

GHANA / JUDGMENT

NUNOO VRS KUMESI (A4/ 121/ 2022) [2024] GHADC 171 (13 February 2024)

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IN THE DISTRICT MAGISTRATE COURT TAKORADI MARKET CIRCLE
HELD ON THE 13TH DAY OF FEBRUARY, 2024 BEFORE HER WORSHIP
CATHERINE OBIRI ADDO ESQ
SUIT NO.A4/ 121/ 2022
MERCY NUNOO PETITIONER
PT NO. 125 RACE COURSE
TAKORADI

VRS: JAMES KUMESI RESPONDENT
ALMOND WELL AVENUE AIRPORT
RIDGE- TAKORADI

JUDGMENT

The petitioner has filed for the dissolution of the marriage between herself and the respondent, which was contracted under the custom on the 28th day of February 2009 at Takoradi. After the marriage, the parties cohabited at Race course in Takoradi with three children of the marriage namely; Melisa Kumesi, Jamie Kumesi and Arielle Kumesi who are 14, 9 and 8 years respectively. According to the petitioner, the marriage between her and the respondent has broken down beyond reconciliation she added that the respondent has behaved in a way that she can't reasonably be expected to live with him. The petitioner avers, the respondent does not communicate with her on what he does with his life and travels sometimes without informing her when she confronted the respondent, he was not able to offer a better explanation to it. She added that the respondent at a time slapped her which made her have a hearing problem but when she asked the respondent to pay for the medical bills arising out of the slapping, he indicated that the petitioner did not provide receipt of same. As a result of the respondent 1 behavior, she asked the respondent for a separation however the respondent took it in a different way where he thought she was asking for a divorce as such the respondent endeavored to

perform the customary ritual to dissolve the marriage. She added that the respondent has taken the initiative to dissolve the customary marriage. She added that her family called for a reconciliation of the problems between them but the respondent was insistent on not marrying her. She indicated that, during the marriage they were able to acquire a two-bedroom flat at race course which was their matrimonial home, three VW Passat vehicles, three plots of land situated at Ayensudo in the central region of Ghana she avers that the parties has settled on the ancillary reliefs and prays the court for the dissolution of the customary marriage between the parties and prays for the following reliefs:

- a. An order of dissolution of the customary marriage celebrated in fact between the parties.
- b. An order of the court to settle the matrimonial house thus the two-bedroom flat at race course Takoradi and one vehicle in favour of the petitioner and the children.
- c. An order to settle the four plots of land situated at Ayensudo in the central region and two vehicles in favour of the respondent.
- d. An order for financial provision of ghc100.000.00.
- e. An order for custody of the children in favour of the petitioner with reasonable access to the respondent.
- f. That maintenance of ghc2,500.00 be ordered for the upkeep of the children.
- g. An order for payment of school and medical fees of the children.
- h. Any order the court deems fit to make. In response, the respondent, who spoke through an attorney Charles Ackon with the power of attorney in evidence as exhibit 1 avers, the parties married under the custom but they have now separated. He indicated, that there were misunderstandings between the petitioner and the respondent which they were unable to settle as such he prays for a decree of dissolution of their customary marriage 2 The primary issue to be determined in this case is whether the marriage between the parties has genuinely deteriorated beyond the possibility of reconciliation. It's essential to note that the burden of proof lies with the petitioner, who must demonstrate, based on the balance of probabilities, that the marriage has irreparably broken down. Legal principles dictate that the party making the allegations must provide convincing evidence to substantiate their claims. The court adheres to the principle that the party raising the issue in their pleadings bears the initial burden of proof, with the burden only shifting to the opposing party when some evidence is presented to support the claim. See the cases of ABABIO V AKWASI III (1994-1995) 2GBR, 774, and BISI V TABIRI (1987-1988) 1GLR 360n Although the petitioner sought ancillary reliefs, it's important to clarify that these ancillary reliefs are secondary to the primary relief for the dissolution of the marriage. The court will first address the issue of marriage dissolution before considering any ancillary matters. The key question at hand is whether the marriage between the parties has reached a state of irreparable breakdown. On the 2nd day of August 2022, the parties filed terms of settlement, in respect of the ancillary reliefs. The dissolution of marriage is one that cannot be settled as I am bound to take

evidence to satisfy myself that the marriage between the parties has broken down beyond reconciliation in accordance with sections 1 and 2 of the MCA. To buttress this point, in the case of AMEKO V AGBENU (2015) 91 GMJ. A circuit court Judge failed to take evidence before dissolving the party's marriage because he was 3 convinced by the pleading of the parties that the marriage had broken down beyond reconciliation on Appeal to the Court of Appeal it was held that: "The failure by the trial circuit court judge to take evidence in the matter before dissolving the marriage is contrary to sections 1 and 2 of the Matrimonial Causes Act and it is therefore a nullity. In such matters time does not run and could be attacked and set aside at any time as void. The order made by the circuit court on the 5 September, 2013 is hereby declared a nullity and same is hereby set aside." Again, in MARIAM PARTEY VS WILLIAM PARTEY (2014) 71 GMJ 98 CA @ 122 the court of appeal speaking through KUSI-APPIAH JA stated "It appears to us that from the tenor of sections 1 and 2 of Act 367, parties to divorce proceedings cannot file terms of settlement or consent judgment that the marriage has broken down beyond reconciliation. The only procedure prescribed by law for the dissolution of marriages by the court is provided by section 2(2) and (3) of Act 367, that the court must inquire into and satisfied on all the evidence led before it that indeed the marriage has broken down beyond reconciliation. The learned trial judge therefore committed a grave error when he breached the mandatory provisions of the Matrimonial Causes Act 1971 Act 367, that is section 2 which is substantive Act of parliament. We must hasten to add that this was a fundamental breach which goes to the root of the action and therefore rendered the whole proceedings null and void and of no legal effect whatsoever." Cognizance of the above position of the law, I did not accept the terms of settlement as consent judgment. I rather took evidence to determine only the issue of dissolution of marriage between the parties as raised supra. It is important to highlight that, though the parties' marriage was contracted under customary law, the provisions of the MCA is applicable to same because the 4 petitioner submitted their marriage to the provisions of the MCA when she filed this petition. This position is backed by section 41(2) of the MCA which reads: "(2) on application by a party to a monogamous marriage, the court shall apply the provisions of this Act to that, marriage and in so doing, subject to the requirements of justice, equity and good conscience, the court may

- (a) Consider the peculiar incidents of that marriage in determining appropriate relief, financial provision and child custody arrangements. (b). Grant any form of relief recognized by the personal law of the parties to the proceedings in addition to mor in substitution for the matrimonial reliefs afforded by this Act. From the above, this court therefore has jurisdiction to apply the provisions of the MCA to the customary marriage of the parties. Although petitioner did not seek leave of this court to apply the MCA to their customary marriage, the petition is competent in law in view of a recent decision of the High court. The aforementioned decision is in the unreported case of COMFORT HILOVER V SIMON HILOVER in suit NO. E6/28/20 delivered by Richard Adjei Frimpong J (as he then was), at Sekondi High Court, on the 15th day of July 2020 where the court held that filing of a divorce petition implies an application for leave to apply the provisions of the MCA to their

customary marriage. Although section 2 (1) (a) to (f) of the MCA must be proved by the petitioner before her claim for dissolution of their marriage, be granted, section 41(3) of the MCA, provides additional grounds of divorce for customary marriages like the current one between the parties. This means that petitioner has a wider spectrum of grounds for grounds of divorce to establish her claim for dissolution of their marriage. In a divorce proceeding, it's crucial for the court to thoroughly assess all the evidence presented, rather than simply accepting one party's claim of a broken marriage. The court's evaluation should determine if the evidence aligns with any of the grounds specified in section 2 of the Matrimonial Causes Act (MCA). 5 According to section 1(2) of the MCA, the sole basis for granting a divorce is the irreparable breakdown of the marriage. To establish this breakdown, the petitioner and/or the respondent must provide evidence supporting any of the factors outlined in section 2(1)(a) to (f) of the MCA. This principle was elucidated in the case of *MENSAH V MENSAH* 1972 2GLR 198-209 by HAYFRON BENJAMIN J (as he then was) on page 202. The judge emphasized that the court should only grant a divorce when there's clear evidence of an irreparable marriage breakdown. Even if the specified facts are proven to the court's satisfaction, it still has the discretion to deny the decree if it believes the marriage hasn't irretrievably broken down. The petitioner asserts that the respondent does not communicate with her on what he does with his life. He travels without informing her and when asked, he fails to give any explanation for same. At appoint the respondent slapped her resulting in an ear problem but he failed to pay for the medical bills when he was asked to insisting there are no receipts pertaining to same. She alleged base on this she suggested separation which the respondent took it in a different way. According to her, the customary marriage between the parties has been dissolved. She avers their marriage has broken down beyond reconciliation and she cannot reasonably be expected to live with the respondent. It's important to note that the respondent chose not to cross-examine the petitioner regarding these claims. In line with the legal precedent set in *FORI V AYIREBI* 1966 GLR 627 SC, it is established that when a party makes an unchallenged averment, no further evidence or issues need to be addressed on that particular matter. Additionally, when a party presents material evidence that remains unchallenged during cross-examination, there is no requirement to provide additional evidence to support that fact. This principle is further supported by the case of *TAKORADI FLOUR MILLS V SAMIR FARIS* (2005-2006) SCGLR 882. Therefore, the court accepts as factual that the respondent did slapped the petitioner leaving her with an ear problem. The court accept as a fact that the respondent fails 6 to discuss issues with the petitioner and even travels without the knowledge of the petitioner his wife. The court finds this behavior of the respondent as unreasonable on his part. The court also accept as a fact that families has tried to settle their differences but all proved futile as such the court finds in terms of sections 2(1) (f) of the MCA. In light of these circumstances, the court finds the parties failed to resolve their differences thereby causing a wear and tear of their married life. After a thorough analysis of the evidence presented by the petitioner, and considering the fact that it remains undisputed by the respondent, the Court hereby determined that the marriage between the parties has indeed broken down beyond reconciliation. Importantly, the respondent

consents to the grant of the decree of dissolution of their customary marriage. In line with the precedent set in the case of KOTEI V KOTEI (1972) 2GLR 172, the court pronounces a decree of dissolution of the marriage between the parties. This marriage, originally contracted under custom is hereby dissolved. In respect of the ancillary reliefs, the parties filed terms of settlement on the 2nd day of August 2022. I adopt the terms of settlement as consent judgment of the parties in respect of the ancillary reliefs to the effect that,

1. The matrimonial home, two-bedroom flats at race course, Takoradi be valued by a qualified valuer and the petitioner paid 20% of the value and the respondent retained the building.
2. That the matrimonial home has subsequently been valued and the parties have adopted the value to be GHC 160,000.00.
3. That the parties have agreed that the respondent shall pay the petitioners share of the matrimonial building amounting to GHC 32,000.00 within six months 7 commencing from the 2nd of July 2022 to 1st of January 2023 in six equal installments.
4. The respondent shall pay financial provision of GHC 25,000.00 to the petitioner by installments as follows:
 - a. Payment of GHC 5000.00 on or before 15th March, 2022.
 - b. Payment of second instalment of GHC 4,000.00 on or before 15th April, 2022.
 - c. Payment of third installment of GHC 4,000.00 on or before 15th May 2022.
 - d. Payment of fourth installment of GHC 4,000.00 on or before July, 2022.
 - e. Payment of final installment of GHC 4,000.00 on or before July 2022.
5. That the transportation fare for the children's school shall be borne by the parties equally (50%).
6. The respondent shall give one of his cars namely VW Passat with registration No. GR9781-13 in good working condition to the petitioner.
7. The petitioner shall be entrusted with custody of the children with reasonable access to the respondent.
8. The respondent shall give the petitioner sum of GHC 1,200 as monthly maintenance money for the upkeep of the children subject to review.
9. The respondent shall be responsible for the payment of school fees and medical expenses of the children.
10. That the terms of settlement shall be as full and final settlement between the parties in respect of this suit and the parties in respect of this suit and the parties pray the court to adopt the terms of settlement as consent judgment.

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11. There shall be no order as to cost. The court hereby adopt the above listed terms as the consent judgement of the parties in respect of the ancillary reliefs. 8 (SGD) H/W CATHERINE OBIRI ADDO ESQ: (MAGISTRATE) 13/2/2024 REPRESENTATION PETITIONER- EMMANUEL BECKLEY ESQ: RESPONDENT – PHILIP FIIFI BUCKMAN ESQ: Ladd*. 9
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