

IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE
TAMALE NORTHERN REGION

SUIT NO: NR/TL/HC/E5/7/2023

DELIVERED ON 23RD DAY OF NOVEMBER, 2023

ANDREW TAMPURI MOHAMMED

== PETITIONER

VRS

ESTHER HYANCITHA AKANDAKUM

== RESPONDENT

COUNSEL

SYLVESTER ISANG FOR PETITIONER

MOHAMMED ALHASSAN FOR RESPONDENT

CORAM

ERIC ANSAH ANKOMAH J

JUDGEMENT



Background

The Petitioner married the Respondent under customary law in 2013 and in 2017 the parties converted the customary marriage to Ordinance marriage. The parties are blessed with two children namely; David Tampuri aged nine (9) and Kilian Tampuri Awinsakiya aged two (2). The Petitioner has a Twenty (20) year old son who lived with the parties when he was a child.

The parties had challenges in their marriage leading to separation. The Respondent moved out of the matrimonial home and she has been living in a rented house since January, 2022.

The Petitioner instituted this petition for divorce on 31st May, 2023 seeking the following reliefs: -

- i) Dissolution of the ordinance marriage between the Petitioner and the Respondent celebrated in 2017.*
- ii) Custody of David Tampuri Awinsakiya aged nine (9) years to the Petitioner with access for the Respondent and custody of of Kilian Tampuri Ayinbono aged two (2) years to the Respondent with access to the Petitioner.*
- iii) Toyota Matrix with Registration No. GR 549-16 which is duly registered in Petitioner's name and which was solely acquired by Petitioner be settled in favour of the Respondent.*

The Respondent entered appearance on 21/06/2023 and on that same day filed her answer to the petition where she also cross petitioned for the following reliefs;

- a) The dissolution of the Ordinance marriage celebrated on the 4th October, 2017.*
- b) Custody of the children namely; David Tampuri Awinsakiya aged 9 years and Tampuri Ayinbono aged two (2) years to the Respondent with access to the Petitioner.*
- c) Distribution of properties acquired during the subsistence of the marriage as follows;*
 - i) The matrimonial home to be settled on the Respondent to dwell therein with the children.*

- ii) The 3 Plots of land with a fence wall at Dungu-Airport and the uncompleted 2-apartment house situate on the Plot at Sognaliyi Residential Area, be settled on the Petitioner.*
- iii) The Respondent to continue to keep the Toyota Matrix bought for her by the Petitioner while the Petitioner also keeps Benz Car No. UE-106-12.*
- iv) Benz car no. GR 7312-20 be valued and sold and the proceeds shared equally to the parties or one party buys out the other.*
- v) An order for Petitioner to take care of the education, medical, and other social needs of the children.*
- vi) An order for the Petitioner to provide GHs 4,000.00 monthly for the maintenance of the children and their transportation to school.*
- vii) An order directing the parties to file their bank statements showing balances in their accounts as at the date of institution of the Petition for same to be shared.*

IN THE ALTERNATIVE.

- viii) A lump sum payment as financial provision to the Respondent.*
- ix) Any other relief lawfully available to the Respondent.*

The petitioner applied for the petition to be set down for trial on 7th November 2023 but eventually the parties appeared before the court for setting down on 21st November 2023.

When the parties and their counsel appeared before me with assistance from their lawyers and the court, the parties settled all other reliefs amicably leaving the only issue of the dissolution of the marriage for the court to take evidence and make a pronouncement.

In the course of this judgment, I will incorporate the terms of settlement filed by the parties in respect of the other reliefs for ease of reference.

Evidence of the Petitioner

The petitioner on 22nd day of November, 2023 testified that;

He is lives in Tamale and he is Engineer by profession working with Northern Electricity Distribution Company (NEDCO). That he knows the Respondent to be his wife. That he married the Respondent customarily in 2013 and their marriage was subsequently converted to Ordinance Marriage in 2017.

The witness tendered a copy of the marriage certificate in evidence without objection and it was admitted in evidence and marked as exhibit A.

That the parties were living together as husband and wife in the matrimonial home until their own problems as married couple started. That since January, 2022, the Respondent has moved out of their matrimonial home where she is living in a rented apartment with the last child of the parties.

That all attempts made by their family members as well as their priest to reconcile the parties have proved futile. That for about three years now, the parties have not lived together as husband and wife. That for about three years now the parties have not had sex.

The Petitioner prays that, the marriage between them be dissolved.

In cross-examination by counsel for the Respondent, the Petitioner answered that he cannot live together with the Respondent as husband and wife since all attempts to reconcile them have proved futile. The Petitioner closed his case without calling a witness.

The Respondent elected not to testify or call witnesses on her answer to the petition and on the cross petition.

Counsel for the parties waived the filing of address.

The court adjourned the petition to 23rd November for judgment.

It is this piece of evidence and the pleadings in the case that are before this court for me to determine whether the marriage between the parties has broken down beyond reconciliation to the extent that the court can order dissolution of the marriage.

The position of the law is clear that dissolution of marriage especially under Cap 127 cannot be at the discretion of the parties but rather at the instance of the Court where evidence is led to the satisfaction of the court that indeed the marriage has broken down beyond reconciliation.

See: *Mariam Partey v Williams Partey [2014] 71 GMJ 98 CA.*

Again, section 1 (2) of the Matrimonial Causes Act 1971 (Act 361) stipulates that the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation.

The same Matrimonial Causes Act section 2 (1) list the grounds proof of which the Court may grant dissolution of marriages.

Section 2(1) (d) of Act 361 states as follows;

“That the parties to the marriage have not lived together 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;”

Section 2(1) (f) of Act 361 also states that;

“That the parties to the marriage have, after diligent effort, been unable to reconcile their differences.”

The uncontroverted evidence-in-chief of the Petitioner is that, the parties have not lived together as husband and wife for about three years now. The Respondent also cross petitioned for divorce. She only elected not to testify in view of the fact that the parties have settled all the other ancillary reliefs and actually filed terms of settlement to that effect.

Again, the unchallenged evidence before me is that, all attempts made by the parties, their families and priest to resolve their differences have proved futile.

All these notwithstanding it is the duty of the Court to probe further and satisfy itself that the Ordinance marriage has broken down beyond reconciliation.

See: Section 2 (2) and 2 (3) of Act 367.

After assessing the evidence on record as well as the conduct of the parties in filing terms of settlement on the ancillary reliefs as well as their prayer for the dissolution of the marriage, I hereby make the following findings of fact: -

That the parties married customarily in 2013 and on the 4th day of October, 2017 converted the marriage to Ordinance marriage.

That, there are two issues in the marriage with the Petitioner having an adult child who is 20 years old now.

That the parties since three years now have not lived together as husband and wife and have also not had sex.

Finally, that all attempts to reconcile the differences between the couple have proved futile.

I must add that no issues were joined at this stage since the Respondent abandoned her Cross Petition and also did not cross-examine the Petitioner on these salient evidence on the breakdown of the marriage.

The position of the law is clear that the failure of a party to deny an important averment means admission.

See; Aryeetey v Brown [2006] 5 MLRG 160 CA

See also; Kusi and Kusi v Bonsu [2010] SCGLR 60.

Under **Section 11 (1) of the Evidence Act 1975 (NRCD 323)** it is provided that;

“For the purpose of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on an issue”.

This position of the law was amply explained in the case of

In Re Ashaley Botwe Lands: Adjetey Agbosu & Others [2003-2004] SCGLR 400, 425-426 per

Brobbey JSC stated:

“The effect of Section 11 (1) and 14 and Sections in the Evidence Decree, 1975 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything; the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time if the court has to make a determination of fact or of an issue, and that determination depends on evaluation of fact and evidence, the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favour then he has a duty to help his own cause by adducing before the court such facts or evidence that will induce the determination to be made in his favour the logical sequel to this is that if he leads no such facts or evidence the court will be left with no choice but evaluate the entire case on the basis of the evidence before the court, which may turn out to be the only evidence of the plaintiff.

If the court chooses to believe the only evidence on record the plaintiff may win and the defendant may lose. Such loss may be brought about by default on the part of the defendant. In the light of the statutory provisions. Literally relying on the common law principle that the defendant does not need to prove any defence and therefore does not need to lead any evidence may not always serve the best interest of the litigant even if he is a defendant"

See also *Takoradi Flour Mills v Samir Faris [2005-2006] SCGLR 882 Holding 1:-*

"The law is well settled that where the evidence led by a party is not challenged by his opponent in cross-examination and the opponent does not tender evidence to the contrary, the facts deposed to in that evidence are deemed to have been admitted by the opponent and must be accepted by the trial court"

Applying these authorities to the case before me, it is clear that the Respondent did not lead any evidence to rebut the evidence of the Petitioner on the irreconcilable differences of the parties that has resulted in the filing of this petition for divorce.

It is my decision that the customary marriage contracted by the parties in 2013 and which said marriage was converted to Ordinance marriage on 4th October, 2017 has broken down beyond reconciliation.

I grant the Petitioner's relief (a) of the petition and hereby dissolve the marriage between the parties.

I hereby cancel the marriage certificate issued on 4th October, 2017 and numbered 963 with License Number 11/0012. The parties are declared as no longer husband and wife and can go their separate ways.

The parties filed terms of settlement on 22nd November, 2023 concerning property settlement and custody of the issues of the marriage.

I hereby adopt the terms of settlement as consent judgment for the parties as they themselves set out in the terms of settlement filed at the registry of this court as follows:

-

1. *That ownership of the matrimonial home will be transferred to the three children with Petitioner as Trustee with powers to renovate and maintain same but Petitioner cannot transfer or sell same.*
2. *That custody of David Tampuri Awinsakiya aged (9) years be granted to the Petitioner with reasonable access to the Respondent.*
3. *That custody of Kilian Tampuri Awinsakiya aged (2) years be granted to the Respondent with reasonable access to the Petitioner.*
4. *That the Petitioner pays to the Respondent a maintenance fee of One Thousand Two Hundred Ghana Cedis (GHs 1,200.00) on or before the last day of each month.*
5. *That the Toyota Matrix with Registration No. GR-549-16 be settled in favour of the Respondent.*
6. *That Benz Car with Registration No. UE-7312-20 be settled in favour of the Petitioner.*
7. *That the three plots of land acquired during the pendency of the marriage be given to the 3 children as owners namely; Isaac Tampuri aged (20) years who is the Petitioner's son and has lived with them since childhood; David Tampuri Awinsakiya (9) years; and Kilian Tampuri Ayinbono (2) years with the Petitioner as Trustee with powers to renovate and maintain same but Petitioner cannot transfer or sell same.*

8. *That any future development on the said plots will be to the benefits of the three children.*
9. *That a lump sum of Twenty Thousand Ghana Cedis (GHs 20,000) be paid to the Respondent by the Petitioner.*
10. *That the court adopts these terms of settlement as the judgment of the court in this matter.*
11. *That the terms of settlement contained herein shall constitute the full and final settlement of all the reliefs endorsed in the petition and the response to the petition save relief on the dissolution of the marriage.*

I make no order as to cost.

SIGNED

HIS LORDSHIP JUSTICE ERIC ANSAH ANKOMAH