CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 1ST DECEMBER, 2022

SUIT NO. C5/19/22

ABRAHAM COFFIE OPOKU - PETITIONER

VRS

REBECCA AFIA TAWIAH HEABLEY - RESPONDENT

JUDGMENT

This petition was presented on the 29th day of October, 2021. The petitioner prays the court to dissolve the marriage celebrated between him and the respondent on the 22nd day of April, 2017 at Kpone Katamanso District Assembly on the grounds that same has broken down beyond reconciliation. There is no issue of the marriage.

He avers that the respondent has behaved in such a way that he cannot be expected to continue to live with her as husband and wife. That although they currently both reside in the U.S.A, they have been separated since March, 2021 and do not communicate as husband and wife any longer. That the respondent is of a quarrelsome disposition and always quarrels with him for no reason. That she abuses him both physically and verbally and informed him that she was no longer interested in the marriage. Further that they cannot accommodate each other.

The petitioner issued the petition with leave of the court and was granted further leave to serve notice of it on the respondent in the United States of America. Respondent was served personally via courier services but failed to enter appearance or file an answer to the petition. Upon the orders of the Court and at what I expect would be great cost to

the petitioner, she was served with notice of every process filed and numerous hearing notices. She did not appear in Court throughout the process.

As it is the duty of a court to give a party to a case before it a hearing, the failure of the respondent to appear in court to be heard is taken to mean that she did not wish for the court to hear her before deciding on the matter. Dotse JSC speaking for the Supreme Court in the case of ***Julius Sylvester Bortey Alabi v. Paresh & 2 Others [2018] 120 GMJ 1 at p. 11*** held: *"We are therefore of the view that, if a party voluntarily and deliberately fails and or refuses to attend a court of competent jurisdiction, (such as the High Court which determined this case) to prosecute a claim against him, he cannot complain that he was not given a fair hearing or that there was a breach of natural justice. The Defendants must be respected for making such a choice, but they must not be allowed to get away with it*".

The Court of Appeal also in the case of ***Ghana Consolidated Diamonds Ltd. v. Tantuo [2001-2002] 2 GLR 150*** held at holding 4: *"A party who was aware of the hearing of a case but chose to stay away out of his own decision could not, if the judgment went against him complain that he was not given a hearing*". See also the case of ***Accra Hearts of Oak Sporting Club v. Ghana Football Association [1982-83] GLR 111 at page 117.***

Order 36 rule 2 (a) of C.I.47 provides in unambiguous terms that the proceedings at a trial where the defendant fails to attend is for the court to strike out the counterclaim if any and allow the plaintiff to prove his claim. As this is a matrimonial matter, and proceedings are to be by enquiry, the Court set the matter down for the petitioner to prover her claim.

The relevant issue for the court to determine is;

1. Whether or not the marriage has broken down beyond reconciliation.

THE CASE OF THE PETITIONER

According to petitioner's attorney, the parties cohabited briefly in Tema after their marriage and the respondent went back to the United States. The petitioner eventually joined her. Although there is no issue of the marriage, the respondent has three children from a previous marriage.

She continued that the respondent always quarrels with petitioner for no reasonable cause and has on numerous occasions, attempted to harm the petitioner. That she also abuses him both physically and verbally. That the respondent informed the petitioner that she was no longer interested in the marriage and they both agreed to end the marriage. Since then, the respondent has been showing disrespect to the petitioner and does not regard him as her husband.

Also that they have been separated since March, 2021 and the respondent is accommodating her ex husband in the apartment which she had rented for them to stay in. That they no longer communicate as husband and wife and they are incompatible. That in the course of these proceedings, the respondent obtained the number of petitioner's lawyer and called the lawyer to say they could proceed without her.

That respondent further informed the petitioner's lawyer that she would be in Ghana in August and would attend court if she could. She however came to Ghana and left to the USA again and it is clear that she is no longer interested in the marriage but has refused to file any process. The petitioner attorney tendered in evidence Exhibit A as the power of attorney and Exhibit B as a copy of their marriage certificate.

CONSIDERATION BY COURT

Blacks' law dictionary, (8th edition, 2004 p. 1449) defines divorce as "***the legal dissolution of a marriage by a Court***." In Ghana, when a couple decide to marry under the Ordinance, then they can only obtain a divorce through the Courts. The ground upon which a divorce can be obtained from the Courts is clearly stated under the ***Matrimonial Causes Act, 1971 (Act 367).***

In ***Section 1 (2)*** *of* ***Act 367***, the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation. In proving that the marriage has broken down beyond reconciliation, a petitioner must establish one of six causes i.e. adultery; unreasonable behavior; desertion for a period of two years; consent of both parties where they have not lived together as husband and wife for a period of two years; not having lived together as husband and wife for a period of five years; and finally, inability to reconcile differences after diligent effort.

Petitioner's basis for arriving at the conclusion that their marriage has broken down beyond reconciliation is unreasonable behavior. Although the respondent did not appear in court or file any process, her non appearance does not mean that the petitioner is entitled to be believed by the court automatically. The respected ***Benin JSC*** in the case of ***John Tagoe v. Accra Brewery Ltd. [2016] 93 G.M.J. 103 @ 123*** *was convicted that: "It is trite law that he who alleges, be he plaintiff or a defendant, assumes the initial burden of producing evidence. It is only when he has succeeded in producing evidence that the other party will be required to lead rebuttal evidence, if need be***."**

The petitioner still bears the burden of proof and persuasion to establish his case on a balance of probabilities in the mind of the court. The burden on him is akin to a double edged sword. Akamba JA (As he then was) in the case of ***Kwaku Mensah Gyan & I Or. v. Madam Mary Armah Amangala Buzuma & 4 Ors. (Unreported) Suit No. LS: 794/92***

dated 11th March, 2005 explained: *"What is required is credible evidence which must satisfy the two fold burdens stipulated by our rules of evidence, N.R.C.D. 323. The first is a burden to produce the required evidence and the second, that of persuasion. Section 10 & 11 of N.R.C.D. 323 are the relevant section stipulated by our rules of evidence, N.R.C.D. 323. The first is a burden to produce the required evidence and the second, that of persuasion. Section 10 & 11 of N.R.C.D. 323 are the relevant section.*

The case of the petitioner is that their marriage has broken down beyond reconciliation due to the behavior of the respondent. That he cannot be expected to continue to live with her as husband and wife due to her unreasonable behavior. That seven months prior to the filing of the instant petition, they had ceased to live together as husband and wife and were no longer communicating as such.

Through his attorney, he testified of attempts by the respondent to harm him and her disrespect towards him. Also that since both parties agreed to end their marriage, the respondent no longer regards him as a husband. I have no cause to doubt the evidence of the petitioner.

Act 367 does not define what constitutes unreasonable behaviour. The Cambridge English Dictionary defines unreasonable as "**not based on, or using good judgment; not fair''.**

By virtue of the varied nature of mankind character and sensibilities, it may very well prove a herculean task if an attempt is made to set in stone what acts constitute unreasonable behaviour. However, the test that is used is whether or not the act committed by one spouse is such that all right thinking men would hold that the act is

unfair and unjust and the spouse who has been so offended, cannot be expected to continue to live with the other as husband and wife.

In determining what constitutes unreasonable behavior, the test to be applied is an objective one. Hayfron Benjamin J (as he then was) held in the case *of* ***Mensah v. Mensah (1972] 2 G.L.R. 198*** 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 behaviour 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".

This test was relied on by the Court of Appeal in the case of ***Knusden v. Knusden [1976] 1 GLR 204-216*** where the court held that "The cross-petition was based on ***Act 367, Section 2 (1) (b)*** under which the test to be applied in determining whether a particular petitioner could or could not reasonably be expected to live with the particular respondent was an objective one, and not a subjective assessment of the conduct and the reaction of the petitioner.

In assessing such conduct, the court had to take into account the character, personality, disposition and behaviour of the petitioner as well as the behaviour of the respondent as alleged and established in the evidence. The conduct might consist of one act if of sufficient gravity or of a persistent course of conduct or series of acts of differing kinds, none of which by itself might be sufficient but the cumulative effect of all taken together would be so."

In the circumstances of this case, neither of the parties were in court to enable the court to assess their character, personality and disposition. However, in applying the objective test, I find that the fact that the respondent was served with notice of all processes and failed to enter an appearance or file any process is itself an indication that she was not disputing any of the claims of the petitioner. That she came into the jurisdiction in the course of proceedings and still did not appear in court is conclusive evidence that she is not interested in the process and by necessary implication, accepts all that the petitioner has testified on.

The behavior that the petitioner complains of is not a one off incident. It is a series of behaviours including acts of disrespect, verbal and physical abuse, indications that the respondent was no longer interested in the marriage and constant quarrels for no reasonable cause. These acts resulted in the parties ceasing cohabitation and communication.

From the petition, both parties live in Washington in the U.S.A. but at different addresses. That proves the claim of the petitioner that they no longer live together. Cohabitation and communication are regarded as two of the main incidents of a marriage and save for a viable reason, parties to a marriage are expected to live together. They are also expected to not only communicate but to be each others primary source of communication. Where these cease, then the marriage is headed into the sea if no attempts are made in time to save it.

The petitioner did not testify of any attempts made to save their marriage either by themselves, their families or friends. However, that is not a precondition to a dissolution of a marriage. In the case of ***Knudsen v. Knudsen [1976] 1 GLR 204***, the court speaking through ***Amissah J.A*** held that "if the law had expected that in every case

there should be evidence of an unsuccessful attempt at reconciliation, ***section 2(1) (f) of Act 367*** would have been made conjunctive and not disjunctive to the other fact situations given. In a state of affairs where the duty was placed upon the petitioner to show that the marriage had broken down beyond reconciliation common prudence indicated that attempts at reconciliation be made wherever possible and that where such attempts have been made without success evidence of this had to be given to help the court arrive at the desired conclusion. But it did not follow that divorce would never be granted in any case unless evidence of an unsuccessful attempt at reconciliation was led''. See also the decision in ***Mensah v. Mensah [1972] 2 G.L.R. 198***.

In the case of ***Kotei v. Kotei [1974] 2 GLR 172***, ***Sarkodee J*** (as he then was) held that 'once the facts are proved bringing the case within any of the facts set out in section 2 (1), a decree of dissolution should be pronounced unless the court thinks otherwise''.

That it is the actions of the respondent which have brought their marriage to its knees four (4) years into their marital journey is not in doubt. The evidence that she is currently entertaining her ex husband even before the dissolution of their marriage is one that many would consider to be unfair.

In the circumstances, without any contrary evidence, at the close of the trial and after an evaluation of all the evidence on record and applying it to the relevant law I hereby find that the respondent has behaved in such a manner that the petitioner cannot be expected to continue to live with her as husband and wife.

Consequently, I hereby hold that the marriage celebrated between the parties on the 22nd day of April, 2017 at the Kpone Katamanso District Assembly and evidenced by certificate number KKDA/115/2017 has broken down beyond reconciliation and the said

marriage certificate is hereby cancelled. It is hereby decreed that the marriage between the parties be and same is hereby dissolved.

(SGD)

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUDGE)

BENJAMIN ZIGORSH NYAKPENU FOR THE PETITIONER