IN THE CIRCUIT COURT "A", TEMA, HELD ON FRIDAY THE 5TH DAY OF MAY, 2023, BEFORE HER HONOUR AGNES OPOKU-BARNIEH, CIRCUIT COURT JUDGE

SUIT NO.C5/86/22

JOSEPHINE MARTEI ----- PETITIONER

VRS.

FRANCIS COMMEY ----- RESPONDENT

PARTIES ABSENT

AARON OPOKU AWUAH, ESQ HOLDING THE BRIEF OF EDWIN KUSI-APPIAH, ESQ. FOR PETITIONER PRESENT

JUDGMENT

FACTS:

The petitioner, an Estate Manager and the respondent, a Businessman got married under **Part III of the Marriages Act (1884-1985), Cap 127,** at the International Central Gospel Church, (ICGC) Biden Powell Branch, on the 2nd day of January, 1992. After the marriage, the parties cohabited at Dome Pillar 2, in Accra. There is one issue of the said marriage, by name Charmian Commey, who is now an adult aged twenty-nine years. The petitioner filed the instant petition for divorce on 30th June, 2022, alleging that the marriage celebrated between herself and the respondent has broken down beyond reconciliation and prays the court for an order for the dissolution of the Ordinance Marriage contracted between them, cost, including legal cost and cost of the petitioner and any further or other relief(s) as this Honourable Court may deem fit.

The petitioner avers that the marriage contracted between the parties has broken down beyond reconciliation since the parties have not lived together as husband and wife for a continuous period of fifteen (15) years immediately preceding the presentation of the petition for divorce. The petitioner asserts that the respondent left the matrimonial home in the year 2007 and has since not returned to resume cohabitation. The petitioner further alleges a dereliction of marital obligations on the part of the respondent towards the petitioner and the only issue of the marriage since the year 2007 when he is alleged to have deserted the matrimonial home. Additionally, the petitioner avers that the respondent ceased all forms of communication between them since he left the matrimonial home and has not bothered about the well-being of herself and the child of the marriage. Again, according to the petitioner, since the respondent left the matrimonial home, she has not set eyes on him and the parties have not lived as husband and wife. To make matters worse, all efforts made to reconcile them have proved futile and the petitioner maintains that the conduct of the respondent clearly indicates that he is no longer interested in the marriage and her interest in the marriage has also waned. The petitioner is therefore of the firm conviction that the marriage celebrated between the parties more than three decades ago has broken down beyond reconciliation and ought to be dissolved.

All the processes in the suit were served on the respondent by substituted service when personal service proved futile. However, the respondent failed to appear in court to defend the petition for divorce. The court therefore granted leave to the petitioner to lead evidence to prove her allegation that the marriage is broken down beyond reconciliation.

LEGAL ISSUE

Whether or not the marriage celebrated between the petitioner and the respondent has broken down beyond reconciliation.

ANALYSIS

It is provided for under **Section 1** of the Matrimonial Causes Act, 1971, (Act 367), that the sole ground for granting a decree for dissolution of a marriage is that the marriage has broken down beyond reconciliation. To prove that a marriage has broken down beyond reconciliation, a petitioner is required to prove one of the facts contained in **Section 2(1)** of Act 367 on a balance of probabilities namely, adultery, unreasonable behaviour, desertion, failure to live as man and wife for two years, failure to live as man and wife for five years and irreconcilable differences. The burden on a petitioner to establish any of the facts on a balance of probabilities remains the same even when the petition is uncontested since the court has a statutory duty to enquire into the facts alleged to prove the breakdown of the marriage.

In consonance with the letter and spirit of Act 367, which is to promote reconciliation, the petitioner or her Counsel is mandated to inform the court about all attempts at reconciliation and the court is enjoined to refuse to grant a petition for divorce if there is a reasonable possibility for reconciliation. See **Section 2(3)** of the Act 367. See also the case of **Adjetey & Adjetey** [1973] I GLR 216 at page 219.

The petitioner in the instant petition has set out to prove fact 2(1) (e) namely;

"that he and the respondent have not lived as man and wife for a continuous period of at least five years immediately preceding the presentation of the petition."

To succeed under **Section 2(1)** of Act 367, all that is required of a petitioner is proof that for five years immediately preceding the presentation of the petition for divorce, she and the respondent have not lived together as man and wife. Unlike the other facts set out in **Section 2** of Act 367 to prove that a

marriage has broken down beyond reconciliation, once there of proof of failure to live as husband and wife for a continuous period of five years immediately preceding the presentation of the petition for divorce, it is not necessary to establish blame and the marriage can be dissolved against the wishes of a party who has not committed any matrimonial offence. Thus, in the case of **Kotei v. Kotei [1974] 2 GLR 172,** a husband petitioned for divorce alleging that he and the respondent had not lived as husband and wife for six years, and that the marriage had broken down beyond reconciliation and should be dissolved. It was the petitioner's case that he had recognised and continued to recognise that the marriage was at an end and that he never intended to take back his wife. In resisting the petition, the respondent asserted that she still loved her husband, that she was still waiting for her husband to send for her and was willing to make attempts at reconciliation if the proceedings were adjourned for that purpose. The High Court per Sarkodie J, held in holding 4 that:

"Where there was proof that the parties had lived apart for a continuous period of five years immediately preceding the presentation of the petition, the court would dissolve the marriage against the will of a spouse who had not committed a matrimonial offence and who could not be blamed for the breakdown of the marriage. But there must be proof that the parties had not lived as man and wife during that period; there must have been a total breakdown of the consortium vitae, mere physical separation was not enough. The petitioner must prove not only the factum of separation but also that he or she had ceased to recognise the marriage as subsisting and intended never to return to the other spouse. The state of mind of the parties was relevant but it did not matter whether or not the state of mind of one of the parties was communicated to the other."

The petitioner in the instant petition testified that the early years of their marriage was blissful save for a few misunderstandings which are the normal vicissitudes of married life. The petitioner further testified that in the year 2007, the respondent began behaving unreasonably and demonstrated to her that his interest in the marriage had waned. The respondent would go out and return anytime he wished without offering any explanation for his absence from home. To her dismay, the respondent left the matrimonial home that same year and never returned. According to the petitioner, herself, mutual friends and family members made several attempts to contact the respondent to ascertain his reasons for leaving the matrimonial home but all to no avail. The petitioner further testified that at the time the respondent left the matrimonial home, their only daughter was about to write her Basic Certificate Examination (BECE) and needed the physical, emotional and psychological support of her father but the respondent was nowhere to be found. According to the testimony of the petitioner, she thought that the respondent would return for the sake of their daughter but he rather abandoned them entirely and resiled from all his duties towards her and the child of the marriage and saddled her with the sole responsibility of raising the child as a single mother.

Furthermore, the petitioner testified that since she and the respondent got separated in the year 2007, they have never lived together as a husband and wife and there have not been any sexual intimacies between them. The petitioner further testified that after 16 years of separation and failed attempts to reach the respondent to resolve their differences or salvage the marriage, she is convinced that the marriage has broken down beyond reconciliation. Additionally, various attempts made to reconcile them have proved futile. According to the petitioner, the conduct of the respondent in completely abandoning her and their daughter clearly indicates that he is no longer

interested in the marriage and that the marriage has broken down beyond reconciliation.

The respondent in the instant petition was duly served with all the processes in the suit but he failed to enter appearance and to defend the suit. The respondent having spurned the opportunity to be heard on the petition for divorce, the testimony of the petitioner that for five years immediately preceding the petition for divorce they have not lived together as man and wife remains unchallenged. In the case of the **Republic v. High Court (Fast Track Division), Accra Ex-Parte State Housing Company Limited (No. 2)** [2009] SCGLR 185 at 190, the Supreme Court per Georgina Wood, C.J held that: *"A party who disenables himself or herself from being heard in any proceeding cannot turn round and accuse an adjudicator of having breached the rules of natural justice".*

The respondent having failed to participate in the proceedings when he has been afforded every opportunity to do so, I find that the petitioner proved her case on a balance of probabilities that since the year 2007, the parties have not lived as husband and wife. The parties have each ceased to recognise the marriage as subsisting and they have not evinced any intention to reconcile their differences to resume cohabitation as man and wife.

On the totality of the evidence led, I hold that the Ordinance Marriage celebrated between the petitioner and the respondent has broken down beyond reconciliation on account of the failure of the parties to live together as man and wife for a continuous period of at least fifteen (15) years immediately preceding the presentation of the petition for divorce. I

accordingly grant the petition for divorce and decree for the dissolution of the marriage celebrated between the parties.

CONCLUSION

In conclusion, I hold that the marriage celebrated between the petitioner and the respondent has broken down beyond reconciliation. I accordingly grant the petition for divorce and enter judgment in the following terms;

1. I hereby grant a decree for the dissolution of the ordinance marriage celebrated between the petitioner and the respondent at the International Central Gospel Church, ICGC Biden Powell Branch on 2nd January, 1993.
2. The Registrar shall cancel the authenticated copy of the marriage certificate number *ICGC 141-93.*
3. I hereby award costs of Five Thousand Ghana Cedis (GH¢5,000) against the respondent.

H/H AGNES OPOKU-BARNIEH
(CIRCUIT COURT JUDGE)