

GHANA / JUDGMENT

BOATENG VRS ASAMOAH (C4/01/24) [2024] GHACC 233 (11 July 2024)

COURT
ghaccDECIDED
11 July 2024

Source: ghalii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE CIRCUIT COURT HELD AT DUAYAW NKWANTA ON THURSDAY 11TH OF JULY, 2024 BEFORE H/H AKOSUA ASANTEWAA SAPORNG ESQ C/C JUDGE SUIT NO. C4/01/24 ERNEST KUSI BOATENG SUING PER HIS LAWFUL ATTORNEY PETITIONER SAMUEL ASANTE VRS LYDIA ASAMOAH RESPONDENT

JUDGMENT

The petitioner is a teacher by profession and a citizen of Ghana, currently resident outside Ghana. The petitioner got married to the Respondent customarily in 2010 under Asante custom in Yamfo and later celebrated the said marriage under the Ordinance. The Respondent is a nurse by profession and after the said marriage the parties cohabited at Duayaw Nkwanta until the Respondent recently relocated to Sunyani. There are two issues in the marriage namely Nana Baffour Gyau Akoto Boateng who was fourteen (14) years old at the time the petition was filed on 27/01/2023 and Maame Afia Tiwaa Boateng who was also ten (10) years at the time the Petition was filed. The contention of the Petitioner is that the marriage between the Parties has broken down beyond reconciliation on account of adultery and unreasonable behavior of the Respondent. The Petitioner therefore commenced the instant action by filing a petition praying the honorable court for the relief:

- (a) Formal dissolution of Petitioner's marriage with the Respondent which has already been dissolved with the consent of the parties and by performance of the necessary customary rites since 2017. 1 | P a g e The respondent entered appearance and filed her answer to the Petition and cross petitioned as follows:
 - (a) The respondent agrees the marriage between the parties be dissolved.
 - (b) An order of the Honorable Court to compel the Petitioner to provide adequate maintenance money to provide respondent's two (2) children with the Petitioner including the full payment of their school fees. The Petition was set down for trial and the Parties were ordered to file their respective witness statements. The Petitioner filed his respective witness statement through his lawful Attorney Samuel Asante and the respondent also filed her witness statement. Case management conference was duly conducted and the case was scheduled to be heard. At the case management conference the witness statement of the

witness of the petitioner was expunged from the record since counsel for Petitioner indicated to the court that he wished to abandon same. On the day that the case was scheduled to be heard the Petitioner's Attorney and counsel for Petitioner were in court but the Respondent who was not represented by counsel failed to attend court. The Attorney of the Petitioner tendered his power of attorney given to him by the Petitioner and his witness statement. Since the Respondent was not in court to cross-examine the Attorney on same, the case was adjourned for the respondent to be present the next adjourned date to cross-examine the Petitioner's Attorney. The court adjourned the case and ordered for hearing notice to be served on the Respondent. On the next adjourned date that the Respondent was to show up to cross-examine the Attorney of the Petitioner she did not show up even though there was proof of service on the court's docket that she had been served with the hearing notice. The 2 | Page Petitioner closed his case since the respondent was not available to cross-examine his Attorney and also since the Petitioner was not calling any other witness to testify on his behalf. The court made another order for the Respondent to be served with a hearing notice to come to court to put her case across yet the respondent failed to show up in court. The Respondent had continuously been absent from court from the 27/03/2024, 16/04/2024, 3/05/2024, and 20/05/2024 and in all she was served with hearing notices. It is trite that the rules of natural justice can be waived in such circumstances for the petitioner to be heard. Order 36(1) of the High Court (Civil Procedure) Rules, 2004 gives sanctions for failure to attend trial. Order 36 (2) states "Where an action is called for trial and a party fails to attend, the trial Judge may

- (a) Where the plaintiff attends and a defendant fails to attend, dismiss the counterclaim, if any, and allow the plaintiff to prove the claim; In the case of *ALEX QUARTEY VS KOANS BUILDING* 16/03/2018 HC; It was held that a Party who fails to attend court after due service is taken to have deliberately failed to take advantage of the opportunity to be heard, and the *Audi alteram partem* rule cannot be said to have been breached. In the case of *THE REPUBLIC VS THE COURT OF APPEAL EXPARTE; EASTERN ALLOY COMPANY LTD* (04/06/2007) CIVIL MOTION NO. J5/9/2007 where it was held that "It is difficult to understand the Applicant's plaint that it was denied a hearing in breach of the rules of natural justice. It is trite law that the rules of natural justice can be waived, see *BILSON VS APALOO* [1981] GLR 24 SC. There is no suggestion that the Applicant was unaware of the hearing date of the motion, yet it absented itself without 3 | Page even representation by counsel. A clearer case of waiver of the right to a hearing could not be imagined. In another case of *IN RE KUMI* (deceased) *Kumi v Nartey* (2007 – 2008) 1 SCGLR 623 @ 628, it was held by the Supreme Court as follows; "As we see it, the main point raised in this appeal by the appellant is that he was not given a hearing and this was in breach of the maxim *Audi alteram partem* rule. However, this maxim cannot avail a Party who has notice of a trial but fails or refuse to appear. In this present case the respondent was served with hearing notices severally by the Petitioner but she failed to appear in court since she was not represented by counsel to prosecute her case. She waived her right to be heard and as per the effect of provision of the laws stated above her cross-petition is dismissed and the Petitioner allowed to prove his

petition. In this circumstance the court has allowed the petitioner to prove his case and the court will solely rely on the petitioner's evidence-in-chief or witness statement to prove his case before the court. Since the case is a matrimonial one and no issues were set down formally, however from the pleadings and evidence before the court the following issues have been identified by the court for determination. The issue to be determined before the court is:

1. Whether or not the ordinance marriage between the parties had broken beyond reconciliation. Facts of the case of the Petitioner. 4 | P a g e The Petitioner contents that during the pendency of the marriage between the parties the Petitioner sponsored the midwifery nursing course of the Respondent at Dormaa Ahenkro. The Petitioner became suspicious of the behaviour of the Respondent which was that the Respondent was having extra-marital affairs. The Petitioner indicates that he questioned the Respondent about the issue of her infidelity and respondent confessed that , whilst schooling at Dormaa Ahenkro she had sexual intercourse with a certain Medical Doctor at the Dormaa Ahenkro Hospital on two occasions. When Petitioner asked the Respondent why she did that she explained that she did so to earn money to supplement her income. Again the Petitioner suspected the Respondent again of infidelity and Respondent confessed that she was having an affair with a certain man at Duayaw Nkwanta. The Petitioner states that he convinced the parents of the Respondent to accompany him to question the said man, upon meeting the man, he admitted having had sex with the Respondent several times because Respondent did not let him know that she was married. Petitioner stated that he captured all confessions on tape. The Petitioner stated that he summoned the Respondent and her family for the customary dissolution of the marriage which has been done at Yamfo where the respondent's father admitted the confession of the man at Duayaw Nkwanta who claimed to have had several sexual intercourse with the Respondent. It is the case of Petitioner that Respondent subjected him to verbal abuse by saying that the Respondent said she was in love with another person and she regretted marrying the petitioner. All attempts to resolve their marital problems through family members and respectable members of the society have proved futile. The parties have ceased to live together as husband and wife since 2017. The Petitioner avers that the marriage has broken down beyond reconciliation and prays the court to dissolve same. STANDARD OF PROOF 5 | P a g e The standard of proof in civil cases has been set out in NRCD 323 Section 10 as follows; "10(1) For the purpose of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court
- (2) The burden of persuasion may require a party to raise reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond reasonable doubt" The standard of proof in civil cases has been emphasized in Section 12 of NRCD 323 provides that: 12(1) except as otherwise provided by law, the burden of persuasion requires proof by preponderance of probabilities. In the case of MAJOLAGBE V. LARBI AND ORS [1952] GLR 190-195: Holding 4 states "that where corroborative evidence must exist, the court expects a

party who makes an averment (which the other side denies) to call such corroborative evidence in support of his own” In the case of *KHOURY AND ANOR V. RICHTER* on the question of proof. The judgment was delivered on 8th December 1958 and her passage of question is as follows: “Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in same positive way, eg. by producing documents, descriptions of things, references to other facts, instances , or circumstances and his averment is denied, he does not prove it by merely going into the witness-box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances from which the court can be satisfied that what she avers is true” In the case of *TAKORADI FLOUR MILLS VRS SAMIR FARIS* [2005-2006] SC GLR 882 at holding 5, the Supreme Court held that, “ It is sufficient to say that being a civil suit, 6 | P a g e the rules of evidence require that the plaintiff produces sufficient evidence to make out a claim on the preponderance of probabilities as defined in Section 12(2) of the Evidence Act 1975 NRCD 323. In assessing the balance of probabilities , all the Evidence be it that of Plaintiff or the defendant must be considered and the party in whose case is more probable of the rival versions and deserving of a favourable verdict” See also the cases of

1. *ZABRAMA V SEGBEDZI* [1991] 1 GLR 221
2. *EFFISAH V ANSAH* [2005-2006] SC GLR 943
3. *ACKAH V PERGAH TRANSPORT LTD & OTHERS* [2010] SCGLR 728 THE LAWS ON DISSOLUTION OF MARRIAGE SECTION 1(1) OF THE MATRIMONIAL CAUSES ACT, 1971 (ACT 367) STATES “A petition for divorce may be presented to the court by either party to a marriage” Section 1(2) states “The sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation” The Petitioner seeking to dissolve the marriage on the sole ground that the marriage has broken down beyond reconciliation shall establish any one or more of the six facts or marital offences under Section 2(1) of Act 367 in order to succeed. Section 2(1) provides “For the purpose of showing that the marriage has broken down beyond reconciliation the Petitioner shall satisfy the court of one or more of the following facts:
 - a. that the Respondent has committed adultery and that by reason of the adultery the Petitioner finds it intolerable to live with the Respondent;
 - b. that the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with the Respondent; 7 | P a g e
 - c. that the Respondent has deserted the Petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

- d. that the parties to the marriage have not lived as husband and wife for a continuous period of at least two years immediately preceding the presentation of the petition and the Respondent consent shall not be unreasonably withheld, and where Court is satisfied that it has been withheld, the Court may grant a petition for divorce under this paragraph despite the refusal;
 - e. that the parties to the marriage have not lived as husband and wife for continuous period of at least five years immediately preceding the presentation of the petition; or
 - f. that the parties to the marriage have , after diligent effort, been unable to reconcile their differences. Section 2(2) of Act 367 states: On a petition for divorce the court shall inquire, so far as it's reasonable, into the facts alleged by the Petitioner and the Respondent. Section 2(3) states: "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 beyond reconciliation". It is the obligation of the court to find from the evidence before it whether or not the marriage between the Parties has broken down beyond reconciliation. On the issue of dissolution the Petitioner contends that the Respondent has committed adultery and that he finds it intolerable to live with her. In petitions for divorce based on adultery, the petitioner must satisfy the court that, apart from the adultery that was actually committed, he finds it intolerable to live with the respondent. Adultery is defined as the voluntary sexual intercourse with a person of the opposite sex other than your spouse. 8 | P a g e The elements of adultery are (a) Proof of sexual intercourse and (b) Proof of Voluntariness Adultery can be proof through the following (1) Confession, which must be voluntarily made. In the case of QUARTEY V. QUARTEY & ANOR [1972] 1 GLR 6. It was held by Kingsley-Nyinah J that "The burden of proving adultery lies on the person who alleges it, and it cannot be shrugged off by evidence that is tainted, indifferent, suspicious or uncertain. The standard of proof required is proof beyond reasonable doubt, that is, it must be proved with the same degree of strictness as is required for the proof of a criminal offence". The court refused to declare that adultery had been established because confession was involuntary.
2. Circumstantial evidence : In the case of ADJETEY AND ANOTHER V. ADJETEY [1973] 1 GLR 216-221: Where it was held that " Adultery must be proved to the satisfaction of the court and even through the evidence need not reach certainty as required in criminal proceedings it must carry a high degree of probability
 3. D NA
 4. Caught in the Act
 5. Having a child with someone other than your spouse. If parties fail to live as man and wife for 2 years it is a good ground to grant a dissolution of the marriage. In the case of ADDO VRS ADDO [1973] 2 GLR 103 where the husband Petitioner and the Respondent were married in 1958 but ceased to 9 | P a g e live together as man and wife in 1969. Even though before 1969 they had lived under one roof , there was in effects two households. The Petitioner

charged that the Respondent had an ungovernable temper and was persistently nagging him, and that the last time he had sexual intercourse with her was in May 1967. Even though the Respondent admitted that lack of sexual intercourse with the Petitioner had affected her health, she still refused the Petitioner's request for her consent to a grant of decree of divorce as required by 5.2 (1) of Act 367. The Petitioner therefore Petitioned for divorce on the grounds that his marriage with Respondent had broken down beyond reconciliation that they had not lived together as man and wife for a continuous period of over two years and that the Respondent had unreasonably withheld her consent to the grounds of a decree in his favour. It was held that the Petitioner was entitled to a grant of decree of dissolution. In this particular case the Petitioner stated that he had not lived together with the Respondent since 2017. The Respondent also stated that they had not had sexual intercourse from 2010. Not having lived as man and wife for 5 years Section 2(1)(e) of Act 367 is also a good ground for the dissolution of the marriage. From 2017-2023 is more than 5 years preceding the time the Petition was filed. All these incidents clearly shows that the marriage has broken down beyond reconciliation. From the evidence adduces so far the Petitioner could not proof that the Respondent had committed adultery. In the pleadings of the Petitioner he stated that he had a tape 10 | P a g e recording of the confession of the respondent but during trial failed to provide same to the court. The Petitioner in his pleadings stated that the parties had not lived together as husband and wife from 2017 to date. The Respondent in her answer also stated that the Parties have not had sex from 2010. The Parties failing to live together for 2 years preceding the time that the petition is filed a ground to dissolve the marriage. The Petitioner again in his pleadings stated that the marriage has been dissolved customarily by the families. With all these incidents it is clear that the marriage has broken down beyond reconciliation. Article 11 (2) of our Constitution states "The common law of Ghana shall compromise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the superior court of Judicature"

- (2) "For the purpose of this article, "customary law" means the rules of law, which by custom are applicable to particular communities in Ghana". Even though customarily the marriage has been dissolved by customary law which is part of the laws of Ghana, since the marriage is an ordinance marriage the court has to be the last forum for the parties to finally dissolve the marriage. Considering all these circumstances and the fact that the Respondent failed to attend court to prove her case shows that, she does not want the marriage anymore and does not care what happens to the marriage. I conclude by stating that the marriage between the Petitioner and Respondent has broken down beyond reconciliation and it is herein dissolved. Cross petition dismissed. 11 | P a g e No order as to cost. SGD. H/H AKOSUA ASANTEWAA SARPONG ESQ (CIRCUIT COURT JUDGE) 12 | P a g e

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ghalii.org/akn/gh/judgment/ghacc/2024/233/eng@2024-07-11/source.pdf>

CASE PAGE <https://chat.esheria.ai/case-law/ghana/lydia-asamoah-divorce-ghacc-2024>

Prepared on 27 October 2026 · Esheria