IN THE CIRCUIT COURT HELD AT DANSOMAN, ACCRA ON THURSDAY, THE 25TH DAY OF JULY, 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL BAASIT, CIRCUIT COURT JUDGE

SUIT NO.: CCD/C4/26/23

ZHANG JIE - PETITIONER

VS

SLAY NANA YAW ASANTE - RESPONDENT

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PARTIES:
PETITIONER – PRESENT
RESPONDENT – ABSENT

COUNSEL:
NO LEGAL REPRESENTATION

JUDGMENT

Background:

Petitioner herein per the Petition filed at the Registry of this Court on the 6th day of June, 2023, prays for a nullification of the marriage celebrated between the parties on 29th of September 2017 at the Accra Metropolitan Assembly at Accra. The basis of the instant Petition is that the parties got to know each other through e-mail and other modern means of communication which led to them getting so much attached to each other, fell in love and decided to contract a marriage. However, after the marriage, they lived at Mateheko for about Four (4) months without having sexual intercourse as the Respondent kept denying the Petitioner sex without any tangible reasons. This continued until the Petitioner returned from work to find that the Respondent had packed all his belongings and deserted the marriage. It is the case of the Petitioner that the marriage has broken down beyond reconciliation due to irreconcilable differences as she discovered that the Respondent was never

truthful to her but only married her to facilitate his travel outside the country. She stated further that the Respondent deliberately denied her the pleasure of love making and also refused to impregnate her hence her prayer before this Court which she communicated same to the Respondent and he has given his consent.

On the 19th of June, 2023, the Respondent filed an Answer to the Petition wherein he denied most of the Petitioner's assertions stating that he has been a very good, faithful and lovely husband to the Respondent just that he needed time to get to know the Petitioner. He stated further that on several occasions, he wanted to have sexual intercourse but he is unable to get an erection. He concluded by stating that the Petitioner is a good woman and has been extremely helpful to him to the extent that he does not want to hurt her, hence his approval for the Court to grant the Petitioner her request for the nullification of the marriage.

The Petitioner applied to set the issues down for trial and same was granted but the Court, on the 27/6/23 ordered substituted service of a Hearing Notice as well as the Court Notes ordering the parties to file their Witness Statements and Pretrial Checklist Pursuant to a Court Order. All other Court processes including Court notes were also served on the Respondent by Substituted Service but the Respondent again failed to respond to any of the said Court processes. The Court accordingly proceeded to hear the case of Petitioner since Respondent, after being duly served, failed to appear before the Court to exercise the rights available to him as part of the civil practice in our Courts.

Determination

On the 18/7/25, the Court heard the case of the Petitioner on oath as she gave a short evidence in chief but the Respondent failed to avail himself for trial.

Consequently, the main issue for determination is **whether the marriage between the parties can be nullified.** It is to be noted that, the failure of the Respondent to appear at trial to cross examine the Petitioner on the evidence or challenge same either in cross examination or by contrary evidence does not exonerate the Petitioner from satisfying the Court that the marriage should be nullified. The Standard of proof in civil case such as the present action is proof on the preponderance of probabilities. This is statutory and has received countless blessing from the Courts of this land in plethora of authorities. See sections 11(4) and 12 of the **Evidence Act, 1975 (NRCD 323)**.

Section 12(2) of NRDC 323 defines preponderance of probabilities to mean that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence. In the case of **Adwubeng vs. Domfeh** (1997-98) 1 GLR 282, it was held per holding 3 as follows: *"...sections 11(4) and 12 of NRCD 323 clearly provided that the standard of proof in all civil actions, without exception, was proof by a preponderance of probabilities".* Similarly, it is trite that the failure of a party to deny a material averment constitute an admission of same and such implied admitted fact requires no further proof. As the Supreme Court in the case of **Fori vs. Ayirebi and Other** [1966] GLR 627 held *"when a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment. Similarly, when a party had given evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact".*

Analysis

In the instant case, the Petitioner prays the Court to nullify the marriage of the parties was celebrated at the Accra Metropolitan Assembly on 29/9/2017 under the Marriage Ordinance (Cap 127). According William E. Offei in

Family Law in Ghana, 1998 at page 143, *'…a marriage celebrated under the Marriage Ordinance (Cap 127) or under the Common Law may be valid, void or voidable'*. A Marriage is said to be valid when it fulfils all the conditions stated by the law, however, in the case of **De Reneville vs. De Reneville** [1998] 1 All E. R. 56 at 60, Greene M. R. stated that *"A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be treated by both parties to it without the necessity of any decree annulling it'*. The Judge then defined a voidable marriage as follows; *'… a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction*'.

Section 13(1) of the Matrimonial Causes Act, 1971(Act 367), *a person may present a Petition to the Court for a decree annulling a marriage on the ground that it is by law void or voidable*. By **section 13(4)** of Act 367 supra, *a void marriage shall not be regarded as valid even when a court has not granted a decree of nullity and nothing can validate a void marriage. Such a marriage is void and it is not necessary to obtain a court order decreeing the marriage to be void.* In the instant case, the Petitioner, repeated her averments contained in the Petition for annulment on oath and testified that the Respondent denied her sexual intercourse as well as the opportunity to have her own babies and also prevented her from adopting children. One of the circumstances under which a marriage is regarded as voidable is where there is lack of consummation due to wilful refusal by the Respondent to consummate the marriage. Consummation has been defined as achievement of full penetration in the normal sense. It must amount to full and complete intercourse. Intercourse must amount to full and complete penetration. A transient penetration will not amount to full and complete penetration. (See the book of **Contemporary Principles of Family Law in Ghana**, authored by Mrs Frederica Ahwireng-Obeng, 2015 at pages

92-96). This assertion was however discounted during cross-examination by the Court and the following ensued;

Q: Is it your case that you wanted babies but the Respondent did not.

A: Yes he did not want babies

Q: Why do you say that?

A: Because we do not have sex that much, we have sex once in Three (3) months we have sex once after marriage. After 5 to 6 months of our marriage he moved out.

The evidence therefore shows that there has been sexual intercourse in the marriage and the position of the law is that once there has been sexual intercourse, then the marriage has been consummated. A marriage once consummated is not a voidable marriage but is a valid marriage and same cannot be nullified. Since the instant marriage cannot be annulled, the appropriate relief the Petitioner should have sought in this instant Court was for the marriage to be dissolved. In the case of **Mrs. Theresa Owuo vs. Francis Owuo** [2017] DLSC2490; Civil Appeal No.J4/20/2017 dated 6/12/2017, the High Court had found that the marriage of the parties was a nullity but dissatisfied with the decision, the Respondent proceeded to the Supreme Court where the Supreme Court, among others, held that when the learned High Court Judge found that the parties lacked the capacity to have contracted the marriage celebrated in 1999 owing to the existence of an earlier marriage between the appellant and Mrs. Beatrice Owuo, he ought to have decreed the annulment notwithstanding the fact that the case was not fought on those grounds.

In the circumstances, although the Petitioner prays for an annulment, the Court shall proceed to dissolve the marriage. It must be emphasized that there is only one ground for dissolution of a marriage under the Act 367.

Section 1(2) of the Matrimonial Causes Act, 1971 Act 367 states *"The sole ground for granting a Petition for divorce shall be that the marriage has broken down beyond reconciliation"*. Section 2(1) of Act 367 provides that 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;
(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 consents to the grant of a decree of divorce, provided that the consent shall not be unreasonably withheld, and where the Court is satisfied that it has been so 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 a 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(1) of Act 367 requires that a Petitioner must satisfy the Court of one or more of the instances listed therein as proof that the marriage has broken down beyond reconciliation. The Court also has to satisfy itself that the grounds for dissolution canvassed by the Petitioner falls within Section 2 of Act 367. The Petitioner testified among others, that the Respondent denied her sexual intercourse on several occasions, deliberately refused and/or prevented her from getting pregnant and also vacated the matrimonial home. From the pleadings of the parties and the evidence led, the material facts alleged by the Petitioner is not disputed by the Respondent. In the case of **Re Asere Stool; Kotei v. Asere Stool** [1961] GLR 493 SC, the Supreme Court held

that: *"Where an adversary had admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish that fact than relying on such admission which is an example of an estoppel by conduct. It is a rule whereby a party is precluded from denying the existence of some states of facts which he has formally asserted. This is a salutary rule of evidence based on common sense and expediency."* Similarly, it is trite that the failure of a party to deny a material averment constitute an admission of same and such implied admitted fact requires no further proof. As the Supreme Court in the case of **Fori vs. Ayirebi and Other** [1966] GLR 627 held *"when a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment. Similarly, when a party had given evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact".* Thus, the Respondent having failed to avail himself to cross-examine the Petitioner, there is no need to call in further evidence to establish the fact that the instant marriage ought to be dissolved.

CONCLUSION

Although the Petitioner prays for an annulment of the marriage, I find that the marriage is a valid marriage and on the authority of the case of **Mrs. Theresa Owuo vs. Francis Owuo** (supra), the marriage cannot be annulled but dissolved. Accordingly, the Petition for annulment is dismissed but I enter judgment for the dissolution of the marriage pursuant to Section 2(1)(b) of Act 367 as the court is satisfied that the marriage has broken down beyond reconciliation because the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with the Respondent. In the circumstances;

1. I hereby dissolve the Ordinance Marriage celebrated between the Petitioner and the Respondent on 29th of September 2017 at the Accra Metropolitan Assembly, Accra this 25th day of July 2023.
2. The Petitioner shall present the original copy of the Marriage Certificate for cancellation by the Registrar of the Court.
3. There shall be no order as to costs.

H/H HALIMAH EL-ALAWA ABDULBAASIT
CIRCUIT COURT JUDGE