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WRITE-UP

# CAN CONCUBINAGE RELATIONSHIP BE EQUATED TO A VALID CUSTOTMARY MARRIAGE; THE DECISION IN MINTAH V AMPEYIN IN RETROSPECT.

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# CAN CONCUBINAGE RELATIONSHIP BE EQUATED TO A VALID CUSTOMARY MARRIAGE; THE DECISION IN MINTAH V AMPEYIN IN RETROSPECT.

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## INTRODUCTION

Customary law has been defined under Article 11(3) of the Constitution 1992 as:

"Rules of law which by custom are applicable to particular communities in Ghana."

These include the rules of customary law that have been determined by the Superior Courts of Judicature. Customary law therefore, is now part of the common law of Ghana, the establishment of which is no more a question of fact but a question of law.

Article 11(2) of the Constitution 1992 provides: "The common law of Ghana shall comprise 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."

This means that customary marriage is highly recognized under our laws so it cannot be thrown into the abyss.
*Black's Law Dictionary*[1] defines concubinage relationship as:

"A relationship of a man and women who cohabit without the benefit of marriage. The woman in the relationship, the concubine, cohabits as a wife without title. Although a concubine was expected to serve all the functions of a legitimate wife, she has no authority in the family or household, and was denied certain legal protection."

*Sarbah's Fanti Customary Laws*[2] define a valid customary marriage as:

"When there has been a marriage in fact, the validity thereof presumed, and where caprice, avarice, or ambition of a parent has not been excited to force on a marriage, it will be found by careful study of the people and examination of the local marriage institution, that marriage entirely rests on the voluntary consent of and a woman to live together as man and wife; which intention, desire, consent, or agreement, is further evidenced by their living together as husband and wife."

Also in *Yaotey v Quaye*[3] it was held that the essentials of valid customary are:

a. Agreement by the parties to live together as husband and wife;

b. Consent of the families of the man and the woman to the marriage. Such consent may be implied from conduct, e.g acknowledging the parties as man and wife, or

1 9th ed at page 330
2 3rd ed, page 49
3 [1961] 2 GLR 573

accepting drink from the man or his family;

c. Consummation of the marriage, i.e the parties living together openly as man and wife.

The definitions of a valid customary marriage can be distinguished from the definition of concubinage relationship stated supra. That is there is no presentation of drinks from the man to the woman's family, but under certain circumstance there is an implied consent from the family. [4] However there are situations where concubinage relationships have received family consent and thereby ending up in a valid customary marriage. The question is how long should concubine exist between a man and a woman for it to be equated to a valid customary marriage. Some schools of thought are of the view that no matter how long parties cohabit it cannot be equated to a valid customary marriage. Some thought leaders in the field of family are of the view that before concubinage can be equated to a valid customary marriage it should impliedly have all the features of valid customary marriage as stated in the *Yaotey* case supra.

This paper seeks to analyse some cases where concubinage has been equated to a valid customary marriage and those that never qualified to be a valid customary marriage. In my estimation, concubinage should lead to a valid customary marriage if the parties agree to live together as husband and wife. In the event of divorce, the principle of 'equality is equity' should be applied in the distribution of properties. On the other hand, in the case of death, the surviving concubine should be clothe with the requisite capacity to apply for letters of administration (situation where the deceased did not make any will) or probate in the (situation where the deceased made a will).

***Some cases where concubinage relationship has been equated to a valid customary marriage.***

In the case *Esssilfie v Quarcoo*[5] , the facts were that, following the death of one T, her mother in her capacity as the head of the immediate family and her sister as her customary successor jointly applied for letters of administration to administer the estate. The estate comprised of an uncompleted house, personal effects, savings, and buildings. The defendant, claiming to be the husband of the deceased and the father of her two infant children, caveated. When the parties failed to agree on the one to whom the grant should be made, the plaintiffs were ordered to issue a writ for the determination of that issue. The plaintiffs claimed that as the head of the family and the customary successor respectively of the deceased, her whole estate devolved on them and that the defendant was only the deceased concubine and he therefore had no interest in her estate. The defendant on the

4 Essilfie v Quarcoo [1992] 2 GLR 180

5 supra

other hand claimed that he was the husband of the deceased because he had married her under Fanti customary law and since he had two children with her even if he was held not to have any personal interest in the estate, as the father of the children he was entitled to the grant. Evidence led by the parties established that after the defendant had impregnated the deceased, his family sent drinks to the family of the deceased to acknowledge his responsibility for the pregnancy and thereafter the deceased and the defendant lived in the defendant's house for seven years until she died at child birth, survived by the two minor children she had had with the defendant. The court further found on the evidence that (a) the first plaintiff had been visiting the couple in their house, (b) on the death of the deceased's father, the defendant at the request of the plaintiff's family performed the custom required of a son-in-law; (c) the deceased in beneficiary nomination forms she had filed with her employees indicated that she was married; and (d) the defendant at the request of the plaintiffs' family, provided the shroud and the grave used in burying the deceased.
The court held thus:
"there were two forms of valid marriages known to our customary law; first, the ordinary case where a man sought the hand of the woman from her family and with their consent performed the necessary ceremonies of payment of drinks, customary fees and dowry; and secondly, where although the customary marital rites had not been performed, the parties had consented to live in the eyes of the world as man and wife and their families had consented that they should do so, and the parties actually lived as man and wife in the eyes of the whole world until she died; the plaintiffs' family obliged the defendant to perform the necessary customary rites of a son-in-law on the death of the deceased's father and furthermore, the defendant provided the shroud and the grave for the burial of the deceased in the capacity of a husband, the plaintiffs' family knew and accepted the defendant as the husband of the deceased. Accordingly, all the ingredients essential to a customary law marriage between the deceased had been proved.[6]

In another case of *Irene Gorleku v Justice Pobee & Anor*[7] the respondent cohabited with the deceased for 19 years as husband and wife. The respondent, claimed to be the lawfully wedded wife of one Eliezer Dugba Pobee (deceased) for fraudulently applying for, and obtaining letters of administration to administer the estate of the deceased without her notice and consent as the surviving widow. She alleged that the letter of administration was fraudulently obtained and she produced particulars of the fraud. Appellants contended that the respondent only cohabited with their late father in the same, and in the eyes of the public as husband and wife, but no customary right was performed to formalize the relationship between their late father and the respondent to qualify them to be husband

6 Sackitey v Caveat, Re [1962] 1 GLR 180
7 [2012] 42 GMJ 53 CA

wife. They contended further that their father during his lifetime made known his intention not to marry the respondent and since the relationship of the respondent with their father is nothing but mere consensual uncommitted cohabitation, no fraud whatsoever has been committed by their application for the letter of administration.

The court per Appau JA (as he then was) dismissed the appellant's claim and held thus:

"This court agrees with the brilliant reasoning of Lutterodt, J (as she then was) in the decided case of *Essilfie v Quarcoo* supra where the essentials of a valid customary marriage as applied by legal authorities following the decision in *Yaotey v Quaye* supra were critically and analytically examined to the intent that:

"first, the ordinary case where a man sought the hand of the woman from her family and the consent performed the necessary ceremonies of payment of drinks, customary fees and dowry; and secondly, where although the customary marital rites had not been performed, the parties had consented to live in the eyes of the world as man and wife and their families had consented that they should do so, and the parties actually lived as man and wife in the eyes of the whole world." The court further held that, from the above decision there are two major forms of customary marriages: one involves the presentation of drinks and the other is devoid of formalities like the presentation of drinks and other items by the man's family to the woman's family (both paternal and maternal) and their acceptance by the woman's family, constitute express consent of both families to the marriage that their family members had agreed to indulge in such organized ceremonies normally involve young persons who are getting married for the first time though adults who are indulging in second or third marriages could decide to go formal as well. The second case involves the existence of a valid customary marriage between a man and a woman without the express consent of the families manifested by the presentation and acceptance of drinks and other presents. In the second case, the consent of the families is implied by their conduct. Such conduct includes but not limited to attending funerals involving families of either party together and making donations in the eye of the public as man and wife without any hindrance, paying visits to relatives on both sides during occasions and other festivities, acquiring properties in joint names as man and wife, attending public functions together in the eye of the world as man and wife, long co-habitation with or without children in the eye of the public as man and wife without any interference from any quarters (including both families) and express written statements acknowledged by both parties to that effect….

In *Quaye v Kuevi*[8] , Deane C.J also said:

"the inability to show that the ceremony of the

8 [1934] D. Ct. 1931 at p. 74

presentation and acceptance of drinks took place to signify family consent to an alleged marriage was not sufficient to invalidate a marriage if the consent of the parties to the marriage could be proved by other means and if it were also proved that the parties had lived together in the sight of the world as man and wife. In the words of the learned Justice:

"…although it is highly desirable that a party seeking to establish a marriage should be able to point to the giving of the girl's parents and acceptance by them of a rum as evidence of their consent to the marriage, yet the inability to show that such a ceremony has taken place would not in my view of itself be sufficient to invalidate a marriage if the consent of the parties to the marriage were proved by other means and if it were also proved that the parties had lived together in the sight of the world as man and wife."

This implies that if in the past, formality was the norm; it is an exception today as family consent is no longer an essential requirement of a valid customary marriage, and modern courts must accept this as a fact. As was rightly stated by Sarbah and quoted supra; marriage entirely rests on the voluntary consent of a man and woman to live together as man and wife; which intention, desire, consent or agreement is further evidenced by their living together as husband and wife.

The above cases are to the effect that if parties agree to live together as husband and wife, a valid customary marriage can be inferred from their conduct.

***Cases where concubinage relationship never equated as valid customary marriage.***

Concubinage relationship cannot be equated to a valid customary marriage was said by Osei-Hwere J (as he then was) in *Badu v Boakye*[9] thus:

"…where a man lives with a woman not as a real wife but only as a concubine with the consent of the woman's parents, that association cannot be translated into a valid customary marriage because the man and the woman are reputed to live as a man and wife. Even though the defendant freely described the plaintiff as his wife and also described their association as 'marriage' this was no more than another euphemism for 'concubine' and 'concubinage' respectively."

***Facts in the Badu case supra.***

The plaintiff sued the defendant for damages for an alleged breach of promise to marry at customary law, damages for assault and battery and an order directing the defendant to pay 100.00cedis as medical expenses. They lived together thereafter as man wife until 1970 when she was asked to leave the matrimonial home by the defendant because he no longer wanted to continue the marriage. The defendant subsequently threw out her belongings and when she tried to put them back, she was seriously assaulted by the defendant as a result of which she

9 [1975] 1 GLR 283

was admitted to the Berekum hospital and operated upon. The defendant was however not prosecuted for the assault committed on the plaintiff. The defendant in his evidence admitted that he had been living with the plaintiff, but however denied that it was husband and wife relationship. He alleged that two months after meeting the plaintiff, he presented some drinks and money to the plaintiff's parents and family as 'akotogyan' to enable him to consort freely with the plaintiff, with the hope that if he found the conduct of the plaintiff suitable he would marry her. On realizing that the plaintiff would not be a suitable wife, he again presented drinks to the family of the plaintiff to terminate the 'akotogyan' relationship. The main issues for the determination by the court were: (a) whether the payment of 'akotogyan' constituted a valid marriage or an unconditional promise to marry at customary law, (b) whether a woman staying with a man under the akotogyan custom was entitled to sue for maintenance or a breach of promise to marry…..

The Court per Osei-Hwere, J. (as he then was) held;

"'akotogyan' was the drink provided by a man to inform the parents of a woman with whom he was cohabiting about the fact of their concubinage. The drink provided might be either one half bottle or a full size bottle of Schnapps and, as the name implied, it means "bottle (taken) for nothing" or "drink (taken) for nothing". The providing of 'akotogyan' created no legal relationship between the man and the woman as the drink was not refundable if the woman decided to bring to an end to their concubinage, and the woman could not claim any damages for breach of promise if the man decided to break their relationship as it did not serve as a token of a promise to marry. Neither could a woman living in concubinage sue the man with whom she was so living for any maintenance."

In a recent Supreme Court case of *Mintah v Ampenyin*[10] the Court per Akamba JSC held in holding 3 as follows:

"the appellant and the respondent lived in concubinage throughout the period in issue because the promised marriage, as found by the Court of Appeal, did not materialize. A concubinage relationship did not constitute or equate a valid customary marriage. Therefore, the invitation by counsel for the appellant to bring the instant appeal under the spectrum of the principle of "equality is equity" was most ambitious. The principle of "equality is equity" applied in an environment of spousal relationship which created a status that went with certain right and duties which were fixed by law and custom, but same could not be said of concubinage relationship.[11]

Facts in the Mintah case supra

Barely two years in the relationship, it hit the rocks and the appellant sued the respondent in the High Court seeking, inter alia, damages

10 [2015-2016] 2 SCGLR 1277

11 Badu v Boakye supra; Mensah v Mensah [1998-99] SCGLR 350; Boafo v Boafo [2005-2006] SCGLR 705; Mensah v Mensah [2012] 1 SCGLR 391.

for breach of promise to marry; damages for inconvenience; and loss of time wasted on the respondent; and payment of various sums specified in her statement of claim. At the trial, the appellant among other things contended that they run a joint business and did improvements to the house out of the proceeds from the business. The trial High Court dismissed all of the appellant's claims and granted the respondent's counterclaim. Dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal. The Court of Appeal found for the appellant that, the respondent had a made promise to marry her but later reneged on it. Consequently, the Court of Appeal granted the appellant the sum of six thousand Ghana cedis as general damages to ameliorate her injured feelings… The appellant being dissatisfied with the decision of the Court of Appeal, filed the instant appeal before the Supreme Court on two main grounds. (ii) the decision that the plaintiff-appellant was in the property as a licensee was wrong in law and not supported by the evidence on record particularly when it was a fact of that the parties were in concubinage relationship upon which the appellant joined the respondent in the house and did business together for the improvement of the house besides the appellant's personal contribution.

***Analysis***

Case like *Essilfie v Quarcoo* supra, *Irene Gorleku* supra have recognized that concubinage can lead to a valid customary marriage with implied conduct from the parties. It is trite learning that every marriage contract begins with the exchange of promises between a man and a woman. The contract may be express or implied. It is implied where the agreement to marry can be inferred from the behaviour of the parties towards each other. It may also be inferred from the actions such as the giving and acceptance of an agreement. This fulfills the implied consent as stated in the *Essilfie* case as applied in the Irene *Gorleku* case supra.

In my view the decision in badu case supra was given per incuriam because the parties agreed to live together as man and wife. According to the court even where there is family consent, because the relationship is one of concubinage it cannot be equated to a valid customary marriage. This in my view very pedestrian and against good conscience and equity.

The defendant in *badu* case presented some drinks and money to the plaintiff's parents and family as 'akotogyan'. The act of the defendant portrayed to the whole world that they are going to live together as husband wife. I am strongly of the view that the plaintiff was entitled to damages because the act of the defendant satisfied the second hurdle of a valid customary marriage.

Customary law marriage is a valid marriage recognized under the laws of Ghana. It is not subservient to an ordinance marriage. In the case of *Amoah v Boakye*[12] , the court held:

"We do not think it conscionable to hold that a breach of promise to marry exists in ordinance

12 Civil Appeal No. H1/42/2012, dated 9 th April, 2014.

marriage but does not exist in customary marriage. We do not think marriage under ordinance is superior to customary marriage as both of them are recognizable by law…"
The court stated further that:

"It would offend article 17 of the Constitution 1992 to discriminate against a person on grounds of ethnic origin and culture. To say that a promise to marry a person under ordinance is well founded but cannot be found in customary marriage is discriminatory, unconscionable and contrary to justice and equity."

In the *Mintah* case supra, I respectfully submit that the decision of the Supreme Court was given per *incuriam* because there was a breach of promise to marry. The parties lived as husband and wife for two years. Had joint businesses together. This in my estimation satisfies the implied condition stated in *Yaotey* case and applied in *Essilfie v Quarcoo* case supra. The Court of appeal was right in awarding damages for the appellant because according the Court, the respondent had made a promise to marry the appellant but he later reneged on it.

However, specific performance cannot be ordered when there is a breach of promise to marry because it will sin against section 109 of the criminal offence Act[13]. That will amount to compulsion of marriage.

***Conclusion***

Where parties agree to indulge in a concubinage relationship then there is an implied assertion that a man has promised to marry the woman at a later date. In this case when there is evidence that the parties have lived together as husband and wife for the whole world to see, have joint business(es) together, evidence of consummation etc, I submit that the decision in the ***Yaotey*** case as applied in the *Essilfie* case should apply. In the event where the relationship hit the rocks, the party in breach should be awarded damages.

Also the ratio in the *Irene Gorleku* case should apply in the sense that in the event of death, the party should be able to have the requisite capacity to apply for letters of administration or probate to benefit from the deceased property. Some may argue that in the *Mintah* case supra the parties lived barely for two years and that the period was very short. I still submit that if there is evidence that there was a promise to marry and they lived together as husband and wife, the party in breach should be entitled to damages.

13 Act (1960)