

GHANA / JUDGMENT

OHENE-SARFOA VRS PHILIP (A4/34/23) [2024] GHADC 115 (14 March 2024)

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IN THE DISTRICT COURT HELD AT AKIM ODA ON 14TH MARCH, 2024 BEFORE HER
WORSHIP ADELINE OWUSUA ASANTE (MS.) SITTING AS THE DISTRICT MAGISTRATE

A4/34/23

PETITIONER

RESPONDENT

DORCAS OHENE-SARFOA

AKIM ODA-NKWANTA

VRS

AGYEI PHILIP

OF AKIM MALLAM NKWANTA D/A JHS

MALLAM NKWANTA

NEAR ADONKRONO

PARTIES:

PETITIONER PRESENT

RESPONDENT PRESENT

Introduction

JUDGMENT

The Petitioner herein filed a Petition against the Respondent on 7th July 2023 praying for the following reliefs;

- (a) An order dissolving the Ordinance Marriage
- (b) An order of the court for evaluation of the two rooms and the remaining plot of land, sell same and share the proceeds equally to parties.
- (c) An order for custody of the first child Agyeiwaa Esmeralda and for the respondent to maintain the two (2) children at GHS 600.00 a month, pay their school fees and provide the children's needs on health, education, clothing etc. The Parties were married under Part III of CAP 127 on the 19th September, 2015 at Christ Apostolic Church International, Akim

Edubiase. The Parties are both teachers. There are two (2) issues of the marriage who were 7 years and 5 years at the time of filing the suit. Page 1 of 11 It is the Petitioner's case that the Parties were in a blissful marriage until the Respondent accused her of having committed adultery and despite denying it, Respondent continued to disgrace her. Plaintiff says one day, together with her fellow staff she attended an installation of her school PTA chairman as Abusuapanin of his family at Akim Abenase and returned around 6.30 pm but without any cause Respondent physically assaulted her and the conduct, attitude and behaviour of Respondent was reported to DOVVSU office, Akim Oda for redress but Respondent's father requested that the matter be referred home for amicable settlement. She says nothing good came out of the settlement process as Respondent and his family were harsh on her and to avoid further assault, she called for dissolution of the marriage. She says at the end of 2022, the Respondent became ill and sought medical attention at his mother's end and upon his return to the matrimonial home, Respondent accused her of poisoning him and claimed that had resulted in his kidney and liver problems. She say this resulted in Respondent instructing her never to cook for him and he started eating outside and equally neglected all his matrimonial duties. She says the Respondent sought transfer from Gyewani Nkwanta School to Mallam Nkwanta JHS, in the Kwaebibirem Municipal Assembly and subsequently took the female child of the marriage with him. The customary marriage was dissolved on 1st July 2023 at Akyem Tafo. She says the parties secured a plot of land at Oda -Nkwanta and later built two rooms thereon and prayed this court to cause the said two (2) rooms together with the undeveloped plot of land to be sold and the proceeds shared equally between the parties and prayed for custody of the child, Agyeiwaa Esmeralda. In Answer to the Petition filed on 17th July 2023, the Respondent says he also found it intolerable to live with the Petitioner since she is not willing to change from the things that constantly cause their differences. He says the viciously promiscuous lifestyle of the Petitioner is what has shattered the once peaceful home. He says the Petitioner engaged in acts, a married woman should not be engaged in with her staff colleagues. This resulted in him informing the headmaster to address the disgraceful conduct. He denied assaulting the Petitioner alleging that he only had a verbal intercourse with her when she left home Page 2 of 11 very early and returned very late. He says he took the elder child because the child complained to him that Petitioner had been bringing another man to the house in his absence and on three (3) occasions she had been given the sum of GHS 5.00 to keep mute. As such he is living with the said Agyeiwaa Esmeralda and taking very good care of her. He cross petition for the following reliefs;

- (1) That the marriage celebrated between the two parties be dissolved by the court when the Petitioner is ready to bear all liabilities or cost involved in the dissolution of the marriage.
- (2) That the two separated rooms owned by the Respondent, one room should be sold for Petitioner. The other one room should be left by the court for the Respondent. The same should be done for the remaining plot of land.
- (3) That the Respondent be granted custody of Esmeralda Agyeiwaa.

- (4) Any other relief the court may deem fit.

Issues

The issues for determination by this court are as follows;

- (1) whether or not the marriage between the Petitioner and the Respondent has broken down beyond reconciliation;
- (2) Whether or not custody of the children should be given to the Petitioner or Respondent;
- (3) Whether or not the Parties acquired the property during the subsistence of the marriage and thus entitled to 50% share The burden of Proof The principle of law is that he who asserts must prove. In the case of *Adwubeng v Domfeh* [1996-97] SCGLR 660, SC in holding 3 held that “sections 11(4) and 12 of the Evidence Decree, 1975(NRCD 323) have clearly provided that the standard of proof in all civil actions was proof by preponderance of probabilities. No exceptions were made”. The standard of proof as stated applies to Petition for divorce. Page 3 of 11 A party who bears the burden of proof is to adduce the required evidence of facts in issue that has the quality of credibility short of which his claim may fail. See *Ababio v Akwasi III* (1994-1995) 2 GBR 774 Evaluation of evidence/Resolution of Issues Issue 1: Whether or not the marriage between the Petitioner and the Respondent has broken down beyond reconciliation A Court will only dissolve a marriage that has broken down beyond reconciliation. See section 1(2) of the Matrimonial Causes Act, 1971 (Act 367). The Petitioner relied on his Witness Statement filed on 22nd September, 2023 as his Evidence in Chief. Her testimony was essentially a repetition of all the averments in her Petition. She tendered a copy of the receipt of purchase of a plot of land at Oda Nkwanta jointly purchased by the Parties as Exhibit “A”. Respondent also testified by relying on his Witness Statement filed on 14th December, 2023 as her Evidence in Chief. His testimony was also essentially a reproduction of his Answer. He however denied punching or assaulting Petitioner and says that he sought medical attention at Akim Ayirebi Government Hospital and not his mother’s end when he fell ill. He say the doctor informed him that the issues with his kidney, liver and intestines were as a result of the food he eats which he alluded to the Petitioner being a cause of since he does not drink, smoke or indulge in drugs. He says when Petitioner heard the news of his health, she happily danced and started putting on black clothes every day. He says it was rather the Petitioner who suddenly stopped cooking for him, washing and sweeping saying she is not a housewife but a headmistress and this has affected him emotionally as he has been traumatized. He prayed that one room and half plot be given to the Petitioner as he is not ready to sell his children’s inheritance and the Petitioner can equally rent her part to tenants since the rooms are two single rooms. From the evidence adduced by both Parties, there have been counter arguments of physical assault, disrespect, shirking of marital responsibility on both sides and Page 4 of 11 irreconcilable differences. No evidence was however led by the Petitioner in support of her allegations against the Respondent that she had been abused as no copy of the said complaint to DOVVSU was attached herewith and neither was her allegations corroborated. Nonetheless, I note that the

parties have irreconcilable differences which makes cohabiting as a couple impossible. It has been held that the following elements must be present where irreconcilable differences exist or a party alludes to it;

- (a) There should exist differences between the parties
 - (b) They should have made diligent efforts to reconcile these differences
 - (c) They should have been unable to effect the reconciliation of the differences The Parties have testified that their family and friends tried to help resolve their differences however same proved futile. The outcome of their inability to reconcile their differences in addition to the counter allegations and accusations resulted in the dissolution of their customary marriage. In any event, I am of the opinion that it is toxic for the parties to continue living together when the Respondent believes that Petitioner is capable of poisoning him to the extent that he buys food from outside to eat on a daily basis. As such I do not deem it fit to order Parties to resume consortium as the marriage has broken down beyond reconciliation. Issue 2: Whether or not custody of Agyeiwaa Esmeralda should be awarded to Petitioner or Respondent In issues concerning children, it is the best interest of the child which is the paramount consideration as stipulated in section 2 of the Children's Act, 1998 (Act 560) as amended irrespective of the wishes of the parents. In making decisions concerning custody or access, the Court ought to avert its mind to matters such as the age of the child, the importance of a young child being with his mother, the need for continuity in the care and control of the child, among others. Page 5 of 11 Pronouncements have been made by the courts in respect of custody in a plethora of cases which includes the following; Kyei Baffour v. Carlis Anaman [2018] 124 GMJ 95 @ 111 C.A, it was held that in determining which parent is to take custody of a child, it is trite law that the best interest or welfare of the child must be paramount and likewise, in the making of orders by the court pertaining to custody of an infant, section 18 (1) (b) and (2) of the Court's Act, 1993 (Act 459) provides for the service of the best of the interest of the infant, as well as the child's welfare, to be primarily essential. In Opoku-Owusu v Opoku-Owusu [1973]2GLR 349 the court held as follows; "the paramount consideration is the welfare of the child. The Court's duty is to protect the children irrespective of the wishes of the parents. In the normal course, the mother should have the care and control of very young children, particularly girls or those who for some reason need a mother's care: and older boys to have the influence of their father. It is desirable to keep brothers and sisters together and not split them up. A separation will disturb their progress and may affect them emotionally" Both parties prayed in their pleadings for custody of the first child of the marriage, Agyeiwaa Esmeralda to be granted to them. There are two (2) issues of the marriage who at the time of filing the Petition, were seven
- (7) and five (5) years respectively. According to the evidence of the Petitioner, she has in her custody the younger of the two (2) being the male aged 5 years and the elder, female, aged 7 years is in the custody of Respondent. From the evidence, Respondent prayed for the custody of the female child whom he went on transfer with reason being that he did not want the child to emulate the behaviour of Petitioner in future. In fact, during cross

examination Respondent intimated the he will not be worried about the other child, Nana Agyei Sikapa, emulating the behaviour of Plaintiff. This is what ensued during cross examination: Q: Is it true that there are two (2) issues of the marriage? A: Yes, I agree Q: If yes, why are you preventing our female child, Agyeiwaa Esmeralda from staying with me, the mother? Page 6 of 11 A: This is because I want the child to avoid the behaviour you portray in life. Q: Then what about Nana Agyei Sikapa, our son, if that is what you are saying? A: Because it will not worry me in future. Q: Why since Nana Agyei is also your son. A: The negative behaviour portrayed by you, the mother will not have effect on our son. Q: From paragraph 8 of your witness statement you stated that you perform your duties as a father, when was the last time you paid Nana Agyei Sikapa's fees or you gave money for feeding? A: I have not been paying the school fees because I cannot afford the fees for that private school for two (2) kids and I have asked you to send him to a government school for the meantime. Q: It is not true that the last day you provided feeding money for the child is September 2023 because I left the matrimonial home in July 2023 and I have not received any money for the child. A: It is not true because your family warned me strongly to never visit you and this became a quarrel. I must say that I find it odd that a father will take only one child more specifically the female leaving behind the male who ordinarily Respondent would have influence over as the father. I see no reason on record for the two (2) children to be separated other than Respondent alluding to Esmeralda Agyeiwaa constantly falling sick when she is left in the care of Petitioner and which Petitioner also denied alleging that it is Nana Agyei Sikapa who constantly falls sick. This is what ensued during cross examination of Respondent by Petitioner; Q: In paragraph 13 of your witness statement, you said the court has the right to give custody of Nana Agyei to me and Agyeiwaa Esmeralda to you to avoid future complaints and spiritual problems, why? Page 7 of 11 A: This is because anytime I leave the child with you she gets sick but that of Nana Agyei Sikapa it is not so. Q: It is never true because Esmeralda Agyeiwaa does not get sick normally but rather Nana Agyei Sikapa. A: It is a lie because the child herself does not like her mother. The two (2) children of the marriage, were together in the matrimonial home under the care of Petitioner until the Respondent took the female, Esmeralda Agyeiwaa, aged 7 years, away. From the evidence on record, aside the Respondent alleging that the Petitioner brought men to the matrimonial home in his absence which was reported to him by their daughter, Esmeralda Agyeiwaa, I do not see any other evidence impugning the character of Petitioner as to affect the psychological, emotional and spiritual wellbeing of the children. Furthermore, the Respondent intimated that he had stopped remitting the Petitioner the school fees and feeding fees of the 2nd issue of the marriage. Needless to say he has not been performing his fatherly duty towards the child he left behind claiming he cannot afford school fees for the private school for two (2) kids and intimated that he has asked Petitioner to send the 2nd child to a government school for the time being. The question to be asked is, will it be in the best interest of Esmeralda Agyeiwaa to continue being in the custody of the Respondent considering that Respondent is unbothered about the survival of his own son whom he left behind? Did the Respondent take Esmeralda Agyeiwaa for the purpose of serving him in the house? This is what ensued during cross examination of Petitioner by

Respondent; Q: Do you think I will allow my child who has been serving me to be taken care of by a different man? A: Yes, I think you will allow me. Q: You think I will allow Agyeiwaa Esmeralda to leave my home/house? Page 8 of 11 A: Yes Q: I will not allow her to leave my house, I put it to you. It is also evident that the Respondent has impliedly agreed to the Petitioner having custody of Nana Agyei Sikapa who has been with Petitioner all this while when he cross petitioned for custody of only Agyeiwaa Esmeralda. As stated in Opoku-Owusu (Supra), siblings must not be separated as brothers and sisters must always be together. I also do not see any reason why the two children should be separated per the wish of Respondent. In the circumstances, the Petitioner is awarded custody of the two (2) children, Agyeiwaa Esmeralda and Nana Agyei Sikapa. Issue 3: Whether or not the Parties acquired the property during the subsistence of the marriage and thus entitled to 50% share Property acquired during marriage is presumed to be marital property. Thus, marital property is to be understood as property acquired by the spouses during the marriage, irrespective of whether the other spouse had made a contribution to its acquisition. See Arthur (No. 1) vs Arthur (No.1) [2013-2014] 1 SCGLR 543 Assets which are jointly acquired during the marriage shall be distributed equitably between the spouses upon the dissolution of the marriage. See Article 22(3) (b) of the 1992 Constitution. The Petitioner testified that during the subsistence of the marriage, a plot of land at Oda Nkwanta was jointly acquired on which they had built two (2) single rooms. She tendered Exhibit A in support of her assertion of the said purchase. From the evidence on record, it is not in doubt that the land on which the matrimonial home is situated was acquired jointly during the subsistence of the marriage on 24th February 2018 as Respondent explicitly admitted same under cross examination but denied building the house on the land together with Petitioner. This is what ensued during cross examination of Respondent by Petitioner: Page 9 of 11 Q: In paragraph 11 of your witness statement, you said the court should give one room and half plot to me, why should the court warn me to never bring any man to that room because we both built the house. A: That is because it will cause disturbance to me. If you claim we both built it together then prove it. Q: The receipt to the land that we bought is here, Exhibit A. A: The land was jointly acquired together but the house was not. Q: Right from the beginning we both took loans to build the house. A: I leave the sharing of the house to you, my lady. Both Parties are in agreement that the house be shared between them and have expressed varying opinions as to how the property should be shared. Having come to the conclusion that the property was jointly acquired, it is the court's opinion that the two single rooms together with the undeveloped land be valued and the Parties given the option to buy out each other with the Petitioner given the first right of refusal.

Conclusion

The marriage between the parties has broken down beyond reconciliation. I hold as follows:

- (1) That the marriage celebrated between the parties on 19th September, 2015 at Christ Apostolic Church International, Akim Edubiase is hereby dissolved and the certificate of marriage is accordingly cancelled;
- (2) Custody of the two (2) children of the marriage, Esmeralda Agyeiwaa and Nana Agyei Sikapa is granted to Petitioner with reasonable access to the Respondent to the children every fortnight weekend (Fridays after school and return them by 5pm on Sundays).
- (3) The Respondent is to maintain the children of the marriage at GHS 600.00 per month subject to renewal. Page 10 of 11
- (4) The property acquired during the marriage (two single rooms and undeveloped land) should be valued by the Valuation Office, Akim Oda. The cost of the valuation shall be borne equally by both Parties. Petitioner has the first option to buy out the Respondent within three (3) months from the date of the valuation. Respondent should exercise the right of buying out Petitioner within three (3) months thereafter. In the event that all these fail, the property should be sold in the open market and proceeds shared in a ratio of 50:50 between the Parties.
- (5) The Respondent shall be responsible for the educational needs of the children (including feeding fees, school uniforms, books, educational supplies) as and when they fall due. As such the children are to be enrolled in a good school which the Respondent can afford.
- (6) The Parties are each to bear 50% of the medical needs of the children as and when they fall due (The children are also to be enrolled on the National Health Insurance Scheme).
- (7) The Petitioner shall be responsible for the clothing needs of the two (2) children. However, on festive seasons such as Christmas, the Respondent is to buy Christmas clothing, shoes and toys for both children. (SGD) ADELINE OWUSUA ASANTE (MS.) (MAGISTRATE) Page 11 of 11

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