

GHANA / JUDGMENT

KANGAH VRS DAGADU (C5/109/2023) [2024] GHACC 148 (5 January 2024)

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5 January 2024

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IN THE CIRCUIT COURT ONE HELD AT ACCRA ON FRIDAY, 5TH OF JANUARY 2024, BEFORE HER HONOUR AFIA OWUSUAA APPIAH (MRS) CIRCUIT COURT JUDGE C5/109/2023 ALBERTA ESI KANGAH PETITIONER VRS BERNARD DAGADU RESPONDENT Parties herein a marketing officer and a banker respectively then a bachelor and a spinster got married under at the Assemblies of God Church, Takoradi in the Western Region on the 17th of November 2018. This union is blessed with one child, Kekeli Ablah Dagadu, aged about 2 1/2 years at the time of the filing of this petition. Parties after the marriage cohabited at Race Course Lapaz, in Accra. On the 11th day November 2022, Petitioner herein caused a petition to be filed before the court praying the court for the following reliefs;

1. An order to dissolve the Ordinance marriage contracted by the parties on 17th November, 2018 be dissolved.
2. An order granting custody of the only child to the petitioner.
3. An order granting the Respondent reasonable access to the only child of the marriage.
4. An order that the Respondent to remit the Petitioner with the sum of One Thousand Five Hundred Cedis for the maintenance and upkeep of 1 the only child of the marriage. The said monthly maintenance should be subject to 20% upward adjustment yearly.
5. An order directing the Respondent to be responsible for the educational expenses and medical bills of the only child of the marriage. According to her, the marriage celebrated between him and Respondent had broken down beyond reconciliation due to the unreasonable behaviour of Respondent. Respondent in his answer to the Petition agreed that the marriage between parties has broken down beyond reconciliation but denied any unreasonable behaviour on his part. He averred that it was Petitioner rather that has behaved unreasonably in the marriage. He also cross-petitioned the court as follows;
 1. An order for the dissolution of the marriage contracted between the parties.
 2. An order of custody of the only child of the marriage in favour of Petitioner with reasonable access to Respondent especially on weekends and vacations.

3. An order directing the Respondent to continue to pay monthly maintenance of Three Hundred and Fifty Ghana Cedis for the child of the marriage and in addition to same pay her school fees and medical bills as and when they fall due.
4. An order directing the Respondent to pay the said maintenance until the child attains adulthood and the said amount should be reviewable upwards by 10% every two years. 2
5. An order that the consent of the Respondent should be sought in terms of choice of school and other important decisions relating to the child of the marriage.
6. Any other order(s) this Honourable Court deems fits. Both parties per the pleading aver that the marriage celebrated between them has broken down beyond reconciliation and pray for dissolution of the marriage. Section 1 of the Matrimonial Causes Act, 1971 Act 367 provides that “The sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation”. Thus though both parties have averred in their pleadings that the marriage has broken down of the said marriage beyond reconciliation for a petition for dissolution would be granted. The standard of proof in civil case such as the present action is proof on the preponderance of probabilities. Section 12(2) of Evidence Act NRC 323 defines preponderance of probabilities as “Preponderance of the probabilities” means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence.” In the case of *ARYEH & AKAKPO V AYAA IDDRISU* [2010] SCGLR 891, the Supreme Court unanimously held that a party who has counterclaimed bore the burden of proving his counterclaim on the preponderance of probabilities and would not win on that issue only because the original claim had failed. See the cases of *Malm v Lutterodt* [1963] 1 GLR SC & *Apea v Asamoah* [2003-2004] 1 GLR SC 226, 246. Respondent therefore also must lead evidence to prove his assertions/ assertions. Both Petitioner and Respondent therefore assume the onus to lead sufficient evidence in support of their assertions and their reliefs. On the orders of the court, parties filed their respective witness statements in 3 support of their respective cases. To promote reconciliation, parties were referred to the Alternative Dispute Resolution Centre by the court. Mediation between them in respect of reconciling as a couple was unsuccessful. However, parties agreed on dissolution of the marriage and all other ancillary issues raised in their pleadings save monthly maintenance for the issue of the marriage. Despite this express consent to the dissolution of the marriage by the parties, the court is the only determinant of the break down beyond reconciliation or otherwise of an ordinance marriage under the laws of Ghana. Accordingly, the court shall consider whether or not the marriage celebrated between parties herein has indeed broken down beyond reconciliation as canvassed by the parries. Section 1(2) of the Matrimonial Causes Act, 1971 Act 367 states “The sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation.” Section 2(3) of Act 367 provides “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, has

outlined several instance which suffice as proof of break down of a marriage. A petitioner must satisfy the court of one or more of the instances listed therein as proof that the marriage has broken down beyond reconciliation. Section 2(1)(b) of Act 367 provides that where the respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent same suffice as proof of the break down of the marriage beyond reconciliation. Both Petitioner and Respondent ground for seeking the 4 dissolution of their marriage is unreasonable behaviour of the other. Petitioner's evidence on the break down of the marriage is that Respondent is a bisexual. According to her, during their courtship, Respondent confessed to her that he used to date and have sex with other men but had stopped when he realized it was not normal. She stated it turned out later in the marriage that Respondent was still in the bisexual lifestyle, displaying his nude photographs, charts and sexual activities with other men. She contended that Respondent is so engrossed in the bisexual lifestyle that he has a symbolic silver ring which he wears as soon as he steps out for work and wears his wedding ring at home. Petitioner testified further that Respondent refused to spend time with her even during her complicated pregnancy and persistently abandoned her to spend time with his male partners. According to Petitioner, due to the complicated nature of her pregnancy, she moved in with her mother at Takoradi but monthly visited Respondent to perform her marital duties. Whilst in Takoradi, Respondent called her Auntie to report to her that she Petitioner was aware of his sexual orientation before marriage and should therefore not complain. Petitioner contends that counseling from her auntie, their pastor and their respective families during a meeting to counsel and urge Respondent to stop his bisexual lifestyle have been to no avail. She stated that at a meeting held by both families, Respondent attended the said meeting wearing the symbolic silver ring and rudely talked to her family members, as a result their families advised that they separate. She therefore relocated to her grandmother's house at Teshie in February 2021 and parties have since then lived separately. Petitioner's evidence was not challenge under cross-examination. Respondent on the other hand contended that Petitioner has at all material times from courtship through marriage exhibited rudeness and domineering character towards him. He testified that he was forced to perform most of her duties as a wife including cooking, washing and cleaning. Respondent stated that Petitioner without provocation in order to prevent him from having any form of intimacy with her during the marriage often slept in the living room. he stated that he continued to love her and perform all his responsibilities all aimed at winning her love but Petitioner continuously refused to person her side of the chores that they chores leading to several quarrels between her, caretaker and other tenants of their rented apartment. According to Respondent to avoid the quarrels between Petitioner and other tenants, he took up the responsibility of doing the chores. He stated further that Respondent refused to cook and gets angry when he insist she should perform her duties as a wife and would stop talking with him for days until he abandons the issue and get the chores done personally. Respondent admitted that during courtship they shared their past experiences in the spirit of enhancing their relationship and he confided in her that he had had sex with some men in the past but regretted same and had stopped. He averred that just as promised, he had

stopped the said act and did not go back to same after the marriage. He admitted sharing his nude with a friend but contended it was on only one occasion and he had done so not on his own volition. According to him although he had apologized to Petitioner over same, her attitude towards him changed drastically and she moved out of the matrimonial bed and barely spoke with him after the incidence. Respondent testified that he had never been in a polyamorous relationship and has been faithful at all times to Petitioner but she was using his past life he had confided in her against him. What suffices as unreasonable behaviour has been discussed in the case of *Mensah v Mensah* [1972] 2 GLR 198. Hayfron-Benjamin held that “In determining whether a husband has behaved in such a way as to make it unreasonable to expect a wife to live with him, the court must consider all circumstances constituting such behavior including the history of the marriage. It is always a question of fact. The conduct complained of must be grave and weighty and mere trivialities will not suffice for Act 367 is not a Cassanova’s Charter. The test is objective.” Also, in the case of *Knudsen v Knudsen* [1976] 1GLR 204, Amissah JA stated that “the question therefore is whether the Petitioner established that the Respondent behaved in such a way that he could not reasonably be expected to live with her. Behaviour of a party, which would lead to this conclusion, would 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 of a series of acts of differing kinds none of which by itself may justify a conclusion that the person seeking the divorce cannot reasonably be expected to live with the spouse, but the cumulative effect of all taken together would do so.” The evidence of the parties in respect of their assertions of unreasonable behaviour remains their evidence on oath. Parties failed to cross-examine each others evidence on the conduct of the other as alleged to aid the court in determining which parties allegation on unreasonable behaviour is more probable than the other. With the issued of unreasonable behaviour of each party challenged by both parties, and parties failing to challenge their evidence on oath, the court unable to find unreasonable behaviour against either of the parties as claimed. In the case of *KOTEI V KOTEI* [1974] 2 GLR 172, Sarkodee J held, “the sole ground for granting a petition for divorce is that the marriage has broken down beyond reconciliation. But the petitioner is also obliged to comply with section 2 (1) of the Matrimonial Causes Act, 1971 (Act 367), which requires him to establish at least one of the grounds set out in that section... proving one of the provisions without more is proof of the breakdown of the marriage 7 beyond reconciliation...It is accepted that proof of one or more of the facts set out in section 2 (1) is essential and that proof of one of them shows the marriage has broken down beyond reconciliation. It is also conceded that notwithstanding proof the court can refuse to grant the decree of dissolution on the ground that the marriage has not broken down beyond reconciliation. It will be noted that the discretion given to the court is not a discretion to grant but to refuse a decree of dissolution. This means that once facts are proved bringing the case within any of the facts set out in section 2 (1) of Act 367 a decree of dissolution should be pronounced unless the court thinks otherwise. In other words, the burden is not on the petitioner to show that special grounds exist justifying the exercise of the Court’s power.” Therefore notwithstanding that parties failed to establish the alleged unreasonable behaviour of the other as proof of the marriage

they contend has broken down beyond reconciliation, the evidence on record reveals at that there are a lot of differences between them. All these evidence satisfy the court that parties after diligent efforts are unable to reconcile their differences. Under section 2 (1f) of Act 367, where the parties to the marriage have, after diligent effort, been unable to reconcile their differences, same is proof that the marriage has broken down beyond reconciliation. The court there finds per the evidence on record that the marriage celebrated between the parties herein has broken down due to parties failure to irreconcilable their difference after diligent effort. Accordingly the court decrees the said marriage celebrated between the parties herein at Martyrs of Uganda Catholic Church Accra on the 17/11/2018 be and same is dissolved today, 5th day of January, 2024. ANCILLARY RELIEFS 8 The parties executed terms of settlement on 14/4/2023 and filed same at the registry of the court on 19/4/2023. They prayed the court to adopt same as consent judgment in respect of the ancillary reliefs of the parties save the issue of maintenance of the issue, which remains outstanding for the court to determine. Parties per their terms of settlement agreed as follows;

- a) That the marriage celebrated between the parties be dissolved by this Honourable court.
- b) That the Petitioner be granted custody of the only child of the marriage and the Respondent be given reasonable access.
- c) An order directing the Respondent to pay the child's school fees and receipted cost of list of books and medical bills as and when they fall due.
- d) An order that the consent of the respondent should be sought in terms of the choice of school and other important decisions relating to the child. This court therefore adopts the above terms of agreement as consent judgment consequential to the dissolution of the marriage of the parties and orders as follows;
 - a) That custody of the only child of the marriage is granted to Petitioner with reasonable access to Respondent.
 - b) Respondent is ordered to pay the child's school fees and receipted cost of list of books and medical bills as and when they fall due.
 - c) That Petitioner shall seek the consent of the respondent in terms of the choice of school and other important decisions relating to the child. Parties as noted supra were unable to agree on the sum to be paid as monthly maintenance of the issue of the marriage. 9 Under section 6 of the Children's Act, 2008, Act 560, it is the responsibility of parents of a child whether married at the time of the birth of the child or separated to provide the basic necessities of life for a child including protecting the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression, provide good guidance, care, assistance and maintenance for the child and assurance of the child's survival and development. It is therefore the responsibility of both the mother and father of the child to ensure that a child is provided with all the necessities of life Both parties therefore have a responsibility to maintain the children and educate them. In making maintenance orders,

the court is obliged to consider the financial strength and obligations of the parties. Petitioner prays the court for GHC1,500 as monthly maintenance for the child of the marriage being the average amount she spends on the monthly on the child. From the record, Petitioner is a marketing officer of an insurance company with Prudential Life. She indicated that her lowest monthly commission she received in 2023 was Ghc2,200 with the highest being GHC3,600. According to Petitioner, the child of the marriage reacted to anything food, medicine or water with sulfur in it as well as beans due to her having the G6PD condition. She stated that she therefore gives the child only Awake mineral water, which does not contain sulfur. Respondent on the other hand works at the clearing unit of UMB. He stated that he earns GHC2,583 monthly from his banking job, GHC350 monthly for canteen allowance and GHC1000 annually as clothing allowance. Respondent per the record is also into catering services and periodically takes orders that fetches him income. Respondent claims to be the only sibling responsible for his parent and his nephew as only one out of his three siblings is working. As noted earlier, parenting is a shared responsibility and same cannot be 10 shirked by one party. The medical condition of the child, Kekeli demands careful if not particular care in respect of her diet and medication. Respondent being the father of the child cannot be financially responsible to his nephew at the expense of his own child. the current sum of GHc300 Respondent gives for the upkeep of the child is woefully in adequate for the monthly upkeep of a child in present day Ghana. From the executed terms of settlement, which have been adopted by the court as consent judgment, Respondent is saddled with the payment of educational and medical expenses. These expenses however are not the only expenses to be incurred in the maintenance of a child. The parent with custody of the child usually incurs feeding, clothing, play toys, recreational and other miscellaneous expenses. Petitioner being the parent with custody of the child automatically would bear these mentioned expenses of the child. With the current economic state of the country and for a child who requires special care in the diet and upkeep, the sum of GHc300.00 given by Respondent as monthly upkeep is woefully in adequate. The court accordingly orders respondent to pay as monthly maintenance for the child in issue the sum of GHc800 effective January 2024 to be paid by the last working day of every month. Further the said monthly allowance shall be reviewed upwards by the parties yearly at a rate agreeable to the parties. In the absence of an agreement, the monthly allowance shall be increased at a rate not less than 20% of the sum payable monthly previous year.

CONCLUSION

1. The court decrees the said marriage celebrated between the parties herein at Assemblies of God Church, Takoradi in the Western Region 11 on the 17th of November 2018 on the 17/11/2018 be and same is dissolved today, 5th day of January, 2024.
2. That custody of the only child of the marriage is granted to Petitioner with reasonable access to Respondent.

3. Respondent is ordered to pay the child's school fees and receipted cost of list of books and medical bills as and when they fall due.
4. That Petitioner shall seek the consent of the respondent in terms of the choice of school and other important decisions relating to the child.
5. That Respondent shall pay as monthly maintenance for the upkeep of the child, the sum of GHc800 effective January 2024.
6. That said monthly allowance shall be reviewed upwards by the parties yearly at a rate agreeable to the parties. In the absence of an agreement, the monthly allowance shall be increased at a rate not less than 20% of the sum payable monthly previous year. There shall be no order as to cost. PARTIES PRESENT ADWOA TWUMWAA OWUSU ANSAH HOLDING THE BRIEF OF OPOKU AMPONSAH FOR PETITIONER PRESENT ITA TETTEH FOR RESPONDENT PRESENT H/H AFIA OWUSUAA APPIAH (MRS) (CIRCUIT COURT JUDGE) 12 13

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Prepared on 29 October 2026 · Esheria