed one which detailed the relationship between the parties when they initially were in amorous relationship and then later converting same into an Ordinance marriage in Sekondi on 26/5/2021.

According to the Petitioner, she is a Ghanaian but now ordinarily resident in Bronx in the U. S. A. whereas the Respondent, also a Ghanaian lives in Takoradi. The parties met as lovers in 2015, dated and resulted in amorous relationship and consequently married on 26/5/2021 at the Marriage Office, Sekondi.

But the circumstances surrounding the marriage according to the petitioner made it impossible for the marriage to be CONSUMMATED as a result of the wilful act of the Respondent and which included the following:

- a. *Respondent's mother published falsehood against the Petitioner and her mother that a witch doctor had confided in her that the Petitioner and her mother practiced juju on the Respondent to secure the Respondent's love for the Petitioner.*
- b. *Respondent's mother succeeded in influencing the Respondent to the extent that prior to the marriage and thereafter, the Respondent refused to sleep with the Petitioner, insisting that both of them should proceed to the Shrine for purification rite before they could sleep together.*
- c. *As a Christian, the Petitioner refused to accompany the Respondent to the Shrine and for that reason the marriage could not be consummated before the petitioner travelled back to the U. S. A.*

The Petitioner therefore concluded that with the above and NOT being able to consummate the marriage on 26/5/2021, she is no longer interested in the marriage as a Christian to undergo fetishism, and also the Petitioner believes that the Respondent's mother has found a woman for the Respondent. The Petitioner averred that the marriage has already been dissolved customarily to signify the nullification of the non-consummation of the marriage.

Upon the service of the petition on the Respondent, he, without filing appearance, just filed an answer to the petition on 22/6/2023. The Respondent in his Response admitted that indeed there was no consummation of the marriage but that it was not his fault as the Respondent averred that the Petitioner insisted that the petitioner's church wanted her to wait for seven (7) days after the marriage for the consummation. The Respondent averred that his mother did not have any negative influence on the marriage. The Respondent averred that the Petitioner used to have petty quarrels with the Respondent's mother and that he never lived with any other woman.

Conceding to the breakdown of the marriage, the Respondent put the blame squarely on the Petitioner in his 12 paragraph Response to the Petition stating amongst others that the Petitioner has grown horns and is thus in no mood to submit to the authority of the Respondent as a man and that there was NO trust between the parties and the Petitioner's chastity was put into question.

Upon the service of the Response on the Petitioner, the Petitioner on 5/9/2023 filed a Notice to set the cause down for trial with a Return date of 12/9/2023 and 19/9/2023. On 19/9/2023, both parties were present and the matter was then fixed for 26/9/2023 for hearing after the parties had informed the court to hear the matter expeditiously even though the court was on legal vacation and wanted to take an opportunity to have their case determined within the period.

THE PETITIONER'S CASE:

Testifying through her Attorney, Yaw Boateng Asante-Asare, the Petitioner's brother, stated that she got married to the Respondent on 26/5/2021 after having initially dated the Respondent. The Petitioner who now is in U. S. A. states that since the marriage was celebrated under the Ordinance in Sekondi, the parties never consummated the marriage

due fundamentally to the Respondent and his family particularly the Respondent's mother who insisted on purification by a witch doctor and the verification before the consummation of the marriage.

The Petitioner's attorney with his Power of attorney tendered in evidence as Exhibit 'A' stated that the Respondent's mother wanted a local Ghanaian wife for the Respondent and all which the Petitioner find unacceptable as the Petitioner is a staunch Christian and did not believe in matters of fetishism.

In cross examination, in denying the matters of fetishism by the Respondent's mother and the Petitioner's justification for such issues, the following is what ensued:

Cross Examination of the Petitioner's attorney:

Q: When did my mother state the shrine and purification matter, as this is very strange?

A: At Auntie Alberta's mother's funeral when your mother was narrating the shrine and purification issue when my sister Abena Poma heard of all of these and narrated same to Ashley.

Q: After the marriage ceremony, the Petitioner was in her period and had had her menstruation and that is why we could not consummate?

A: True.

Q: I have no idea about the cleansing and where you heard it from?

A: Your mother said it at Auntie Alberta's funeral.

Q: Do you know that your sister has a boyfriend somewhere and they have secret relationship?

A: She has no boyfriend.

Q: I know, I have seen and I have heard that the Petitioner has a secret lover with whom she dates and has relationship with?

A: Not correct. Not in Ghana or USA.

Q: Are you saying that you do not know your sister's lover called Cleland with whom she dates?

A: He is a family friend and we all know in Takoradi and he went to the USA for holidays. And all the family knows him as a family friend.

THE RESPONDENT'S CASE:

Testifying, whilst conceding that the marriage was contracted on 26/5/21, the Respondent denied all the accusations by the Petitioner and asserted that the accusations are being made by the Petitioner all because of a man who has come into the marriage, hence forcing her to accuse the Respondent baselessly.

In the cross-examination, the following is what ensued;

Q: Do you not believe in the fetishism and purification rites ever said by you before?

A: I have never visited a shrine before. I am not a traditionalist. My mother is a Christian and I do not know anything about what you have said in this court.

Q: You already know that Cleland is a family friend. Why do you insist that he a secret lover to ASHLEY?

A: I have seen pictures on social media and I have friends in the USA informing me that such secret relationship is going on between them. Moreover, when she was in Ghana, I suspected her of doing it.

THIS case being a matrimonial cause, comes under the Matrimonial Causes Act (971) Act 367 which regulates matters like the instant petition. Section 13 (4) of the Act states that

nothing in the section shall be construed as validating a marriage which is by law void but with respect to which a decree of nullity has not been granted. What the sub-section means is that if a marriage is void, it is void whether a court says so or not.

On voidable marriage, S.13(2) of the Act states that in addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the grounds that:

- a. **The marriage has not been CONSUMATED owing to the wilful refusal of the Respondent to consummate it, or**
- b. **That at the time of the marriage wither party to the marriage was of unsound mind or subject to recurrent attacks of insanity; or**
- c. **That the Respondent was at the time of the marriage pregnant by some person other than the Petitioner; or**
- d. **That the Respondent was at the time of the marriage suffering from an incurable disease in a communicable form.**

It seems to me that the legislature in S13(2) of the Act had in mind other grounds on which a marriage is by law void or voidable.

One such ground is the common law principle that where a marriage has not been consummated because of the incapacity of either party, as opposed to WILFUL REFUSAL to consummate the marriage, the aggrieved party may petition for annulment of the marriage.

“A MARRIAGE IS SAID TO BE CONSUMMATED as soon as the parties have sexual intercourse after the solemnisation of the marriage. (See: **Bromley’s Family Law [6th Ed.] pg.84**).

And what type of sexual intercourse amounts to consummation has exercised the minds of judges (particularly of English courts) over the judges. For instance, in the English case of D.E. v. Attorney - General [1845] 1 ROB BED 279, Lushington ‘J’ stated that;

“In order to amount to consummation, the intercourse must BE ORDINARY and complete, not partial and imperfect. The husband must achieve full regeneration in the normal sense.”

It must be noted also that non-consummation may be due to a husband's incapacity or to the wife's incapacity.

It has been held that a husband's capacity may be caused by a total absence of erection of his organ or to inadequate erection, impotence or physical incapacity of sex. See;

1. **W V. W [1967]3 ALL E. R 178**
2. **PETTIT V. PETTIT [1962] 3 ALL E.R 37**
3. **L V. L [1949] 1 ALL E.R 141**

It has also been held that a wife too may have an incapacity due to a very short and narrow vagina which was a cal-de sac resulting in an impossibility to have satisfactory sexual intercourse with her, suffering from sexual anaesthesia or frigidity, aversion to have sexual act resulting in the act of sex as a great repugnance.

There have been several interpretations and indeed arguments and theories relating to CONSUMMATION.

But the legal position is that irrespective of whether either party uses any form of mechanical or chemical contraception and the marriage is consummated as SOON AS THE HUSBAND ACHIEVES PENETRATION (See; **Bromley's Family Law [6th ed.] pg. 85**).

Thus, where a partner (husband) practises COITUS interruptus on the wife particularly against the wishes of the wife and if the wife eventually filed a petition for a decree of nullity on the grounds of consummation, the court held same to have been consummated.

Under **S.13 (2) of Act 367**, there has been some decisions on the expression: WILFUL REFUSAL to consummate a marriage.

The position, as of now, in our matrimonial causes is that parties who are sheaths and contraceptive jellies do experience PENETRATION.

Husbands who practice COITUS interruptus are also able to penetrate fully. Therefore an aggrieved party cannot bring proceedings for nullity on the ground of wilful refusal to consummate the marriage. The proper remedy will be divorce proceedings.

Also, the position is that if after one satisfactory intercourse after marriage, one of the parties refuses to have intercourse with the other party, there is no question of commencing nullity proceedings. The one act of intercourse would have consummated the marriage and only divorce proceedings can be constituted in appropriate cases.

In the instant situation though, both parties are ad idem on the fact that after the solemnization of the marriage on 26/5/21 at the marriage Registry in Sekondi, the Petitioner was in her menses. Thereafter, the issue of fetishism and other factors relating to beliefs and trusts evolved resulting consequently in the non-consummation of the marriage.

I have had the pains to illustrate issues and scenarios on consummation and NULLITY – on void and voidable marriages as this procedure is not very common in our society even though the laws of Ghana and for that matter the Matrimonial Causes Act (Act 367) have provisions to that effect.

The only relief sought by the Petitioner is for a decree of nullity of the marriage same is void. A marriage is valid if it is in conformity with all legal requirements. In support of the provisions of S.13 (2) of Act 367, I wish to refer to the dictum of Greene M.R in DE RENEVILLE v. DE RENEVILLE [1948]1 ALL E.R 56@60 as follows:

“A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it.”

A voidable marriage is defined by the same Judge as follows @ 60 thus:

“A voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.”

Thus, the position is that where a proceeding is initiated to bring a VOID or VOIDABLE marriage to an end, it ought to be one of annulment and not dissolution of the marriage. Such a proceeding is normally called NULLITY PROCEEDING.

Therefore, I find that the instant proceeding is ripe in the circumstances as the Petitioner rightfully filed the proper process for nullity as per the details in the Petitioner for non-consummation when both parties in their pleadings and evidence do agree to same.

In the instant case, the Petitioner testifies that even though she met the Respondent in Ghana, dated him and had amorous relationship with the Respondent and decided to marry.

This was admitted by the Respondent. However, after the Petitioner had returned to Ghana from U.S.A, and had had the marriage solemnised in Sekondi on 26/5/21, the marriage was never consummated up to the present. This was equally admitted by the Respondent.

It is on record that both parties buttressed their testimonies and positions with different reasons, such pieces of evidence are not in the circumstances, very relevant to the factor of non-consummation of the marriage. It is indeed for the above reason that I delved deep into the nitty gritty of valid marriage, void or voidable marriages, consummation and various cases on such subject before coming into the matter before the court for everyone to have an informed view and appreciation of the subject matter before the court this judgment now being delivered.

To support the Petitioner's case, she testified, albeit through her attorney that the Petitioner has returned the customary marital drink to the family of the Respondent signifying the customary nullification of the non-consummation of the marriage.

What was left then to complete the annulment of the marriage is the instant nullity proceedings. And I am now convinced that in view of the evidence before the court, the parties being ad idem that indeed the marriage was never consummated after its celebration on 26/5/2021, and in accordance with **S.13 (2) of Act 367**, as the law indeed does enjoin the court to find that the marriage was not consummated, I am satisfied that the marriage contracted between the parties on 26/5/2021 was not consummated. And I hereby annul same and order a decree of nullity in respect of same.

SGD

G. K GYAN-KONTOH 'J'

JUSTICE OF THE HIGH COURT

PARTIES:

- 1. YAW BOATENG ASANTE-ASARE (LAWFUL ATTORNEY) FOR THE PETITIONER.**
- 2. NEPHI DAD-ORLEANS FOR THE RESPONDENT.**

e.m.